Description of document:	Consumer Product Safety Commission (CPSC) emails containing the word Magnet or Magnets in selected email accounts 2019
Requested date:	10-April-2020
Release date:	08-March-2023
Posted date:	11-September-2023
Source of document:	U.S. Consumer Product Safety Commission 4330 East West Highway Bethesda, MD 20814 Fax: 301-504-0127 Email: CPSCFOIARequests@cpsc.gov CPSC e-FOIA Public Access Link Website

United States
Consumer Product Safety Commission

March 8, 2023

Via EMAIL

RE: Freedom of Information Act Request #20-F-00126: The results of electronic searches for a copy of each email containing the word MAGNET or the word MAGNETS in each of the following CPSC email accounts: Individuals in the Office of Communications; Individuals in the Office of Legislative Affairs; Individuals in the Office of Commissioner Baiocco; and Individuals in the Office of Commissioner Feldman. I limit this request to emails during the time period of December 1, 2019 to the present. (Date Range for Record Search: From 12/1/2019 To 12/27/2019)

Thank you for your Freedom of Information Act (FOIA) request seeking records from the U.S. Consumer Product Safety Commission (CPSC). Enclosed is a copy of the records responsive to your request, with certain exemptions explained below.

The records include file information generated by CPSC, or its contractors, for regulatory or enforcement purposes. Per your email request of April 10, 2020, we omitted news clippings and other public domain material from the responsive records. The enclosed records are from CPSC's Office of Legislative Affairs, Office of Communications, and the Offices of Commissioners Baiocco and Feldman. CPSC has established management systems under which supervisors are responsible for reviewing the work of their employees or contractors. The file information materials are final and have been prepared and accepted by CPSC staff under such review systems. CPSC believes that it has taken reasonable steps to ensure the accuracy of the information.

Portions of the enclosed records are being withheld pursuant to FOIA Exemptions 5 and 6, 5 U.S.C. § 552(b)(5) and (b)(6). CPSC considered the foreseeable harm standard when reviewing these records and applying FOIA exemptions.

Exemption 5. FOIA Exemption 5 permits withholding from disclosure inter-agency and intra-agency memoranda that would not be available, by law, to a party other than an agency in litigation with the agency. The staff memoranda and analyses being withheld are pre-decisional and deliberative, consisting of recommendations, opinions, suggestions, and analyses of technical and/or legal staff. Any factual materials in the memoranda not covered by some other exemption are inextricably intertwined with exempt materials, or the

disclosure of the factual materials would expose the deliberative process and/or violate the attorney-client privilege. It would not be in the public interest to disclose these materials because disclosure would impair the frank exchange of views necessary for such matters.

Exemption 6. FOIA Exemption 6 permits withholding personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Absent authorizations to disclose the records or personally identifying information from the persons identified in the records or their representatives, such information falls within the protection of this FOIA exemption to disclosure and is being withheld accordingly. In this instance, personal phone numbers and email addresses were redacted.

FOIA Administrative Procedures

Right to appeal. According to the CPSC's regulations implementing the FOIA at 16 C.F.R. § 1015.7, a partial denial of access to records may be appealed. If you are not satisfied with the response to this request, you may administratively appeal in writing, addressed to FOIA APPEAL, Office of the General Counsel, ATTN: Division of Information Access, U.S. Consumer Product Safety Commission, 4330 East West Highway, Room 820 Bethesda, MD 20814-4408.

Your appeal must be postmarked or electronically transmitted (cpscfoiarequests@cpsc.gov) within 90 days of the date of the response to your request. You may also fax your appeal to 301-504-0127. You may contact us Monday – Friday from 8:00AM – 4:30PM EST, by telephone at 1-800-638-2772, by fax to 301-504-0127, or by e-mail addressed to cpsc-foia@cpsc.gov.

Before filing a formal appeal with the CPSC, you may contact me or one of CPSC's FOIA Public Liaisons, Bob Dalton (rdalton@cpsc.gov) or Cooper Gerus (cgerus@cpsc.gov), via email or at 1-800-638-2772, for any further assistance, or to discuss any aspect of your request. Assistance may include guidance on possible reformulation of your request or an alternative time frame for processing the request.

Right to Mediation. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, MD 20740-6001; e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile to 202-741-5769.

Fees will not be charged to you for this request.

Sincerely, ABIOYE OYEWOLE Digitally signed by ABIOYE OYEWOLE Date: 2023.03.08 15:23:54 -05'00'

Abioye Oyewole for Ajoké Oyegunle
Chief FOIA Officer
Office of the General Counsel
Division of Information Access
aoyegunle@cpsc.gov

Enclosures: OLA Emails
OCM Emails
Commissioner Baiocco Emails
Commissioner Feldman Emails

From:	Rodriguez, Kate (Brown)
To:	OLA e-mail
Cc:	Brockington, Alyssa (Brown); Duggan, Abigail (Brown); Kalonia, Maya (Blumenthal); Figures, Shomari (Brown)
Subject:	Letter to CPSC: High Powered Magnets
Date:	Thursday, December 19, 2019 4:45:22 PM
Attachments:	Letter to CPSC_Final.pdf

Mr. Crockett,

Sens. Brown and Blumenthal led a letter to the CPSC regarding the health and safety risks of high-powered magnets. We've attached the scanned letter above and sent the physical copy this afternoon. Please let me know if you have any questions.

Best,

Kate

Kate Rodriguez
Legislative Correspondent
Office of U.S. Senator Sherrod Brown
503 Hart Senate Office Building
Washington, D.C. 20510

United States Senate

WASHINGTON, DC 20510

December 19, 2019

The Honorable Robert S. Adler
Acting Chairman
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

Dear Acting Chair Adler:

Pediatric experts and advocates have reported a substantial increase in the number of child and adolescent injuries since the U.S. Court of Appeals for the Tenth Circuit vacated the Consumer Product Safety Commission's (CPSC) safety standard for round, high-powered magnets. We urge the CPSC to provide our offices and relevant stakeholders with an update on data collection and other monitoring efforts the CPSC has engaged on since the safety standard was vacated, plans for future rulemaking related to this product, and whether the Commission believes additional statutory authority is necessary for the Commission to fully address the critical product safety hazard.

