Health Canada Santé Canada

Amendments to the Food and Drugs Act: Guide to new authorities

(power to require and disclose information, power to order a label change, power to order a recall, power to require assessments, and power to require tests, studies, etc.)

Effective date: June 23, 2021

Canada

Health Canada is responsible for helping Canadians maintain and improve their health. It ensures that high-quality health services are accessible, and works to reduce health risks.

Également disponible en français sous le titre :
Modifications à la Loi sur les aliments et drogues : Guide pour l'application des nouveaux pouvoirs

To obtain additional information, please contact:

Health Canada
Address Locator 0900C2
Ottawa, ON K1A 0K9
Tel.: 613-957-2991
Toll free: 1-866-225-0709
Fax: 613-941-5366
TTY: 1-800-465-7735
E-mail: hc.publications-publications.sc@canada.ca

Publication date: January 2021

Cat.: H164-307/2021E-PDF
ISBN: 978-0-660-37034-7
Pub.: 200331

Table of contents

Objective 1

Preamble 1

About this Guide 1

Role of the Regulator 2

Scope and Application 2

Principles 3

Applying the Law 3

Section 21.1 - Power to require and disclose information 4

Section 21.1 - Power to require and disclose information (continued) 6

Section 21.1 - Power to require and disclose information (continued) 7

Section 21.2 - Power to order a label change or package modification 8

Section 21.3 - Power to recall 10

Section 21.31 - Power to require assessment 12

Section 21.32 - Power to require tests, studies, etc. 15

Annex A - Key Elements for Consideration About Serious Risk 19

Annex B - Notification: Sufficient Notice 19

Objective

This guide was developed to help Health Canada implement the new authorities that came into force upon Royal Assent of Bill C-17, the *Protecting Canadians from Unsafe Drugs Act (Vanessa's Law)*, on November 6, 2014.

This guide will support Health Canada, in applying the new authorities in a manner that is informed, fair, consistent, and effective. This document is also intended to support the development of the operational tools [e.g., standing operating procedures (SOPs), guidance documents, process maps, templates] needed for those authorities that came into force immediately upon Royal Assent. It will also guide future regulatory and operational development for those authorities that require accompanying regulations.

Preamble

Bill C-17 amended the *Food and Drugs Act* regarding therapeutic products[1] in order to improve safety by:

a. Strengthening the safety oversight of therapeutic products throughout their lifecycle;
b. Improving reporting by certain health care institutions of serious adverse drug reactions and medical device incidents that involve therapeutic products; and
c. Promoting greater confidence in the oversight of therapeutic products by increasing transparency.

These amendments to the *Food and Drugs Act* give the Minister increased authorities to take quick action when a safety issue is identified. This includes the ability to order a company to carry out a mandatory product recall or perform additional tests or studies on a therapeutic product. The amendments set out tough new penalties and fines for those who fail to comply with the Act and create an obligation on healthcare institutions to report serious adverse drug reactions (ADR) and medical device incidents to the Minister of Health.

The amendments to the *Food and Drugs Act* also introduce important new transparency provisions that require the Minister to make Orders publicly available. Provisions in the amended *Food and Drugs Act* allow the Governor in Council to make regulations to require therapeutic product authorization holders to register clinical trials and to require the Minister to make positive and negative regulatory decisions publicly available.

Bill C-17 was granted Royal Assent on November 6, 2014. Upon Royal Assent, certain authorities came into force immediately, namely the Minister's ability to require a person to provide information, the Minister's ability to disclose confidential business information in certain circumstances, the Minister's ability to order a label change/package modification, and the Minister's ability to order a recall. Other authorities came into force on a later date as they needed supporting regulations.

About this Guide

This guide sets out principles, policies, and standards to follow when Health Canada identifies situations in which it may be appropriate for the Minister to exercise the power to require a person to provide information, to disclose confidential information in certain circumstances, to order a label change/package modification, to order a recall or to require an assessment or to require tests, studies, etc..

[1] Therapeutic products include prescription and non-prescription drugs, vaccines, blood and blood products, gene and cell therapies, tissues and organs, and medical devices. Therapeutic products do not include natural health products. Natural health products will continue to be regulated under the existing Natural Health Product Regulations of the Food and Drugs Act. Note: Vanessa's Law applies to a natural health product that is adulterated with any substance that meets the definition of "drug" under the Food and Drugs Act.

Specifically, it:

- Sets out guiding principles, policies and standards that should govern all decisions made by Health Canada acting as a regulatory decision-maker;
- Covers "what" triggers the Minister's ability to make use of these powers and explains to "whom" the powers apply.
- Increases the consistency and predictability for Health Canada, industry and others as to how the authorities will be applied, resulting in improved quality of regulatory decision-making and improved compliance.

Guidance documents are meant to provide assistance to industry on how to comply with the policies and governing statutes and regulations. They also serve to provide review and compliance guidance to staff, thereby assuring that mandates are implemented in a fair, consistent and effective manner.

Guidance documents are administrative instruments not having force of law and, as such, allow for flexibility in approach. Alternate approaches to the principles and practices described in this document may be acceptable provided they are supported by adequate justification.

Alternate approaches should be discussed in advance with the relevant program area to avoid the possible finding that applicable statutory or regulatory requirements have not been met.

As a corollary to the above, it is equally important to note that Health Canada reserves the right to request information or material, or define conditions not specifically described in this guidance document, in order to allow the Department to adequately assess the safety, efficacy/effectiveness or quality of a therapeutic product. Health Canada is committed to ensuring that such requests are justifiable and that decisions are clearly documented.

This document should be read in conjunction with the accompanying notice and the relevant sections of other applicable guidance documents.

Role of the Regulator

Health Canada's role as health regulator is largely derived from the federal government's constitutional law-making power over criminal law. Criminal law is the basis for the *Food and Drugs Act* which aims to protect the health and safety of the public through the control of possible hazards from foods, drugs, cosmetics, and medical devices.

