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Expert Analysis

New Indictment a Reminder of CPSC's Enforcement Capabilities

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On March 29, 2019, the U.S. Department of Justice announced that for the first time it had indicted two corporate executives for failing to furnish information under the Consumer Product Safety Act (CPSA). The DOJ alleged that Simon Chu and Charley Loh—in turn the Chief Administrative Officer and the Chief Executive Officer of companies that imported, distributed and sold dehumidifiers—knew of complaints and testing results indicating that the products could catch fire but failed to timely report these defects to the Consumer Product Safety Commission (CPSC) as required by Section 15(b) of the CPSA. Press Release, DOJ, Two Corporate Executives Indicted in First-Ever Criminal Prosecution for Failure to Report Under Consumer Product Safety Act (March 29, 2019) ("Press Release, March 29, 2019"); 15 U.S.C. §2064 (b). The indictment alleges that the defendants knew of the defects for at least six months, during which they continued to sell the dehumidifiers and did not disclose the defects to the CPSC. Press Release, March 29, 2019; see also Indictment, *United States v. Chu*, 2:19-cr-00193 (C.D. Cal. March 28, 2019) ECF 1.

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This prosecution is a reminder to companies of the range of CPSC tools available to enforce its consumer product safety laws, including criminal penalties against directors, officers and agents. In a press release, the U.S. Attorney for the Central District of California warned, "If you plan to profit from selling defective products, you should also plan to face justice." Press Release, March 29, 2019. Significantly, the indictment comes after a $15.45 million civil penalty was already obtained from companies that manufactured, imported and sold the defective humidifiers in a related CPSC matter. News Release, CPSC, Gree Agrees to Pay Record $15.45 Million Civil Penalty, Improve Internal Compliance for Failure to Report Defective Humidifiers (March 25, 2016). The criminal case highlights the need for prompt and fulsome disclosure of known safety risks in

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the consumer product arena as well as the risks that flow from incomplete or inaccurate communications.

Established in 1972, the CPSC is an independent federal agency charged with "protecting the public from unreasonable risks of injuries or death associated with consumer products." CPSC, 2017 Annual Report to the President and Congress, at i ("2017 Annual Report"). It regulates thousands of products ranging from cribs to dishwashers to various hazardous substances through its enforcement of some dozen statutes, including its two main statutes: the CPSA and the Federal Hazardous Substances Act (FHSA). CPSC.gov, Contact/FAQ.

The CPSC primarily regulates via participation in the development of voluntary standards, promulgation and enforcement of regulations and mandatory standards, and reliance on self-reporting by companies. 2017 Annual Report, at 9, 11-13, 14-15, 21. The agency also has enforcement authority. Its main enforcement mechanisms are obtaining voluntary, negotiated product recalls and issuing letters of advice to importers or manufacturers advising the company of a violation, and identifying the nature of a necessary corrective action. 2017 Annual Report, at 21. For example, in 2017, the CPSC negotiated 381 cooperative recalls or corrective actions, and issued approximately 1400 letters of advice for which the CPSC received responses from companies confirming the violations and the CPSC decided that the companies had voluntarily completed corrective actions. Id.; CPSC.gov, Violations. The CPSC may also negotiate civil monetary penalty settlements short of litigation, although this approach is used far less frequently. 2017 Annual Report, at 23. For example, last October, Costco agreed to pay a $3.85 million civil penalty and maintain a compliance program designed to comply with the CPSA for failing to report defective trash cans. News Release, CPSC, Costco Agrees to $3.85 Million Civil Penalty, Compliance Program for Failure to Report Defective Trash Cans (Oct. 5, 2018). The CPSC may also seek civil monetary penalties and injunctive relief in litigation, although it does so rarely (2017 Annual Report, at 23-24; CPSC, 2016 Annual Report to the President and Congress, 20-27; CPSC, 2015 Annual Report to the President and Congress, at 218-21; while at the Justice Department, one of this article's authors handled the first litigated case in which the CPSC's authority was used to obtain civil monetary penalties. News Release, CPSC, CPSC Obtains Record Penalty Against Shelton Wholesale for Importing Illegal Fireworks (Jan. 13, 1999).

Given the CPSC's reliance on a cooperative regulatory approach, and the relative rarity of civil enforcement, it is possible to overlook the fact that the CPSC's investigations can also lead to criminal actions. The recent indictment was a first-of-its-kind involving Section 15(b) of the CPSA, but it is not the only CPSC investigation that has resulted in criminal prosecution. For instance, in April 1999, toy company Dan Dee International, Inc. was sentenced to pay a $40,000 criminal penalty for selling banned children's toys in violation of the FHSA. News Release, CPSC, Toy Importer Sentenced in Criminal Case (April 9, 1999). In June 2013, the president of LM Import-Export, Inc. was sentenced to 22 months in prison and a $10,000 fine after pleading guilty to conspiracy to traffic and smuggle children's products containing banned hazardous substances in violation of the CPSA and the FHSA. Press Release, DOJ, Florida Residents and Corporations Plead Guilty to Charges of Smuggling Hazardous Children's Products, Including Toys Containing Lead and Small Parts, From China (April 25, 2012); News Release, CPSC, President of LM Import-Export Sentenced to 22 Months in Federal Prison, Fined $10,000 for Importing Banned Children's Products (June 5, 2013); CPSC, 2013 Annual Report to the President and Congress, at 173 ("2013 Annual Report"). The corporate defendants in the case were sentenced to five years' probation. 2013 Annual Report, at 173.

Criminal penalties can be imposed under both of the CPSC's main statutes, the CPSA and the FHSA. (Criminal penalty provisions are included in other CPSC enforced statutes, including the Flammable Fabrics Act and the Refrigerator Safety Act. See 15 U.S.C. §1196, §1212.) The CPSA is the agency's umbrella statute. Section 19 lists 16 prohibited acts that trigger criminal penalties, including failing to furnish information required to the CPSC; misrepresenting to an officer or employee of the CPSC the scope of products subject to a possible recall; and selling, distributing or importing a consumer product that does not conform to certain safety rules, regulations and standards. 15 U.S.C. §2068. Section 19 violations are punishable by "1) imprisonment for not more than 5 years for a knowing and willful violation of that section; 2) a fine determined under section 3571 of title 18, United States Code, or 3) both." 15 U.S.C. §2070 (a); Section 3571 provides the maximum fines the government can seek from an individual or corporation based on offense category. 18 U.S.C. §3571. In addition, following the Consumer Product Safety Improvement Act of 2008, criminal violations of the CPSA and any other act enforced by the CPSC can result in asset forfeiture. 15 U.S.C. §2070 (c)(1).

The FHSA regulates hazardous products. The act requires that the products regulated under this statute bear certain warning labels and also gives the CPSC the authority to ban certain products. CPSC, Federal Hazardous Substances Act (FHSA) Requirements. Section 4 of the FHSA prohibits the introduction of a misbranded or banned hazardous substance into interstate commerce or the receipt of such a substance in interstate commerce, among other things. 15 U.S.C. §1263. Under the FHSA, any person who commits one of the prohibited acts in §4 is guilty of a misdemeanor and, if the offense was "committed with intent to defraud or mislead, or for second and subsequent offenses," is guilty of a felony and faces a statutory maximum term of five years' imprisonment and/or a fine. 15 U.S.C. §1264(a).

It is unclear if this indictment is a traditional prosecution premised on alleged false statements and omissions or a sign that the CPSC may become more aggressive in its enforcement of the CPSA, FHSA and its other statutes. Nonetheless, companies should remain alert to the CPSC's ability to seek criminal penalties when considering their interactions with the commission and compliance with its statutes.