As you are aware, in September 2014, CPSC issued a safety standard for high-powered magnet sets that pose serious, and potentially deadly, risks to children. This safety standard restricted the sale of high-powered magnet sets. According to a 2017 study published in the *Journal of Pediatrics*, magnet ingestions after the 2014 CPSC ban decreased by nearly 80 percent. However, in November 2016, the U.S. Court of Appeals for the Tenth Circuit vacated the CPSC's rule on high-powered magnet sets and remanded it to the CPSC to pursue further proceedings consistent with accurate and representative data requirements.

Since the CPSC's rule was vacated and these products reintroduced to the market, medical data suggests an uptick in the number of related injuries. For example, the National Poison Data System (NPDS) indicates that in 2017 about 300 cases of severe magnet ingestions were reported each year. However, after 2017, the same year CPSC lifted the ban on high-powered magnets, the total number of cases reported increased to approximately 1,600, an increase of 490 percent. The data also shows the number of related hospitalizations reported increased by 420 percent, and that the population most affected by this increase are between the ages of 6 years and 12 years. Children who ingest high-powered magnets can suffer from morbid conditions including respiratory depression and hypotension.

Several medical organizations – including the North American Society for Pediatric Gastroenterology, Hepatology and Nutrition – have expressed grave concern about the hazards presented to children by these magnets and have recommended these magnets be banned from the market again. In August 2019, Oregon Health & Science University (OHSU) published an

article warning about the number of magnet-related injuries that required medical intervention, citing 54 magnets that required medically necessary removal from pediatric patients in just over a month.

According to members from the pediatric gastroenterology community, ingestion of high-powered magnets is more likely to cause injury to a child than ingestion of most other consumer products. While most ingestion cases result in children receiving an x-ray and letting the object pass naturally, high-powered magnet ingestions may result in additional x-rays, surgery consultations, transfers to pediatric hospitals, and multiple invasive surgeries, resulting in an increased financial and emotional burden to the patient and their family. In 2014, a 19-month-old from Columbus, Ohio was misdiagnosed with a virus after ingesting multiple magnets and passed away the following day.

The CPSC's initial intent was to ban high-powered magnet sets, as they present a significant threat to the safety of children. However, since these products have been reintroduced to the market, to our knowledge, the CPSC has not revisited its efforts to restrict these products despite receiving countless correspondences from reputable pediatric professionals, advocates, and organizations, expressing concern regarding the dangers these products continue to present to children. Given the rise in pediatric emergencies involving high-powered magnet ingestions, the emotional and financial burdens placed on children and their families, and the expert opinion of members within the pediatric field, it is past time to take action on this matter.

Therefore, we request that you provide us with an update on the actions CPSC has taken to address the health and safety risks presented by high-powered magnet sets after the Tenth Circuit ruling. We also urge the CPSC to provide an update on its current strategies to strengthen and prioritize protections for children, revisit a ban on these dangerous products, and engage in rulemaking as quickly as possible to ensure the strongest consumer protections possible to protect future children from the dangers associated with this product. Finally, if the Commission believes it lacks appropriate statutory authority to address this serious hazard, we request guidance on legislative language that would provide such authority.

Thank you for your prompt consideration on this critical issue. We look forward to receiving your written response.

Sincerely,

Sherrod Brown
United States Senator

Richard Blumenthal
United States Senator

From: Kirshner, Amy

To: Kirshner, Amy; Kaye, Elliot; Fong-Swamidoss, Jana; McGoogan, Stephen; Adler, Robert; Klein, Sarah; Mullan, John; Yahr, Dorothy; Ray, DeWane; Covell, Michelle; Midgett, Jonathan; Kentoff, Maureen; Feinberg, Jennifer; Crockett, David; Boyle, Mary; Pollitzer, Patricia; Summitt, Monica; Steinle, Allison; Recht, Joel; Rodgers, Samuel Gregory; Stadnik, Andrew; Thaler, Alice; Adair, Patricia; Boniface, Duane; Baiocco, Dana; Hanway, Stephen; Hudgins, Christopher; Feldman, Peter; Martyak, Joseph

Subject: EXHR Activities Report 12 03 2019

Date: Tuesday, December 3, 2019 9:23:57 AM

Attachments: EXHR Activities Report 12_03_2019_Final.pdf

EXHR Activities Report

December 3, 2019

Office of Hazard Identification and Reduction

U.S. Consumer Product Safety Commission

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Voluntary Standards Activities