The *Food and Drugs Act* and its regulations give the Minister of Health and Health Canada the authority to regulate food, drugs (including natural health products), medical devices, and cosmetics. As a therapeutic product regulator, Health Canada's role is to verify that regulatory requirements for the safety, quality, and efficacy of therapeutic products are met through scientific assessments, including product and establishment licensing, monitoring and surveillance, compliance, and enforcement activities.

Scope and Application

The amendments to the *Food and Drugs Act*, which only apply to therapeutic products, give the Minister of Health an improved ability to identify, assess and take action when a therapeutic product presents a serious risk to the public. A "therapeutic product" is now defined in the Act as a drug or device, or any combination of drugs and devices. As a result, all of the amendments apply to all therapeutic products, including prescription and non-prescription drugs, vaccines, blood and blood products, gene and cell therapies, tissues and organs, and medical devices. The amendments do not apply to natural health products, which will continue to be regulated under the existing *Natural Health Product Regulations* of the *Food and Drugs Act*.

Principles

Although the *Food and Drugs Act* sets out the powers available to the Minister, all legislation in Canada is subject to the general "rule of law", which requires that all powers be exercised fairly, reasonably, and in accordance with the powers duly conferred on the body exercising them.

The following administrative law principles should guide the Minister's and Health Canada's application of the new powers in the Act to ensure that the process by which the laws are administered and enforced is accessible, fair, and efficient.

- **Principle 1:**
  The regulator should exercise a statutory power of decision reasonably and in a procedurally fair manner that is free from bias or the appearance of bias.
- **Principle 2:**
  The regulator should exercise statutory powers of decisions based on evidence, taking account of only those considerations that are relevant to the exercise of the power. Decisions should be documented.
- **Principle 3:**
  Statutory powers of decision should be exercised in a transparent manner. Decisions and reasons for them should be expressed in a logical and understandable narrative.

Applying the Law

Elements of the Law
Before the Minister (or designated official) can make a decision about whether to exercise a power, he or she needs to determine whether the elements of the law have been met. Typically, this will be done based upon a scientific evaluation and recommendation by Health Canada experts. The elements of each of the powers can be broken down as follows:

1. Who can use the power
2. To whom the power applies
3. To what the power applies
4. The threshold or considerations that need to be met in order to exercise the power
5. The scope of the power

Example
These elements are broken down below in the following example for the authority that confers a power on the Minister to require information, section 21.1 of the *Food and Drugs Act*:

21.1(1) If the Minister **(1)** believes that a therapeutic product **(3)** may present a serious risk of injury to human health **(4)**, the Minister may order a person **(2)** to provide the Minister with information that is in the person's control **(5)** and that the Minister believes is necessary to determine whether the product presents such a risk **(4)**.

Voluntary action to resolve a problem
Unless circumstances warrant otherwise, a notification will precede an Order so that a person or a therapeutic product authorization holder may voluntarily take steps to resolve a problem. Orders will only be issued when necessary.

Interpreting the Elements
The Minister's determination of whether the elements of the law have been met will rely upon a recommendation from Health Canada. In developing such recommendations, Health Canada relies on experts to perform an analysis of scientific information, which includes an evaluation of the scientific information's methodological limitations and inherent uncertainties. Important determinations about risk that do not always fit within narrow definitions and rigid constraints often have to be conducted as part of this evaluation.

Openness and Transparency
The new authorities are balanced by accompanying provisions that will require the Minister to disclose and explain the scientific evidence and reasoning used to support his or her decision-making. Increased transparency around regulatory decision-making helps regulated parties and Canadians better understand how decisions are made and, consequently, boosts the integrity of the regulator.

Designation of Authority
The new powers give the Minister of Health the authority to use them. The *Interpretation Act* makes it clear that the term "Minister" includes officials in his or her department acting in a capacity appropriate to the exercise of the power. The department can designate which officials within the department are appropriate for the purpose of carrying out the various regulatory functions. In this way the designated officials become capable of issuing Orders, although the officials' managers - up to and including the Deputy Minister, and ultimately the Minister herself - can also take up the powers and exercise them. Throughout this guide, anywhere "the Minister" appears can be understood to include "the Minister or the Minister's designate".

Consequence of contravening an Order
If a person contravenes an order made under the Act, he or she is guilty of a criminal offence and is liable on conviction to the increased fines and penalties set out in s. 31.2 of the *Food and Drugs Act*.

To deal proactively with cases of potential or continued non-compliance with the Act, the Minister of Health may also apply to a court for an injunction as set out in section 21.5 of the *Food and Drugs Act*. An injunction allows the courts to direct a person to refrain from an action that constitutes a contravention of the Act or to do something to prevent a contravention of the Act.

Forty-eight hours' notice will be given to the person named in the application prior to the issuance of an injunction unless, due to the urgency of the situation, notice would not be in the public interest.

Section 21.1 - Power to require and disclose information

Power to require information - serious risk
21.1(1) If the Minister believes that a therapeutic product may present a serious risk of injury to human health, the Minister may order a person to provide the Minister with information that is in the person's control and that the Minister believes is necessary to determine whether the product presents such a risk.

Who can use this power?
Only the Minister of Health or the Minister's designate can exercise the power. The regulator's decision to exercise the power relies upon the scientific evaluation and recommendation of Heath Canada.

To whom does it apply?
The Order is made against the person who controls the information that the Minister believes is necessary to determine whether a therapeutic product presents a serious risk of injury to human health. A "person" can include an individual, a research institution, a corporation or an authorization holder.

To what does it apply?
This power applies to therapeutic products, including prescription and non-prescription drugs, vaccines, blood and blood products, gene and cell therapies, tissues and organs, and medical devices. It does not apply to natural health products.

Threshold
There are two components to the threshold that must be met for the Minister to use this power:

i. the Minister must believe that the therapeutic product may present a serious risk of injury to human health; and,
ii. that a person has within their control information that the Minister believes is necessary to determine whether the product presents such a risk.

