U. S. Department of Justice

Washington, D.C. 20530

April 3, 2009

Mr. Kenneth Cohen
General Counsel, U.S. Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Dear Mr. Cohen:

Thank you for taking the time to meet on March 24, 2009, to hear our concerns regarding the Commission's proposed amendments to the federal sentencing guidelines to include offenses created or amended by the Consumer Product Safety Improvement Act of 2008 ("CPSIA"). As was expressed in that meeting and in the Department's letter of March 27, 2009, we believe that the sentencing issues raised by the CPSIA deserve further review by the Commission. The specifics of the Department's concerns are presented more fully in the March 27th letter to the Commission. The purpose of this letter is to respond to some of the questions raised by the Commission staff at the March 24th meeting.

I. Summary of Concerns with the Commission's Proposal

Prosecutions under the Consumer Product Safety Act ("CPSA") (15 U.S.C. §§ 2051-2089), the Federal Hazardous Substances Act ("FHSA") (15 U.S.C. §§ 1261-1278), and the Flammable Fabrics Act ("FFA") (15 U.S.C. §§ 1191-1204) have rarely occurred because of the low penalties available under the Acts and the notice of non-compliance required by the CPSA. The CPSIA deleted the notice of non-compliance requirement and increased the maximum sentences under the CPSA, FHSA, and FFA. Knowing and willful violations of the CPSA and FFA were increased from one-year misdemeanors to five-year felonies. Strict liability offenses under the FHSA remain Class B misdemeanors; however, offenses committed with the intent to defraud or mislead (and subsequent second offenses) were increased from one-year misdemeanors to five-year felonies.

In enacting the CPSIA, Congress was responding to public outcry over lead paint in children's products, unsafe cribs, and dangerous toys with small parts, among other dangerous consumer products. The Commission's proposal results in sentences that are too low given the magnitude of this problem and the statutory five-year maximums. Our primary concern is that under the proposed amendment, the maximum base offense level for a knowing and willful violation of the CPSA and FFA would be six. This is because the current proposal's cross reference to §2B1.1 for offenses involving fraud would only apply to felonies under the FHSA.

15 U.S.C. § 1264 (the FHSA requires an intent to defraud or mislead). The cross reference would not apply to felony violations of the CPSA and FFA because these statutes require the government prove knowing and willful conduct, not fraudulent conduct. 15 U.S.C. §§ 1196, 2070.

II. Past Criminal Cases

The Commission staff noted that they were unable to find any cases brought under the CPSA in the last five years. In the past, the most serious consumer product cases were brought using other statutes, such as false statements or mail or wire fraud, under which more stringent penalties could be obtained. Further, the dearth of criminal CPSA actions was also due to the notice of non-compliance previously required by the CPSA.

To our knowledge, the Department of Justice has brought only one criminal case under the CPSA on behalf of the CPSC in the last twenty years. *See U.S. v. Daniel Guida, Jr. and Andrew Webb*, No. 96-1964-B (S.D. Calif.). In *U.S. v. Daniel Guida, Jr. and Andrew Webb*, Daniel Guida, assisted by Andrew Webb, rented a post office box in San Diego under an assumed name, and sold unlabeled bottles of alkyl nitrite through the mail to a federal agent in Kansas City, Missouri. (These products, commonly known as "poppers," are inhaled for their euphoric and physical effects.) The two men acted after receiving notice of non-compliance by the CPSC that these products are banned under the CPSA. In October 1996, Mr. Webb pleaded guilty to a misdemeanor count under the CPSA. The court sentenced him to two years probation, a $2,400 fine, and 150 hours of community service. In July 1997, Mr. Guida pleaded guilty to a felony count of conspiracy to defraud the United States and to a CPSA misdemeanor count. The court sentenced Mr. Guida to five years probation, with home detention for the first six months.