Update of Standards

- ASTM standard for children's portable bedrails was just updated to F2085-19. Other ASTM standards for non-full-size cribs, slings, soft infant and toddler carriers and children's chairs and stools should all see revisions soon. Once revised, staff will be notified per 112-28 rule. ASTM notified CPSC on November 20 of the revisions to children's portable bed rails and anticipates notification on the remaining standards subsequently.
- ASTM F08 (and F15 playground standards) met November 4 - 8 in Houston. Paul, McCallion, K. Lee, Mella and Hall attended. There was a kickoff meeting for Commercial eScooters; Paul, McCallion and Mella attended.
- ASTM F15.77 continues to meet to discuss a new draft standard for adult magnet sets. The performance requirement task group exchanged a lot of ideas and had much discussion over email. There appear to be no feasible avenues that can be considered now, except limiting the flux density, which would then qualify these products to be child-friendly. A ballot for the labeling and marking requirements is expected to be used before the end of the year.
- Staff sent letter to SVIA, RHOVA and OPEI providing staff analysis of incidents and asking to meet to discuss debris penetration and fire issues. Paul, Lim and Kumagai will attend a meeting on Dec 9 in Atlanta to discuss the data. .
- CPSC (5RP) hosted the ASTM F15.10 subcommittee on Gasoline Containers for a meeting on Nov 21st.
- ASTM F15.02 Safety Standards for Lighters was held on Friday, November 22, from 2:00 to 4:00 pm via webex. (Khanna)
- Results from the ASTM F15.72 subcommittee ballot on a new standard for flame mitigation devices on disposable fuel containers closed with three comments. The task group will begin meeting by teleconference in December to consider the comments and any other potential changes for a ballot to the full committee to establish a new standard. On Nov 18th, A. Lee sent a letter to UL suggesting they develop intermediate thresholds for products to be certified, to help maximize the availability of smoke alarms meeting the new standard, given their need to enact anextension of the effective date for ANSI/UL 268 on Smoke Detectors to June 30, 2021.
- Adult Bath Tub ASTM subcommittee had a teleconference on Nov 20th. There is a new subcommittee chair and Rick McCallion will be working to support him to help get the standard active again (it was withdrawn approximately two years ago).

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Withheld pursuant to exemption

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FY20 Briefing Packages

Completed

- ✓ Non-Full-Size Cribs and Play Yards 112-28 Update DFR
- ✓ Toddler Beds 112-28 update DFR
- ✓ Infant Sleep Products SNPR
- ✓ OFR Guidance Document Federal Register Notice
- ✓ On Product Certification Memo
- ✓ VSTAR FY2019 Annual Report

FY20 Briefing Packages

- VSTAR FY2020 Midyear Report
- Spring Regulatory Agenda
- Adult Portable Bedrails Petition BP
- Lawnmower Petition BP
- Micromobility Hazard Assessment Report
- Wearable Devices Hazard Assessment Report
- 3D Printing Hazard Assessment Report
- VGBPSSA Petition BP
- Gates FR
- Part 1610 and Spandex Final Action Package
- Burden Reduction BP
- Crib Mattresses NPR
- OFR Analysis Plan
- ROV Termination BP
- Lab Accreditation IBR Update DFR
- SRM & Mattress Rule Update 1632
- Burden Reduction Manufactured Fibers FR
- Fall Regulatory Agenda
- Crib Rule Review
- CSU Tipover NPR
- Window Coverings Report
- Table Saws FR
- Magnet Sets Petition BP

Burden Reduction Highlights

- FY20 OP project activities related to reviews of policies and processes for: FFA exemptions underway.

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Docketed Petitions

Table 2 shows the current status of the petitions proposed for evaluation by the staff in the FY 2015 Operating Plan and added since.

Table 2
Docketed Petitions: Commission Decision and Current Staff Activity

Product	Commission Decision	Current Staff Activity	Comments Received
Adult Bed Rails	Defer/Staff report back	Petition BP in FY19	
Torch Fuel and Lamp Oil	Defer	Voluntary Standard	
Magnet Sets	Docketed; FR notice published; comments due 12/05/17. Docket extension request with Commission; Commission voted not to extend comment period (12/12)	The Commission voted to approve publication of the draft Federal Register notice inviting comments. Staff preparing BP.	21 comments received in regulations.gov. Over half of the comments (12 of 21) appear to be from anonymous sources and have nothing to do with the petition
Walk-behind mowers	Docketed	The Commission voted 4/2/19 to approve publication of a Federal Register notice inviting comments on the petition.	Comment period closed 6/10/19, Eleven comments received

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From: Kirshner, Amy

To: Kirshner, Amy; Kaye, Elliot; Fong-Swamidoss, Jana; McGoogan, Stephen; Adler, Robert; Klein, Sarah; Mullan, John; Yahr, Dorothy; Ray, DeWane; Covell, Michelle; Midgett, Jonathan; Kentoff, Maureen; Feinberg, Jennifer; Crockett, David; Boyle, Mary; Pollitzer, Patricia; Summitt, Monica; Steinle, Allison; Recht, Joel; Rodgers, Samuel Gregory; Stadnik, Andrew; Thaler, Alice; Adair, Patricia; Boniface, Duane; Baiocco, Dana; Hanway, Stephen; Hudgins, Christopher; Feldman, Peter; Martyak, Joseph

Subject: EXHR Activities Report 12 20 2019

Date: Friday, December 20, 2019 8:48:08 AM

Attachments: EXHR Activities Report 12_20_2019_FINAL.pdf

EXHR Activities Report

December 20 2019

Office of Hazard Identification and Reduction

U.S. Consumer Product Safety Commission

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of the Freedom of Information Act

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- ✓ Toddler Beds 112-28 update DFR
- ✓ Infant Sleep Products SNPR
- ✓ OFR Guidance Document Federal Register Notice
- ✓ On Product Certification Memo
- ✓ VSTAR FY2019 Annual Report

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- VSTAR FY2020 Midyear Report
- Spring Regulatory Agenda
- Adult Portable Bedrails Petition BP
- Lawnmower Petition BP
- Micromobility Hazard Assessment Report
- Wearable Devices Hazard Assessment Report
- 3D Printing Hazard Assessment Report
- VGBPSSA Petition BP
- Gates FR
- Part 1610 and Spandex Final Action Package
- Burden Reduction BP
- Crib Mattresses NPR
- OFR Analysis Plan
- ROV Termination BP
- Lab Accreditation IBR Update DFR
- SRM & Mattress Rule Update 1632
- Burden Reduction Manufactured Fibers FR
- Fall Regulatory Agenda
- Crib Rule Review
- CSU Tipover NPR
- Window Coverings Report
- Table Saws FR
- Magnet Sets Petition BP

Burden Reduction Highlights

- FY20 OP project activities related to reviews of policies and processes for: FFA exemptions underway.