Regarding the first component, information that a therapeutic product may present a serious risk of injury to human health could come from a number of sources including:

- A recommendation based on a scientific assessment done by reviewers - either pre-market (e.g., a clinical trial application) or post-market (e.g., additional studies submitted as part of terms and conditions placed on a market authorization, information received as part of a routine safety update, or information received as part of an application for a new indication).
- A recommendation based on post-market safety signal detection - this could come from manufacturer, patient or healthcare institution serious ADR reporting, information shared from other international regulatory agencies, reports published in medical/scientific literature, or from an inspection performed by Health Canada or another regulator.

The Act does not contain a definition of "serious risk" to allow for flexibility in its application; for further discussion about "serious risk", see Annex A.

The second component of the threshold is largely a question of judgment that will form the basis of the experts' recommendation to the decision-maker. Recommendations need to provide the Minister with enough information to substantiate a reasonable belief that the information being requested is necessary to make a determination about whether a therapeutic product presents a serious risk of injury to human health. The recommendation needs to be reasonable, based in fact, and arrived at logically based on the information at hand.

Scope of the power
This power allows the Minister to order a person to provide him or her with information that is in that person's control. Thus, it can only be used to obtain existing information; it cannot be used to order a person to create new information, i.e., it cannot be used to require a person to conduct new analysis or studies. Also, the Order must be made against the person holding the information, i.e., it cannot be an Order on a person to seek out information from another source that is not already under their control.

Before issuing an Order
Notification and Opportunity to Respond

The Minister should, prior to issuing an Order under s. 21.1(1), notify a person that they have information in their control that the Minister believes is necessary to determine whether a therapeutic product presents a serious risk to human health. The notification should set out the facts relied upon and the relevant criteria used to form the basis of the Minister's belief.

The notification will also provide the affected person with a reasonable opportunity to respond to the notification (e.g., to correct an error in fact, dispute the proposed exercise of the power, or voluntarily comply with the notification). The timeframe for response should be specified and reasonable in the circumstances. The timeframe may vary depending upon the severity and immediacy of risk that the product presents (e.g., 12 hours, 2 business days, 90 days, etc.).

Should the affected person fail to respond to the notification, the Minister may issue an Order. For further discussion of sufficient notification, see Annex B.

What would an Order look like?
An Order is instructions, decisions or directions given by the Minister that are authorized by the legislation. Orders issued by the Minister will be accompanied by **reasoned decisions** to allow for more transparent decision-making. Reasoned decisions should be based on evidence and should clearly communicate the decision taken and the evidence used to make the decision so that the affected party understands how the result was reached.

An Order issued by the Minister to the holder of a therapeutic product authorization in accordance with Section 21.1(1) of the *Food and Drugs Act* shall include:

a. the person(s) to whom it applies;
b. the legislative provision being relied upon;
c. the therapeutic product in question;
d. a description of the information that is in the person's control that the Minister believes is necessary to determine whether the product presents such a risk;
e. the timeframe for conducting the above activities; and,
f. the consequences for contravention of the Order.

In accordance with s. 21.4(2), the Order has to be made publicly available.

Reasoned decisions accompanying the Order should be unbiased and include:

a. The legislative power being relied upon;
b. What the decision is;
c. An explanation of the basis for the decision and how it was reached, including:
    - a narrative and chronological review of the facts;
    - the scientific evidence considered;
    - any findings on important questions of fact and the accompanying analysis;
    - any relevant criteria considered as part of the threshold determination, and;
    - an explanation of how the evidence satisfies the threshold.

Supporting regulations may be developed at a later date with input from internal and external stakeholders.

Regulatory Outcomes
Health Canada should evaluate the information obtained by the Minister under s. 21.1(1) and the evaluation should result in one of the following outcomes: "information insufficient for the purposes of evaluation", "no further action needed" or "additional regulatory action needed".

Section 21.1 - Power to require and disclose information (continued)

Disclosure - serious risk
21.1(2) The Minister may disclose confidential business information about a therapeutic product without notifying the person to whose business or affairs the information relates or obtaining their consent, if the Minister believes that the product may present a serious risk of injury to human health.

Who can use this power?
Only the Minister of Health or the Minister's designate can exercise the power. The regulator's decision to exercise the power relies upon the scientific evaluation and recommendation of Health Canada.

To what does it apply?
This power applies to confidential business information (CBI) collected under the *Food and Drugs Act* about a therapeutic product in the possession of the regulator obtained as part of its normal regulatory functions, e.g., information containing CBI that was submitted to support pre-market authorization or post-authorization. As long as the threshold is met, the Minister may disclose CBI to any person.

This power applies to therapeutic products, including prescription and non-prescription drugs, vaccines, blood and blood products, gene and cell therapies, tissues and organs, and medical devices. It does not apply to natural health products.

Threshold
In order for the Minister to use this power, he or she must have reasonable grounds to believe that the therapeutic product may present a serious risk of injury to human health. There must be documented evidence that the therapeutic product could pose such a risk. The Act does not contain a definition of serious risk of injury to human health to allow for flexibility in its application; for further discussion about "serious risk", see Annex A.

Scope of the power
This power allows the Minister to disclose CBI about the therapeutic product. The definition of CBI in the Act sets out three conditions that must be met in order for information to be considered CBI:

"confidential business information", in respect of a person to whose business or affairs the information relates, means -- subject to the regulations -- business information

a. *that is not publicly available,*
b. *in respect of which the person has taken measures that are reasonable in the circumstances to ensure that it remains not publicly available, and*
c. *that has actual or potential economic value to the person or their competitors because it is not publicly available and its disclosure would result in a material financial loss to the person or a material financial gain to their competitors.*

CBI disclosed under this provision should only be that which is necessary to mitigate the serious risk of injury to human health.

Amendments to the Food and Drug Regulations and the Medical Devices Regulations, which came into force on February 28, 2019, enable the public release of certain information regarding therapeutic products. These regulatory amendments specify the clinical information in drug submissions and medical device applications that cease to be confidential business information following a final regulatory decision and authorize Health Canada to publicly release this information. Other information in therapeutic product submissions/applications remain subject to the definition of confidential business information, and may be eligible for disclosure under this authority.