With the enhanced sentences and removal of notice of non-compliance under the CPSIA, we anticipate that the CPSC will refer an increasing number of cases under the CPSA for criminal prosecution. In the past, cases that violated consumer product safety rules have been brought under the FHSA because of the CPSA's requirement of notice of non-compliance. An example of such a case is *U.S. v. Steve Thai*, No. CR-01-419 (C.D. Calif.). Between November 1995 and February 1999, Steve Thai, through his company Super Rambo, imported toys with small parts, violative rattles, and improperly labeled toys. The government filed an information against Steve Thai in September 2000. Mr. Thai entered a guilty plea to four misdemeanor counts of violating the FHSA in August 2001. In April 2002, the court sentenced Mr. Thai to three years probation and a $20,000 fine. In the future, it is likely that cases such as *U.S. v. Steve Thai*, will be brought under the CPSA's "knowing and willful" standard.

As previously mentioned, in the past the Department has brought cases under statutes such as mail or wire fraud that previously had more significant penalties than the CPSA and FHSA. An example of such a case is *U.S. v. Lotze*, No. 3:04-cr-02560 (S.D. Calif.). In that case, Matthew Lotze was hired by Chevron Texaco Corporation to destroy approximately 600,000 toy cars which the CPSC had determined contained small parts that could break off and pose a

choking hazard to children under the age of three. Lotze provided Chevron with fake certificates of destruction, photographs, and a videotape purporting to document the cars' destruction, but then re-sold most of the toys to toy wholesalers without telling them about the safety hazard. Lotze subsequently denied having re-sold the toy cars when questioned by CPSC investigators. Lotze pleaded guilty to two counts of mail fraud, four counts of wire fraud, and one count of making false statements to federal investigators. Lotze was sentenced to serve twenty-one months.

Another example is *U.S. v. Chuck Bai-Fun Chen*, CR No. H-01-791 (S.D. Texas), where Mr. Chen was importing extension cords and Christmas lights that did not meet minimal applicable standards and could present a significant risk of death or injury to those who used them. Mr. Chen also engaged in a dual invoicing scheme in which false statements were made on import documents to understate the value of products he imported so as to reduce the amount of importation duties he paid. In January 2002, Mr. Chen pleaded guilty to one felony count of making false statements to a CPSC investigator and one felony count of making false statements on Customs importation forms. In June 2002, the court sentenced Mr. Chen to 14 months in jail, a fine of $30,000, and three years of supervised release.

III. Number of Criminal Cases

The Commission staff asked the Department to quantify how many cases involving substantial risk of bodily harm the Department expects to have referred from the CPSC per year. The number of such cases is impossible to quantify. We can say that given the removal of the notice of non-compliance and heightened penalties and increased resources of the CPSC under the CPSIA, we anticipate that the CPSC will refer an increasing number of cases to the Department for prosecution.

IV. Fraud

The Commission staff requested examples of the types of cases that do not involve fraud such that the different *mens rea* of the Acts will have an impact at sentencing. The primary example — unsafe products imported by dealers in violation of CPSC regulations — is exactly the type of case that led to the passage of the CPSIA. Examples of these cases are those involving importation of toys with dangerous small parts or violations of the lead-paint standard. These types of cases are what Congress intended to deter, but they do not necessarily involve fraud. Therefore, under the Commission's proposal, these cases would have a base offense level of six and would not include a cross reference to the table in U.S.S.G. 2B1.1(b).

V. Difficulty Establishing Loss

In response to the Department's inclusion of "gain" as opposed to "loss" in our proposed sentencing guideline, the Commission staff requested examples of cases where loss will be difficult to determine. An example of such a case is *U.S. v. Donald M. Anthony and Marie A.*