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Docketed Petitions

Table 2 shows the current status of the petitions proposed for evaluation by the staff in the FY 2015 Operating Plan and added since.

Table 2
Docketed Petitions: Commission Decision and Current Staff Activity

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From: Crockett, David
To: Hudgins, Christopher
Subject: FW: Letter to CPSC: High Powered Magnets
Date: Friday, December 20, 2019 9:33:22 AM
Attachments: image001.png
image002.png
image003.png
image004.png
image005.png
Letter to CPSC_Final.pdf

From: Brockington, Alyssa (Brown) [mailto:Alyssa_Brockington@brown.senate.gov]
Sent: Thursday, December 19, 2019 3:09 PM
To: Crockett, David
Cc: Rodriguez, Kate (Brown) ; Duggan, Abigail (Brown) ; Kalonia, Maya (Blumenthal) ; Figures, Shomari (Brown)
Subject: Letter to CPSC: High Powered Magnets

Good Afternoon Mr. Crockett,

We hope this email finds you well. Sens. Brown and Blumenthal have co-led a letter the CPSC regarding the health and safety risks of high-powered magnet sets. Please see the scanned correspondence attached. We are also sending a physical copy, which will be mailed out today.

Thank You,

Alyssa

Alyssa R.J. Brockington | U.S. Senator Sherrod Brown (OH) | 202-224-2315
503 Hart Senate Office Building | Washington, DC 20510

Connect with Senator Brown:


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Duplicative Document

of the Freedom of Information Act

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Withheld pursuant to exemption

Duplicative Document

of the Freedom of Information Act

From: Legislative Affairs
To: Crockett, David
Subject: OLA Letter Database - 12/23/2019
Date: Monday, December 23, 2019 1:55:20 PM

Legislative Affairs

12/23/2019 has been added

Modify my alert settings | View 12/23/2019 | View OLA Letter Database

Date Entered:	12/23/2019
Date of Incoming:	12/19/2019
From:	Sens. Brown and Blumenthal
Subject:	Magnets
Current Office:	
Status/Comments:	
Open/Closed:	Open
#:	779
Date of Outgoing:	

Last Modified 12/23/2019 1:51 PM by Crockett, David

From: Fatula, Shannell
To: Outgoing Communication
Subject: Outgoing Communication / Do Not Distribute
Date: Friday, December 6, 2019 1:51:41 PM
Attachments: 20035.docx
20036.docx
20037.docx
image001.png

The attached releases will be posted today, December 6, 2019:

- **Trek Recalls Super Commuter+ Electric Bicycles Due to Fall Hazard (20-035)**
- **Surly Bikes Recalls Bicycle Racks Due to Crash and Injury Hazards (20-036)**
- **WilliamsRDM Recalls Cooktop Fire Suppressors Due to Risk of Failure to Activate and Suppress Fires (20-037)**

Shannell M. Fatula
Administrative Officer
U.S. Consumer Product Safety Commission
Office of Communication, Room 717
4330 East West Highway 7th Floor
Bethesda, MD 20814
SFatula@cpsc.gov
(301) 504-7245

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(b)(5)

of the Freedom of Information Act

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information Act

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052

Withheld

From: Klein, Sarah
To: Agenda Planning
Cc: Kentoff, Maureen
Subject: This week's agenda
Date: Tuesday, December 17, 2019 9:53:08 AM
Attachments: FOUO_BP_Status 12.17.19.pdf

Please see attached for this week's agenda. Thanks!

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information Act

From: Kentoff, Maureen
To: Agenda Planning
Subject: This week's Agenda
Date: Wednesday, December 11, 2019 1:21:11 PM
Attachments: FOUO_BP_Status 12.11.19.pdf
ATT00001.htm

My apologies for the delay (again) in sending this week's agenda. I will set myself a calendar reminder going forward!

Thank you,
Mo

Begin forwarded message:

Sarah Klein

Chief of Staff to Acting Chairman Robert S. Adler

U.S. Consumer Product Safety Commission

Email: sklein@cpsc.gov

Phone: 301.504.7731

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Withheld pursuant to exemption

(b)(5)

of the Freedom of Information Act

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Withheld pursuant to exemption

Not Responsive

of the Freedom of Information Act

From: Kentoff, Maureen
To: Agenda Planning
Subject: This week's agenda
Date: Wednesday, December 4, 2019 3:18:59 PM
Attachments: FOUO_BP_Status 12.2.19.pdf
ATT00001.htm

Please see attached for this week's agenda.

My apologies for the delay!!! — Mo

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of the Freedom of Information Act

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Not Responsive

of the Freedom of Information Act

From: Calidas, Doug (Klobuchar)
To: Hudgins, Christopher
Cc: Pillai, Jaya (Klobuchar)
Subject: FW: Letter from Senator Klobuchar to Acting Chairman Adler
Date: Friday, December 27, 2019 3:07:52 PM
Attachments: image001.png
12.27.2019 - Letter from Senator Klobuchar to CPSC Acting Chairman.pdf

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Forwarding email in light of auto-message received from the OLA account.

Doug Calidas
Deputy Legislative Director
Office of Senator Amy Klobuchar
425 Dirksen Senate Office Building
Washington, DC 20510
@SenAmyKlobuchar

From: Calidas, Doug (Klobuchar)
Sent: Friday, December 27, 2019 3:06 PM
To: 'ola@cpsc.gov'
Cc: Pillai, Jaya (Klobuchar)
Subject: Letter from Senator Klobuchar to Acting Chairman Adler

Office of Legislative Affairs-

Attached is a letter from U.S. Senator Amy Klobuchar to Acting Chairman Robert S. Adler. Please contact me if you have any questions.