Note that any disclosure of CBI under this section in relation to new chemical entities needs to be compliant with Canada's international treaty obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Canada-United States-Mexico Agreement (CUSMA).

Section 21.1 - Power to require and disclose information (continued)

Disclosure - health and safety
21.1(3) The Minister may disclose confidential business information about a therapeutic product without notifying the person to whose business or affairs the information relates or obtaining their consent, if the purpose of the disclosure is related to the protection or promotion of human health or the safety of the public and the disclosure is to

a. a government;
b. a person from whom the Minister seeks advice; or
c. a person who carries out functions relating to the protection or promotion of human health or the safety of the public.

Who can use this power?
Only the Minister of Health or the Minister's designate can exercise the power. The regulator's decision to exercise the power relies upon the scientific evaluation and recommendation of Health Canada.

To what does it apply?
This power applies to confidential business information (CBI) collected under the Food and Drugs Act about a therapeutic product in the possession of the regulator obtained as part of its normal regulatory functions, e.g., CBI that was submitted to support pre-market authorization or post-authorization. In contrast to s. 21.1(2), which allows CBI to be disclosed to any person, the list of persons to whom the CBI can be disclosed in this section is constrained because the threshold for disclosure is lower (see below).

CBI is a defined term in the Act (see definition reproduced in previous section).

This power applies to therapeutic products, including prescription and non-prescription drugs, vaccines, blood and blood products, gene and cell therapies, tissues and organs, and medical devices. It does not apply to natural health products.

Threshold
In order for the Minister to use this power, the purpose of the disclosure of CBI must be related to the protection or promotion of human health or the safety of the public. The purpose speaks to the various regulatory activities that Health Canada conducts to help evaluate and monitor the safety, efficacy, and quality of therapeutic products before and after they are marketed. The "protection or promotion of human health" is intended to allow Health Canada to disclose CBI for the purpose of either protecting patients from safety risks or promoting the safe use of therapeutic products. "Promotion" should be interpreted narrowly, in keeping with Health Canada's role as a health regulator and its safety-related mandate to promote and protect the health of Canadians. In this context, the disclosure of CBI for the purpose of "promotion of human health" could include CBI disclosure for the purpose of determining the appropriate prescribing of therapeutic products in order to optimize their use.

The threshold for disclosure in this section is lower than the threshold for disclosure in s. 21.1(2) because the list of persons to whom the CBI can be disclosed in this section is constrained.

Scope of the power
The Minister can only disclose CBI for this purpose to the following people:

a. a government;
b. a person from whom the Minister seeks advice; or
c. a person who carries out functions relating to the protection or promotion of human health or the safety of the public.

The term "government" is defined in section 21.1(4) to include a federal, provincial, territorial, municipal, foreign government, an aboriginal government as defined in the *Access to Information Act*, a corporation named in Schedule III to the *Financial Administration Act*, or an international organization of states in prescribed circumstances. This power establishes the Minister's authority to disclose confidential business information relating to a therapeutic product with his or her regulatory counterparts, other federal departments and agencies, provinces and territories, scientific and medical experts, members of departmental advisory bodies and any other person who carries out functions relating to the protection or promotion of the health and safety of the public.

Amendments to the *Food and Drug Regulations* and the *Medical Devices Regulations*, which came into force on February 28, 2019, enable the public release of certain information regarding therapeutic products. These regulatory amendments specify the clinical information in drug submissions and medical device applications that cease to be confidential business information following a final regulatory decision and authorize Health Canada to publicly release this information. Other information in therapeutic product submissions/applications remain subject to the definition of confidential business information, and may be eligible for disclosure under this authority.

Note that any disclosure of CBI under this section in relation to new chemical entities needs to be compliant with Canada's international treaty obligations under TRIPS and CUSMA.

Section 21.2 - Power to order a label change or package modification

Modification or replacement - labelling or packaging
21.2 The Minister may, if he or she believes that doing so is necessary to prevent injury to health, order the holder of a therapeutic product authorization that authorizes the import or sale of a therapeutic product to modify the product's label or to modify or replace its package.

Who can use this power?
Only the Minister of Health or the Minister's designate can exercise the power. The regulator's decision to exercise the power relies upon the scientific evaluation and recommendation of Health Canada.

To whom does it apply?
The Order is made to the therapeutic product authorization holder who authorizes the import or sale of a therapeutic product (this includes therapeutic products used in the course of clinical trials or medical device investigational testing).

To what does it apply?
This power applies to therapeutic products, including prescription and non-prescription drugs, vaccines, blood and blood products, gene and cell therapies, tissues and organs, and medical devices. It does not apply to natural health products.

Threshold
The Minister may order a therapeutic product authorization holder to change a label or modify a package if he or she believes that doing so is necessary to prevent injury to health.

Health Canada assesses therapeutic products and their labels prior to their being made available for sale in Canada. However, once a product is made available for use in a clinical trial or made available for sale, new information about the harms associated with the use of the therapeutic product may become available that is not adequately reflected on the label. Potential harms may also occur as a result of confusion over similar brand names or product packaging. This information could come from a number of sources, either pre-market (e.g., a clinical trial application) or post-market (e.g., additional studies submitted as part of terms and conditions placed on a market authorization, information received as part of a routine safety update, or information received as part of an application for a new indication). This information could also come from manufacturer post-market safety signal detection, patient or healthcare institution serious ADR reporting, information shared from other international regulatory agencies, reports published in medical/scientific literature, or from an inspection performed by Health Canada or another regulator.

Any of the above information sources, or other relevant sources, could be used to form the basis for a reasonable belief that a label change or package modification is necessary to prevent injury to health.

Scope of the power
Section 21.2 allows the Minister to order a therapeutic product authorization holder to change the label or modify a package. This could include, for example, requiring a revision of a label to include new safety information (e.g., new warning) or to revise the brand-name or packaging to prevent confusion and medication error. This section also permits the Minister to order label or package changes to therapeutic products used in the course of clinical trials or medical device investigational testing.