Marrese, Cr. No. 99-20170 (W.D. Tenn.). National Marketing, a firm run by Donald Anthony and Marie Marrese until it went out of business, bought and sold cigarette lighters that lacked child-resistant features. These lighters failed to comply with the CPSC safety standard issued under the Consumer Product Safety Act. In July 1999, a grand jury indicted each defendant on seven counts, including conspiracy to defraud CPSC, false statements to CPSC and the grand jury, and obstruction of justice. (The charges against Ms. Marrese were subsequently dismissed after her death from a heart attack). In October 1999, Mr. Anthony pleaded guilty to one felony count of making a false claim to a CPSC investigator. Mr. Anthony was sentenced to two years in prison. Loss would have been difficult to establish in this case because the evidence showed that the purchasers of the violative lighters were getting exactly what they wanted – lighters that were not child-resistant and thus much easier to activitate. [1] Yet, Mr. Anthony profited considerably by selling lighters that lacked the child-resistant features. We believe that in this, and other consumer cases, "gain" is a much easier to determine (and more accurate) basis to calibrate offense levels under the guidelines.

Another example of a case where loss will be difficult to prove is an ongoing investigation involving a lighter testing company. CPSC regulations require that lighter manufacturers and importers demonstrate their lighters are child resistant before those lighters can be imported into the country. 16 C.F.R. § 1210, 12. The regulations prescribe a rigorous and detailed protocol for the testing process. In this case, the lighter manufacturers and importers hired a third-party testing firm to conduct the required lighter qualification tests. The third-party testing firm falsified the test data that was submitted to the CPSC by the manufacturers and importers. Establishing loss in this case will be challenging because the manufacturers and importers did not have a measurable loss as they obtained the required tests at a low price and their lighters were allowed to be imported into the U.S.

Many illegal fireworks cases are prosecuted under federal explosive statutes. However, some component fireworks "or kit" cases[2] are "bannned hazardous substances" but not explosives. In the past, these cases were prosecuted civilly or as FHSA misdemeanors. We anticipate that these cases will be prosecuted under the enhanced FHSA penalties. Loss in

---

[1] For a similar result in the Food and Drug context, see United States v. Andersen, 45 F.3d 217, 222 (7th Cir. 1995), where the court found that there was no showing of loss because, among other things, "the customers appear to have been well aware that the drugs they were purchasing were not approved by FDA." That opinion was effectively overturned when the Commission's merged the §2F guideline into the §2B guideline and added Application Note 3(F)(v)(III).

[2] The CPSC has designated "M-80s" and other flash powder explosive devices which meet specific explosive criteria as banned hazardous substances because of the danger they pose to health and public safety. 16 C.F.R. § 1500.17(a)(3). Components intended to produce such fireworks are also classified as banned hazardous substances. *Id.*

component fireworks cases is hard to establish because consumers are happy with the products they purchase. Again, gain would be a more workable standard in these types of cases.

VI. "Substantial likelihood of death or serious bodily injury" as a Specific Offense Characteristic

The Commission staff requested the Department's position on placement of "substantial likelihood of death or serious bodily injury" as a specific offense characteristic or as an upward departure. While we recognize that the Commission placed "substantial risk of bodily injury or death" as an upward departure provision in §2N2.1, we disagree with this placement. We would prefer the provision to be a specific offense characteristic in both the food and drug and consumer product contexts. This is a significant aggravating factor. Indeed, whenever there is a substantial risk of bodily injury or death, the sentence should include imprisonment. An upward departure by its very nature asks judges to do a weighing process. Given the serious nature of the offense conduct in such a case, courts should impose a term of imprisonment under the Guidelines.

VII. Civil Penalties under the CPSA

Section 217(b)(2) of the CPSIA requires the CPSC to issue a final regulation providing its interpretation of the civil penalty factors in the Acts. The Commission staff requested information regarding how the civil penalty factors the CPSC is considering relate to the factors that the Commission should consider in assessing monetary penalties. At this time, the CPSC has only issued a request for comments and information regarding the civil penalty criteria. The CPSC intends to issue a notice of proposed rulemaking before issuing its final interpretation of the penalty factors in August of 2009. If the Commission tables the proposed amendment until the next amendment cycle, this information will be be available for the Commission's consideration in August 2009.

Thank you for the considering this additional information. We look forward to working with the Commission on this important issue.

Sincerely,

Eugene M. Thirolf
Director
Office of Consumer Litigation