Thank you,

Doug

Doug Calidas
Deputy Legislative Director
Office of Senator Amy Klobuchar
425 Dirksen Senate Office Building
Washington, DC 20510
@SenAmyKlobuchar

AMY KLOBUCHAR
MINNESOTA

COMMITTEES:
AGRICULTURE, NUTRITION, AND FORESTRY
COMMERCE, SCIENCE, AND TRANSPORTATION
JOINT ECONOMIC COMMITTEE
JUDICIARY
RULES AND ADMINISTRATION

United States Senate

WASHINGTON, DC 20510

December 27, 2019

Mr. Robert S. Adler
Acting Chairman
Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814

Dear Acting Chairman Adler:

I write to express my serious concerns regarding recent reports documenting an alarming increase in injuries to children who have ingested small rare-earth magnets and to request that the Consumer Product Safety Commission (CPSC) investigate this matter and take steps to ensure that children are kept safe from these dangerous products.

According to the National Poison Data System, there have been more than 1,500 accidental ingestions of this type of magnet in 2019 alone. Due to their small size and strength—up to 10 times more powerful than ordinary magnets—these magnets can attract each other inside the intestine when swallowed by children, causing life-threatening injuries to the gastrointestinal tract, sometimes resulting in death.[1]

Despite the clear hazard these magnets pose to children's health, there are currently no safety standards or regulations governing their sale or use.[2] While ASTM International is currently developing voluntary safety standards, early reports suggest that the standard being developed will fail to place any limits on the size and strength of the magnets available for sale to the public.[3] Although the CPSC issued safety standards restricting the size and strength of nonindustrial magnets sold to the public in 2014, those standards were invalidated in a legal challenge in 2016, and the CPSC has declined to issue new regulations—despite the urging of pediatricians and consumer groups.

The CPSC plays a critical role in ensuring the safety of our children, including investigating hazardous children's products and banning certain dangerous products from the market

---

[1] https://www.washingtonpost.com/business/economy/number-of-children-swallowing-dangerous-magnets-surges-as-industry-largely-polices-itself/2019/12/25/77327812-2295-11ea-86f3-3b5019d451db_story.html?arc404=true

[2] https://www.cpsc.gov/s3fs-public/CP_17_1_Petition_Requesting_Rulemaking_to_Establish_Safety_Standards_for_High_Powered_Magnet_Sets_092017.pdf?uYnVcFg2cjAWbxlpZ1LBKyHP_lp.OPbS

[3] https://www.washingtonpost.com/business/economy/number-of-children-swallowing-dangerous-magnets-surges-as-industry-largely-polices-itself/2019/12/25/77327812-2295-11ea-86f3-3b5019d451db_story.html?arc404=true

altogether. Given the seriousness of this issue, I urge the CPSC to revisit this issue and take action to protect children from the dangers of small rare-earth magnets. In addition, I respectfully request responses to the following questions:

1. What is the CPSC doing to investigate the incidence of injuries caused to children by the ingestion of small rare-earth magnets?

2. Does the CPSC need additional resources to investigate this issue and take appropriate measures to protect children from these products?

3. Does the CPSC believe that voluntary standards that fail to limit the size and strength of these magnets will adequately protect children from the safety risk presented by these dangerous products?

Thank you for your prompt attention to this matter. I look forward to your response.

Sincerely,

Amy Klobuchar
United States Senator

From:	Mills, Alberta E.
To:	Adler, Robert; Klein, Sarah; Feinberg, Jennifer; Kentoff, Maureen; Kaye, Elliot; Fong-Swamidoss, Jana; Midgett, Jonathan; Steinle, Allison; Baiocco, Dana; Asplen, Michael; Yahr, Dorothy; Schall, Brandon; Feldman, Peter; Tanzer, Theodore; Web Team Members
Cc:	Mullan, John; Hampshire, Melissa; Pollitzer, Patricia; Mosheim, Abioye; Murphy, Mary; Boyle, Mary; Ray, DeWane; Summitt, Monica; Covell, Michelle; McGoogan, Stephen; Boniface, Duane; Recht, Joel; Kaye, Robert; Tarnoff, Howard; Martyak, Joseph; Davis, Patty; Hudgins, Christopher; Mathis, Shelby; Smith, Timothy; Murchison, Keisha
Subject:	New Web Posting
Date:	Monday, December 23, 2019 12:38:59 PM
Attachments:	CPSC Gather Consumer Feedback - Final Report with CPSC Staff Statement - REDACTED and CLEARED.pdf

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Good afternoon,
For your information, the attached report will be posted on the Research/Statistics/ Technical Reports webpage of CPSC.gov at 2:00 pm today.
Thank you,

Alberta E. Mills
Commission Secretary
U.S. Consumer Product Safety Commission
Office of the General Counsel
Division of the Secretariat
amills@cpsc.gov
301-504-7479

CPSC Staff Statement[1] on Kalsher & Associates, LLC's, "CPSC Gather Consumer Feedback: Final Report"

November 2019

The report titled, "CPSC Gather Consumer Feedback: Final Report," presents the findings of research conducted by Kalsher & Associates, LLC, under Contract HHSP233201860070A.

The objective of the research was to evaluate a set of 20 graphical safety symbols for comprehension, in an effort to develop a family of graphical symbols that can be used in multiple standards to communicate safety-related information to diverse audiences. The contractor developed 10 new symbols for the project; the remaining 10 symbols already existed. These symbols were selected in collaboration with CPSC staff.

Comprehension was evaluated with a group of 80 non-student participants over the age of 18 years, using the open comprehension test procedures described in ANSI Z535.3, *American National Standard Criteria for Safety Symbols* (2011; R2017). ANSI Z535.3 is the primary U.S. voluntary standard for guiding the design, evaluation, and use of safety symbols to identify and warn against specific hazards, and to provide information to avoid personal injury. In addition, a sub-group of 40 participants took part in one of six focus group sessions, intended to contribute to a fuller understanding of the specific characteristics of the symbols that contribute to, or detract from, the symbols' effectiveness in communicating their respective intended messages.