Before issuing an Order
Notification and Opportunity to Respond

The Minister should, prior to issuing an Order under s. 21.2, notify the therapeutic product authorization holder who sells or imports the product that he or she believes that the product label or package requires modification to prevent injury to health. The notification should set out the facts relied upon and the relevant criteria used to form the basis of the Minister's belief.

The notification will also provide the therapeutic product authorization holder with a reasonable opportunity to respond to the notification (e.g., to correct an error in fact, dispute the proposed exercise of power, or voluntarily comply with the notification). The timeframe for response should be specified and reasonable in the circumstances. The timeframe may vary depending upon the severity and immediacy of risk that the product presents (e.g., 12 hours, 2 business days, 90 days, etc.).

Should the therapeutic product authorization holder fail to respond to the notification, the Minister may issue an Order.

What would an Order look like?
An Order is instructions, decisions or directions given by the Minister that are authorized by the legislation. Orders issued by the Minister will be accompanied by **reasoned decisions** to allow for more transparent decision-making. Reasoned decisions should be based on evidence and should clearly communicate the decision taken and the evidence used to make the decision so that the affected party understands how the result was reached.

An Order issued by the Minister to the holder of a therapeutic product authorization in accordance with Section 21.4 of the *Food and Drugs Act* shall include:

a. the therapeutic product holder(s) to which it applies;
b. the legislative provision being relied upon;
c. the therapeutic product subject to the Order;
d. the risk of injury to be mitigated via changes to the label or packaging (if known, the areas of the label to modify);
e. the timeframe for conducting the above activities; and,
f. the consequences for contravention of the Order.

In accordance with s. 21.4(2), the Order has to be made publicly available.

Reasoned decisions accompanying the Order should be unbiased and include:

a. The legislative power being relied upon;
b. What the decision is;
c. An explanation of the basis for the decision and how it was reached, including:
    - a narrative and chronological review of the facts,
    - the scientific evidence considered,
    - any findings on important questions of fact and the accompanying analysis,
    - any relevant criteria considered as part of the threshold determination, and;
    - an explanation of how the evidence satisfies the threshold.

Supporting regulations may be developed at a later date with input from internal and external stakeholders.

Section 21.3 - Power to recall

Minister's powers -- risk of injury to health
21.3 (1) If the Minister believes that a therapeutic product presents a serious or imminent risk of injury to health, he or she may order a person who sells the product to

a. recall the product; or
b. send the product, or cause it to be sent, to a place specified in the order.

Recall Order -- corrective action
(2) For greater certainty, if the Minister makes an order under paragraph (1)(a) and believes that corrective action is an effective means of dealing with the risk, the order may require the person who sells the product to, instead of requesting the product's return, request the product's owner or user to allow corrective action to be taken in respect of the product and then take that corrective action, or cause it to be taken, if the request is accepted.

Prohibition – selling
(3) Subject to subsection (5), no person shall sell a therapeutic product that the Minister orders them, or another person, to recall.

Power to authorize sale
(4) The Minister may authorize a person to sell a therapeutic product, with or without conditions, even if the Minister has ordered them, or another person, to recall it.

Exception
(5) A person does not contravene subsection (3) if they sell a therapeutic product that they have been authorized under subsection (4) to sell, provided that they sell it in accordance with any conditions that the Minister establishes.

Contravention of unpublished Order
(6) No person shall be convicted of an offence for the contravention of subsection (3) unless it is proved that, at the time of the alleged contravention, the person had been notified of the recall order or reasonable steps had been taken to bring the purport of the recall order to the notice of those persons likely to be affected by it.

Who can use the power?
Only the Minister of Health or the Minister's designate can exercise the power. The regulator's decision to exercise the power relies upon the scientific evaluation and recommendation of Health Canada.

To whom does it apply?
The Order is made to the person who sells the therapeutic product. Under the Act, "Seller" includes anyone offering a therapeutic product for sale, such as a pharmacy. It also includes a person distributing a therapeutic product, such as a drug sample in a doctor's office, or a person distributing blood from a blood establishment.

To what does it apply?
This power applies to therapeutic products, including prescription and non-prescription drugs, vaccines, blood and blood products, gene and cell therapies, tissues and organs, and medical devices. It does not apply to natural health products.

Provisions relating to voluntary recall in the regulations continue to operate.

Threshold
The Minister may order a person selling a therapeutic product to recall it or have it sent to a place that is specified by the Minister, when he or she is of the opinion that it presents a serious or imminent risk to health.

The Act does not contain a definition of "serious risk" to allow for flexibility in its interpretation; for further discussion about "serious risk", see Annex A.

"Imminent" can be read and interpreted for the purposes of this section as per its plain language definition, i.e., "ready to take place" or "close at hand".

Scope of the power
Safety issues resulting in a recall Order may be identified by the therapeutic product authorization holder, a seller, the public, foreign regulators, or Health Canada. A mandatory recall Order should be used when a seller is not willing to recall a therapeutic product that is believed to present a serious or imminent risk of injury to health.

Section 21.3(1) allows the Minister to order a seller to remove a therapeutic product from the marketplace. This would typically involve the return of a therapeutic product to the seller, but it could include an Order to send the product to a particular place (e.g., a warehouse for examination or quarantine). Section 21.3(2) also allows the Minister to order the seller to take corrective action, as in cases such as large medical devices (e.g., MRIs), where correcting the product is an effective means of dealing with the risk.

When a recall has been ordered, s. 21.3(4) lets the Minister authorize a seller to sell a therapeutic product that is subject to a recall to be sold with or without conditions. This section would be used where the recall of the product would present a greater risk to health than the reason for recall (i.e., a permitted sale of a life-saving non-GMP compliant drug to a subset of patients for whom no alternative is available due to drug shortage).

Before issuing an Order
Notification and Opportunity to Respond

Unless the circumstances warrant otherwise, the Minister will, prior to issuing an Order under s. 21.3(1), notify the seller that he or she believes that the therapeutic product appears to present a serious or imminent risk of injury to health and will be subject to a recall Order. The notification should set out the facts relied upon and the relevant criteria used to form the basis of the Minister's belief.

Unless circumstances warrant otherwise, the notification will also provide the seller with a reasonable opportunity to respond to the notification (e.g., to correct an error in fact, dispute the proposed exercise of the power, or voluntarily comply with the notification). The timeframe for response should be specified and reasonable in the circumstances. The timeframe may vary depending upon the severity and immediacy of risk that the product presents (e.g., 12 hours, 2 business days, 90 days, etc.).

Should the seller fail to respond to the notification, the Minister may issue an Order. For further discussion of sufficient notification, see Annex B.

In exercising the recall power, the Minister will consider the nature of the risk presented by the product before deciding to issue an Order without prior notice.

What would an Order look like?
An Order is instructions, decisions or directions given by the Minister which are authorized by the legislation. Orders issued by the Minister will be accompanied by **reasoned decisions** to allow for more transparent decision-making. Reasoned decisions should be based on evidence and should clearly communicate the decision taken and the evidence used to make the decision so that the affected party understands how the result was reached.

An Order issued by the Minister to the seller in accordance with section 21.3(1) of the *Food and Drugs Act* should include:

a. the person(s) to whom it applies;
b. the legislative provision being relied upon;
c. the therapeutic product subject to the Order (including lot number, manufacturing site, etc.);
d. the requirement for the person to provide a recall plan satisfactory to the Minister;
e. other instructions for conducting the recall (i.e., taking of corrective action, effectiveness checks), including if necessary the site to which the recalled product will need to be sent;
f. the timeframe for conducting the above activities; and,
g. the consequences for contravention of the Order.

In accordance with s. 21.4(2), the Order must be made publicly available.

Reasoned decisions accompanying the Order should be unbiased and include:

a. The legislative power being relied upon;
b. What the decision is;
c. An explanation of the basis for the decision and how it was reached, including:
    - a narrative and chronological review of the facts,
    - the scientific evidence considered,
    - any findings on important questions of fact and the accompanying analysis,
    - any relevant criteria considered as part of the threshold determination, and;
    - an explanation of how the evidence satisfies the threshold.

Supporting regulations may be developed at a later date with input from internal and external stakeholders.

Section 21.31 - Power to require assessment

21.31 Subject to the regulations, the Minister may order the holder of a therapeutic product authorization to conduct an assessment of the therapeutic product to which the authorization relates and provide the Minister with the results of the assessment.

This power must be read in conjunction with its supporting regulations under section C.01.052 of the *Food and Drug Regulations* and section 62.1 of the *Medical Devices Regulations*.

Who can use the power?
Only the Minister of Health or the Minister's designate can exercise the power. The regulator's decision to exercise the power relies upon the scientific evaluation and recommendation of Health Canada experts.

To whom does it apply?
The Order is made to the holder of one or more of the following therapeutic product authorizations in respect of a drug or a medical device:

1. a drug identification number (DIN) that has been assigned under subsection C.01.014.2(1) of the *Food and Drug Regulations*;
2. aa drug establishment license (EL) that has been issued under subsection C.01A.008(1) of the *Food and Drug Regulations*;
3. a notice of compliance (NOC) that has been issued under section C.08.004 or C.08.004.1 of the *Food and Drug Regulations*; or
4. a medical device licence that has been issued under the *Medical Devices Regulations*.

To what does it apply?
The order must relate to a drug or a medical device. It does not apply to natural health products.

Threshold
The Minister may order an authorization holder to conduct an assessment of the therapeutic product to which the authorization relates and provide the Minister with the results of the assessment if the Minister has reasonable grounds to believe that:

1. In the case of a DIN or NOC holder, the benefits or risk of injury to health associated with the drug are significantly different than they were when the authorization was issued[2] or;
2. In the case of an EL holder who is an importer, the manner in which the drug is imported, or the manner in which the drug is fabricated, packaged/labelled or tested outside of Canada, may present a risk of injury to health associated with the drug;
3. In the case of an EL holder other than an importer, the manner in which the holder conducts an authorized activity may present a risk of injury to health associated with the drug; or
4. In the case of a medical device licence holder, the benefits - or the risks to the health or safety of patients, users or other persons - that are associated with the device are significantly different than they were when the medical device licence was issued or amended.

Scope of the power
New information available to the Minister indicating that the benefits of the therapeutic product or risks associated with it has changed since the previous authorization may result in the issuance of an assessment Order. Such an Order should be used only when an authorization holder is not willing to voluntarily conduct an assessment and provide the results to the Minister. The authorization holder can only be ordered to assess existing information. The power to order a test and study under section 21.32 provides the Minister with an ability to obtain new information.

Before issuing an Order
Notification and Opportunity to Respond

Prior to issuing an Order under section 21.31, the Minister would notify the authorization holder that he or she believes that, based on new information, the threshold for issuing an assessment order has been reached. The Minister would not be able to order an authorization holder to conduct an assessment solely on information that had been previously provided in support of an application for market authorization or to license a drug establishment.

The notification will also provide the authorization holder with a reasonable opportunity to respond to the notification (e.g., to correct an error in fact, dispute the proposed exercise of the power, or voluntarily comply with the notification). The timeframe for response should be specified and reasonable in the circumstances. The timeframe may vary depending upon the severity and immediacy of risk that the product presents.

Should the holder fail to respond to the notification, the Minister may issue an Order. For further discussion of sufficient notification, see Annex B.

What would an Order look like?
An Order is instructions, decisions or directions given by the Minister that are authorized by the legislation. Orders issued by the Minister will be accompanied by **reasoned decisions** to allow for more transparent decision-making. Reasoned decisions should be based on evidence and should clearly communicate the decision taken and the evidence used to make the decision so that the affected party understands how the result was reached.