The test results showed that only 2 of the 20 symbols passed the ANSI Z535.3 comprehension criteria of at least 85 percent correct comprehension, as measured against the contractor's strict (fully correct) criterion, and less than 5 percent critical confusions. The contractor scored a response as a critical confusion if the response indicated the participant understood the symbol in a manner that was opposite to its intended meaning, or if the participant's interpretation could otherwise actively lead to potentially hazardous behavior. Participant feedback indicated that some symbols that did not pass the ANSI Z535.3 comprehension criteria might pass with relatively minor changes. The contractor recommended changes to some symbols that might improve comprehension.

[1] This statement was prepared by the CPSC staff, and the attached report was produced by Kalsher & Associates, LLC, for CPSC staff. This statement and associated report have not been reviewed or approved by, and do not necessarily represent the views of, the Commission.

CPSC Gather Consumer Feedback: Final Report

Order Number: HHSP233201860070A

Fall 2019

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Executive Summary

The goal of this project was to evaluate a set of twenty graphical safety symbols for comprehension. Ten symbols were newly developed for the project. The other ten (existing) symbols are currently in active use. Comprehension was evaluated using the open comprehension test procedures described in ANSI Z535.3 (2011; R2017).

Participants were recruited via a snowball method, posters displayed at public venues, word of mouth, and postings on social media and Craigslist. The final study sample was comprised of 49 female and 31 male participants. The mean age of participants was 44.4 years (*S.D.* = 15.9), ranging in age from 18 to 84 years. The racial profile of the sample was as follows: 69% Caucasian (*n* = 55), 13% African American (*n* = 11), 9% Hispanic/Latino (*n* = 7), 5% Asian (*n* = 4), and 4% gave no response. Given the modest size of the study sample, this breakdown is largely consistent with the 2010 U.S. Census breakdown, which reported the population as 72.4% white, 16.3% Hispanic/Latino, 12.6% African American, and 4.8% Asian. Participant occupations varied widely, falling into seventeen of the Bureau of Labor Statistics' occupation categories. For the most common categories: 19% worked in food preparation or service, 11% were retired, 10% worked in management occupations, and 10% worked in educational instruction. Participant education also varied widely, ranging from some high school completed to doctoral or other professional degrees. Half of the participants (50%) reported having children, 46% reported not having children, and 4% gave no answer to this question.

To evaluate symbol comprehension, 80 participants completed test booklets containing the twenty graphical safety symbols. Four different symbol orderings (booklets) were employed to reduce the potential for carryover effects. Within the booklets, each symbol was sized according to how it might appear on a consumer product or its labeling. In several instances, symbols were presented at the smallest size specified in a consensus standard (e.g., ASTM). Each symbol was accompanied by contextual information (a brief statement and a photograph) intended to communicate the types of products on which the symbol might appear. For each symbol, participants were asked the following three open-ended questions: (1) "What do you think this symbol means?"; (2) "What should you do or not do in response to this symbol?"; and (3) "What could happen if you do not follow the symbol's message?". Additionally, 40 of these individuals participated in a focus group session following their completion of a test booklet. These sessions, six in total, served to facilitate participants' discussion of each symbol in greater detail to gain a better understanding of how people understood the symbols, the positive and negative attributes of each symbol, and specific recommendations for improving each symbol's ability to correctly communicate its intended message.

The test booklets were scored independently by two trained raters using a grading rubric developed by the contractor in cooperation with the CPSC Contracting Officer's Representative (COR). Raters used a binary scoring system (0 = incorrect; 1 = correct) to mark the three open-ended questions. Critical confusions were scored as a "1" if the responses indicated the participant understood the symbol in a manner that was opposite to its intended meaning or if their interpretation could otherwise actively lead to potentially hazardous behavior. Otherwise critical confusion was marked as a "0". After the initial scoring, members of the project team (raters and the contractor) met to review instances of low interrater agreement (lower than 75% agreement) to resolve discrepancies and improve

consistency. For critical confusions, the team reviewed and discussed every disagreement until 100% consensus was reached. Overall, final interrater agreement for each of the three questions for all twenty symbols exceeded 90%, ranging from 91% to 100%.

Additionally, the project team developed a rubric for assigning an overall comprehension score for each participant for each symbol. This score was intended to reflect whether, overall, a participant understood a symbol's intended meaning or not. The scores were assigned using both a lenient (i.e., partially correct) and a strict (i.e., fully correct) criterion. We then used this scoring to determine the number (and percentage) of participants who correctly understood each symbol according to both the strict and lenient criteria, along with the number (and percentage) of participants who did not understand each symbol.

Overall, results of the testing showed that only two of the twenty symbols passed the ANSI Z535.3 comprehension criteria of 85% (or more) correct comprehension, as measured against the strict (fully correct) criterion, with fewer than 5% critical confusions. A summary of the comprehension testing results in terms of the overall comprehension scores and percentage of critical confusions for each of the symbols is presented in Table 4. Participant feedback indicated that some of the symbols that failed to meet the strict criteria would likely pass with relatively minor modifications. However, several symbols clearly did not test well. A brief summary of the reasons for the poorest performers is presented below, with further details in the Results section:

Symbol 2. Methylene Chloride (or other toxic vapor) (an acute inhalation hazard) showed both low comprehension and a high percentage of critical confusions. Many participants thought the symbol was referring specifically to drinking a chemical product, rather than inhaling its vapors.

Symbol 5. Never add soft bedding or padding to (baby's) sleep environment (e.g., a crib) (a suffocation hazard) showed low comprehension and a high percentage of critical confusions. Many participants did not understand that the symbol was referring to a blanket or soft bedding at all.

Symbol 7. Install anti-tip restraint (on furniture prone to tip-over; can crush or kill, especially young children) also showed low comprehension and a high percentage of critical confusions. Some participants focused on the open drawers as the cause of the hazard and many did not notice or understand the depiction of the restraint.