[2] "significantly different" means that there is a strong possibility that the new information available about the drug or the medical device would have influenced the Minister's issuance of the authorization or licence including, (1) in the case of a drug, aspects of the authorization such as the indications for use, contraindications, warnings or other means of managing the drug 's harms, benefits and uncertainties; or (2) in the case of a medical device, the intended use, labelling, or other means of managing the device's benefits, risks, or uncertainties.

An Order issued by the Minister to the authorization holder in accordance with section 21.31 of the Food and Drugs Act should include:

1. the person(s) to whom it applies;
2. the legislative provision being relied upon;
3. the drug or medical device and relevant authorization subject to the Order (including lot number, manufacturing site, etc.);
4. the rationale as to why the Minister now believes that the benefits or risks associated with the drug or the medical device are different than when the authorization was issued or amended;
5. the timeframe for responding to the Order and providing the Minister with the results of the assessment; and,
6. the legal consequences for contravention of the Order.

In accordance with subsection 21.4(2) of the Food and Drugs Act, the Order must be made publicly available.

Reasoned decisions accompanying the Order should be unbiased and include:

1. The legislative power being relied upon;
2. What the decision is;
3. An explanation of the basis for the decision and how it was reached, including:
    - a narrative and chronological review of the facts,
    - the scientific or other new evidence considered,
    - any findings on important questions of fact and the accompanying analysis, and;
    - any relevant criteria considered as part of the threshold determination.

What must the Minister do after examining the results of an assessment?
The Minister must, after examining the results of an assessment:

1. provide the authorization holder with the results of the examination; and,
2. publish on the Government of Canada website a summary of the results of the examination along with a description of any actions that the Minister has taken or may take as a consequence of the examination.

What steps may the Minister take after examining the results of an assessment?
The Minister may, having been satisfied that the benefits or risks associated with the drug or the medical device are not significantly different from when the authorization was issued or amended take no further action.

The Minister may, however, have sufficient information to warrant further regulatory action including cancelling a DIN or suspending an NOC, a drug EL or a medical device licence.

As per subsections C.01.014.6(3) and C.08.006(3) of the *Food and Drug Regulations*, the Minister may cancel the assignment of a DIN or suspend an NOC if:

1. the authorization holder has failed to comply with the order; or
2. the Minister determines that the results of the assessment are not sufficient to establish that the benefits associated with the drug outweigh the risks of injury to health.

As per section C.01A.017.1 of the *Food and Drug Regulations*, the Minister may suspend an EL if:

1. the licensee has not complied with the order; or
2. the Minister determines that the results of the assessment are not sufficient to establish that the licensing requirements in paragraph C.01A.005(l), subparagraph C.01A.005(m)(ii) or (iii) or paragraph C.01A.005(o) continue to be met.

As per section 41.1 of the *Medical Devices Regulations*, the Minister may suspend a medical device if

1. the licensee has not complied with the order; or
2. the Minister determines that the results of the assessment are not sufficient to establish that the benefits associated with the device outweigh the risks to the health or safety of patients, users or other persons.

Before taking this type of action, the Minister should consider whether there are other more appropriate means of mitigating the risks by providing the authorization holder an opportunity to be heard and demonstrate how these means will be implemented.

Section 21.32 - Power to require tests, studies, etc.

21.32 Subject to the regulations, the Minister may, for the purpose of obtaining additional information about a therapeutic product's effects on health or safety, order the holder of a therapeutic product authorization to

1. compile information, conduct tests or studies or monitor experience in respect of the therapeutic product; and
2. provide the Minister with the information or the results of the tests, studies or monitoring.

This power must be read in conjunction with its supporting regulations under section C.01.053 of the *Food and Drug Regulations* and section 62.2 of the *Medical Devices Regulations*.

Who can use the power?
Only the Minister of Health or the Minister's designate can exercise the power. The regulator's decision to exercise the power relies upon the scientific evaluation and recommendation of Health Canada experts.

To whom does it apply?
The Order is made to the holder of one or more of the following therapeutic product authorizations in respect of a drug or a medical device:

1. a drug identification number (DIN) that has been assigned under subsection C.01.014.2(1) of the *Food and Drug Regulations*;
2. aa drug establishment license (EL) that has been issued under subsection C.01A.008(1) of the *Food and Drug Regulations*;
3. a notice of compliance (NOC) that has been issued under section C.08.004 or C.08.004.1 of the *Food and Drug Regulations*; or
4. a medical device licence that has been issued under the *Medical Devices Regulations*.

To what does it apply?
The Order must relate to a drug or a medical device. It does not apply to natural health products.

Threshold
The Minister may issue an Order under Section 21.32 of the Act if the Minister has reasonable grounds to believe that:

1. In the case of a DIN or NOC holder there are significant uncertainties relating to the benefits or harms associated with the drug,
2. In the case of an EL holder, the manner in which the holder conducts an activity has introduced significant uncertainties relating to the benefits or harms associated with the drug,
3. In the case of a medical device licence holder, there are significant uncertainties relating to the benefits or adverse effects associated with the device,
4. The authorization holder is currently unable to provide the Minister with information sufficient to manage those uncertainties; and
5. The applicable requirements in the regulations as well as any terms and conditions that have been imposed on the authorization do not allow for sufficient information to be obtained to manage those uncertainties.

Things the Minister must consider before issuing an Order
The Minister must take into account the following matters:

1. Whether the activities the holder will be ordered are feasible; and
2. Whether there are less burdensome ways of obtaining additional information about the drug or medical device's effects on health or safety.

This means that the Minister should be confident that it would be possible for the holder to conduct the activities in a timely manner without undue burden and that information produced as a result of the activities are anticipated to resolve the uncertainties.

Scope of the power
Such an Order should be used only when an authorization holder is not willing to voluntarily conduct a test or study, compile information or monitor experience with respect to a drug or a medical device that the Minister considers necessary to manage uncertainties associated with a drug or a device. It is recognized that there may always be uncertainties associated with any drug or device and the Minister's use of this power should be reserved for those instances where a lack of knowledge could be detrimental to human health and safety.

For example, if information supporting the safety of a therapeutic product was determined to be invalid because deficiencies in the test methods used to obtain that information failed to detect harms associated with the therapeutic product.

Before issuing an Order
Notification and Opportunity to Respond

The Minister will, prior to issuing an Order under section 21.32, notify the authorization holder that he or she believes that based on new information the threshold for issuing such an order has been reached. The Minister should also provide information demonstrating that the following matters were taken into consideration:

1. Whether the activities the holder will be ordered are feasible; and
2. Whether there are less burdensome ways of obtaining additional information about the drug or medical device's effects on health or safety.

The notification will also provide the authorization holder with a reasonable opportunity to respond to the notification (e.g., to correct an error in fact, dispute the proposed exercise of the power, or voluntarily comply with the notification). The timeframe for response should be specified and reasonable in the circumstances.

Should the holder fail to respond to the notification, the Minister may issue an Order. For further discussion of sufficient notification, see Annex B.

What would an Order look like?
An Order is instructions, decisions or directions given by the Minister which are authorized by the legislation. Orders issued by the Minister will be accompanied by **reasoned decisions** to allow for more transparent decision-making. Reasoned decisions should be based on evidence and should clearly communicate the decision taken and the evidence used to make the decision so that the affected party understands how the result was reached.

An Order issued by the Minister to the authorization holder in accordance with section 21.32 of the Food and Drugs Act should include:

1. the person(s) it applies to;
2. the legislative provision being relied upon;
3. the drug or medical device and relevant authorization subject to the Order (including any applicable details such as lot number, manufacturing site, etc.);
4. a description of the uncertainties and the activities ordered by the Minister intended to resolve them;
5. an explanation of how the Minister assessed the feasibility of the activity and whether he or she considered other less burdensome means of obtaining the information;
6. the timeframe for responding to the Order and providing the Minister with the results of the activity; and,
7. the legal consequences for contravention of the Order.

In accordance with subsection 21.4(2) of the Food and Drugs Act, the Order must be made publicly available.

Reasoned decisions accompanying the Order should be unbiased and include:

1. The legislative power being relied upon;
2. What the decision is;
3. An explanation of the basis for the decision and how it was reached, including:
    - a narrative and chronological review of the facts,
    - the scientific or other new evidence considered,
    - any findings on important questions of fact and the accompanying analysis, and;
    - any relevant criteria considered as part of the threshold determination.

What steps may the Minister take after examining the results of a test, study or compiled information?
The Minister may, having been satisfied that the uncertainties have been resolved or adequately managed take no further action.

The Minister may, however, have sufficient information to warrant further regulatory action as appropriate that could include:

1. suspending an NOC under section C.08.006 of the *Food and Drug Regulations*;
2. triggering the stop sale process under section C.01.013 of the *Food and Drug Regulations*;
3. placing terms and conditions on a drug EL under section C.01A.012 of the *Food and Drug Regulations*;
4. amending terms and conditions on a medical device licence under subsection 36(3) of the *Medical Devices Regulations*;
5. suspending a medical device licence under section 40 of the *Medical Device Regulations*;
6. ordering a label or packaging change under section 21.2 of the *Food and Drugs Act*; or
7. issuing an Order to recall the drug under section 21.3.

Annex A - Key Elements for Consideration About Serious Risk

This annex sets out the considerations to be used to determine whether a therapeutic product presents a serious risk of injury to human health. The determination of whether a therapeutic product presents a serious risk is complex and is conducted on a case-by-case basis when new information becomes available.

This non-exhaustive list of elements should be considered together as the starting point for making a determination of serious risk:

a. **The seriousness of the adverse health consequence.** A serious adverse health consequence includes any untoward occurrence that results in death, is life-threatening, requires inpatient hospitalization or prolongation of existing hospitalization, results in persistent or significant disability/incapacity, or is a congenital anomaly/birth defect. This element should be given the most weight when making a determination of serious risk.
    i. **A change in the nature or frequency of a serious adverse health consequence** posed by the therapeutic product;
    ii. **The probability of the serious adverse health consequence** upon exposure to the therapeutic product.
b. **The vulnerability of the patient population and/or sub-population** that are exposed to the particular therapeutic product. Vulnerable populations may include, but are not limited to: children, the elderly, pregnant and lactating women, and immunocompromised patients.
c. **The extent of the population's exposure to the therapeutic product** and the potential public health impact of the exposure.

Each element may have a different influence or "weight" on the determination of serious risk. When determining serious risk, Health Canada will also consider additional contextual elements that are not listed above but are pertinent to the assessment of a particular risk incident, such as international regulatory actions, public health considerations, past-history of the therapeutic product or therapeutic product holder, chronology of events, and previous regulatory actions taken.

Annex B - Notification: Sufficient Notice

Unless circumstances warrant otherwise, affected parties should have sufficient notice of the Minister's intention to issue an Order against them so that they may have an opportunity to be heard. For a notice to be "sufficient" for the purposes of procedural fairness it should contain the following:

- A reference to the section of the Act by which the Minister derives his or her ability to issue the Order;
- The therapeutic product subject to the notice;
- Scientific evidence, contextualized with respect to the issue that needs to be addressed (e.g., include a summary of the history and facts that the regulator intends to rely upon to issue the Order);
- The criteria that will be used by the regulator to determine that the threshold has been met, including any relevant findings on important questions of fact, and the analysis used to form the basis for the conclusions reached;
- The necessary action the party should take to resolve the issue;
- A specified reasonable timeframe for the affected party to take action to resolve the issue (this may vary depending upon the immediacy of risk that the product presents, e.g., 12 hours, 2 business days, 90 days, etc.);
- A specified reasonable timeframe for the affected party to respond to the notification should the party want to respond to the notification and make representations (this may vary depending upon the severity and immediacy of the risk that the product presents, e.g., 12 hours, 2 business days, 90 days, etc.);
- A statement that the Minister reserves the right to extend the timeframe for the therapeutic product authorization holder to take action.