Symbol 10. Outdoor grills (start with lid open to prevent explosion of built-up gas) showed low comprehension and a fairly high percentage of critical confusions. The consequence of the symbol (getting burned) was communicated effectively, but the specific hazard (open lid when starting grill) was not clear, especially for those who do not have experience grilling.

Symbol 18 — Supervision, Drowning (Keep Children Under Supervision; from ASTM F2666 and ASTM F2729) was generally disliked by focus group participants and it showed relatively low comprehension and a relatively high percentage of critical confusions. Some participants believed the symbol was referring to trespassing or to shallow water and many did not state the implied consequence of drowning.

Symbol 20: Intended for a Certain Age, Range, Weight (from the EN Report) showed low comprehension and a high percentage of critical confusions. Many participants thought the symbol was referring to the size of the child, as a height or weight, rather than their age.

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Background

The main purpose of this research was to assess how well a set of safety symbols/pictograms (hereafter graphical symbols) currently in use and a set of newly developed graphical symbols effectively communicate hazards posed by commonly available consumer products. This research followed the open comprehension testing procedures presented in ANSI Z535.3, the American National Standard Criteria for Safety Symbols. ANSI Z535 is the primary U.S. voluntary standard for guiding design of signs, colors, and symbols intended to identify and warn against specific hazards and for other accident prevention purposes. For symbols previously designed and/or validated in accordance with ISO rules of graphical symbols, this research can serve to verify the symbols' understandability in the United States. Staff from the U.S. The Consumer Product Safety Commission (CPSC) provided guidance and support for the project, as needed. The CPSC is authorized under section 5(a) of the CPSA, 15 U.S.C. 2054(a), to conduct research relating to the causes and prevention of injuries or deaths associated with consumer products.

The overall aim of this research is to develop a family of graphical symbols that can be used in multiple standards to communicate safety-related information to diverse audiences. Given the growing diversification of the U.S. population, in concert with the dramatic expansion in global trade, developing understandable graphical symbols is a critical goal. The graphical symbols that were developed and/or tested were selected in collaboration with CPSC staff and chosen based on injury data associated with products and equipment and the severity of the non-obvious hazards that threaten customers.

The contractor and CPSC COR (Timothy Smith) discussed many different graphical symbol options for study, but jointly decided on the final set of symbols presented in Table 1. CPSC staff's top priorities for the to-be-developed hazard symbols were furniture tip-over, methylene chloride, magnet ingestion, keep baby's face free from obstruction (suffocation hazard), never add soft bedding or padding to an infant's sleep environment, and place baby on back to sleep. The top priorities for testing existing symbols were laundry pods, the ASTM's black and white furniture tip-over symbol, strangulation hazard appearing in ANSI/WCMA A100.1, the keep away from children symbol in IEC 60417, two "requires supervision" (a drowning hazard) symbols, always use restraints, and an age warning from EN71-6-94.

The European Commission (2015)[1] had previously tested existing symbol variants for "Never leave your child unattended," "Always use the restraint system," and "A safety message indicating the range of age, weight or height of a child for which the product is intended," among other warning messages for childcare products. The existing symbols from the above messages that tested best in perception, comprehension, and referent association were used in the present research as Symbol 15, Symbol 16, and Symbol 20, respectively.

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[1] European Commission Consumers, Health, Agriculture and Food Executive Agency (2015). *Design and Validation (in accordance with ISO rules) of graphical symbols conveying certain safety warning messages to be used for child-care articles: Final report.*

During the initial phase of the project, the project team focused primarily on developing and refining the new graphical symbols. This was accomplished through a rapid prototyping approach, based upon the preliminary informal testing procedure outlined in ANSI Z535.3, Appendix B2.1.3, and summarized below:

> *B2.1.3 Preliminary Informal Testing. Preliminary comprehension testing may be useful in several ways. It can serve as a verification procedure to determine whether the intended users can specify both the hazard and the measures needed to avoid the hazard. Preliminary informal testing can also be a quick way to identify poor symbols that need to be discarded or modified.*

Table 1. Final set of graphical symbols.
Newly Developed Graphical Symbols
1. Furniture tip-over (can crush or kill, especially young children)
2. Methylene Chloride (or other toxic vapor) (an acute inhalation hazard)
3. Magnet ingestion hazard (swallowed small magnets, typically, but not exclusively ball-shaped, can attract to one another in the intestines, causing internal injuries, as opposed to a choking hazard)
4. Make sure (child's) restraint fits snugly
5. Never add soft bedding or padding to (baby's) sleep environment (e.g., a crib) (a suffocation hazard)
6. Place baby on back to sleep (a suffocation hazard)
7. Install anti-tip restraint (on furniture prone to tip-over; can crush or kill, especially young children)
8. Stay within arm's reach (of baby)
9. Stay within arm's reach (of baby)
10. Outdoor grills (start with lid open to prevent explosion of built-up gas)
Graphical Symbols Currently in Use
11. Laundry pods (Keep out of reach of children; from ASTM F3159 Standard Safety Specification for Liquid Laundry Packets)
12. Furniture Tip-over (from ASTM F2057017; B&W version)
13. Strangulation hazard (from ANSI/WCMA A100.1 Standard for Corded Window Covering Products)
14. Keep Away From Children (from IEC 60417)
15. Supervision Combination (from the European Normal [EN] Report)
16. Always Use Restraints (from the EN Report)
17. Age Warning Label (from EN71-6-94)
18. Supervision, Drowning (*Keep Children Under Supervision;* from ASTM F2666 and ASTM F2729)
19. Supervision, Drowning (*Keep Children Under Supervision;* from ISO 20712)
20. Intended for a Certain Age, Range, Weight (from the EN Report)

During the initial rapid prototyping phase of the project, individual volunteers and small groups of volunteers were asked to offer their perceptions regarding each symbol's intended meaning, action(s)

they believe they should take in response to seeing the symbol, and any suggestions for improvement. Each person rated a small number of graphical symbols. These individuals were apprised in advance that there were no direct benefits for their participation other than the knowledge they may contribute to the development of more effective safety symbols for the public good.

Formal testing followed a mixed method approach that included assessing comprehension of the graphical symbols with a group of 80 non-student participants over the age of 18 using the "Open Comprehension Testing" described in ANSI Z535.3 (Appendix B) and conducting focus group sessions with 40 of the participants. The focus group sessions were intended to contribute to a fuller understanding of the specific characteristics of the graphical symbols that contribute, or detract, from their effectiveness in communicating their respective intended messages. Formal testing procedures are described more fully in the sections that follow.

Method

Participants

Prospective participants were recruited for this research using a snowball method, posters displayed at public venues (e.g., a local library and YMCA), word of mouth, and through posting on social media and Craigslist. A screener survey with demographic information was used to aid in inviting as diverse a participation pool as possible. As an incentive, participants were offered $25 for completing a Cognitive Interview Booklet and $25 for completing the focus group. The method for each of these research components is described below. All of the study's procedures and materials were reviewed and approved by the Institutional Review Board at Rensselaer Polytechnic Institute.

A total of 82 participants participated in a cognitive interview session (described in greater detail below). The data from two participants was excluded from analyses after it was learned they were students. Two replacement participants were recruited in a subsequent test session, resulting in a final sample of 80 as specified in the contract. Of the 80 participants in the final sample, there were 31 males and 49 females. The mean age of participants was 44.42 years (*S.D.* = 15.94), ranging in age from 18 to 84 years.

A sub-group of 40 participants who had participated in a cognitive interview session took part in one of six focus group sessions that occurred immediately following test booklet sessions between July and September of 2019. The first focus group (*n* = 8) was conducted at the public library in Colonie, New York. The second focus group (*n* = 12) took place in Highwood, Montana. The third focus group (*n* = 3) took place at the public library in Lansingburgh, NY. The fourth focus group (*n* = 2) took place at the Troy public library. The fifth (*n* = 10) and sixth (*n* = 6) focus groups took place at the public library in Colonie, New York.

Participant race was 69% Caucasian (*n* = 55), 13% African American (*n* = 11), 9% Hispanic/Latino (*n* = 7), 5% Asian (n = 4), and 4% gave no response. Given the relatively modest size, the ethnic composition of the study sample is consistent with the 2010 U.S. Census[2] ethnicity breakdown, which

[2] U.S. Census Bureau, *2010 Redistricting Data (Public Law 94-171) Summary File*.

reported the population as 72.4% white, 16.3% Hispanic/Latino, 12.6% African American, and 4.8% Asian.

The open-ended responses for participant occupations were categorized according to the 2018 Standard Occupational Classification (SOC) system, a federal standard used to classify workers into 23 occupational groups for collecting and analyzing data. Additional categories were used in the present analyses for individuals who reported being retired, a homemaker, or unemployed. Participant occupations varied widely, falling into 17 of the Bureau of Labor Statistics' occupation categories (refer to Table 2). For the most common occupation categories: 18.8% worked in food preparation or service, 11.3% were retired, 10.0% worked in management occupations, and 10.0% worked in educational instruction.

Table 2. Reported participant occupations as Standard Occupational Classification (SOC) Categories.

Occupation	Percent	Frequency
Food Preparation and Serving Related Occupations	18.8%	*n* = 15
Retired	11.3%	*n* = 9
Education Instruction	10.0%	*n* = 8
Management Occupations	10.0%	*n* = 8
Building and Grounds Cleaning and Maintenance Occupations	7.5%	*n* = 6
Transportation and Material Moving Occupations	7.5%	*n* = 6
Office and Administrative Support Occupations	6.3%	*n* = 5
Sales and Related Occupations	5.0%	*n* = 4
Computer and Mathematical Occupations	3.8%	*n* = 3
Life, Physical, and Social Science Occupations	3.8%	*n* = 3
Personal Care and Service Occupations	3.8%	*n* = 3
Unemployed	3.8%	*n* = 3
Architecture and Engineering Occupations	2.5%	*n* = 2
Installation, Maintenance, and Repair Occupations	2.5%	*n* = 2
Business and Financial Operations Occupations	1.3%	*n* = 1
Construction and Extraction Occupations	1.3%	*n* = 1
Homemaker	1.3%	*n* = 1

Education also varied widely among participants, ranging from completing some high school to completion of doctoral or other professional degrees. Reported education is displayed in Table 3 below.

Table 3. Reported participant education level.

Occupation	Percent	Frequency
Some high school	3.0%	*n* = 2
High school	20.0%	*n* = 16
Some college	20.0%	*n* = 16
2-year college degree	13.8%	*n* = 11
4-year college degree	25.0%	*n* = 20
Master's degree	13.8%	*n* = 11
Doctoral degree	3.0%	*n* = 2
Other professional degree	3.0%	*n* = 2

Half of participants (50%) reported having children, 46% reported not having children and 4% gave no answer to this question. Overall, the demographic breakdowns reveal that the participant sample for the present research included a range of life experiences. The testing for effects of demographics on symbol comprehension is discussed in the Results section.

Comprehension Testing

Symbol comprehension was assessed in cognitive interview sessions in which small groups of participants (ranging in group size from 2 to 12) completed a Cognitive Interview Booklet (test booklet; see Appendix A). The test booklets were organized and administered according to the open comprehension procedures outlined in ANSI Z535.3 (2011; R2017).

The first page of the test booklet (the title page) provided space for participants to print their name and date of the session. It also included two numbers at the bottom of the page. The first of these was a 7-digit number used to identify the order in which the symbols were presented out of the four different orderings. The only relevant number was in the sixth position (1, 2, 3, or 4), which identified the symbol order. The other eight-digit number identified the project (3041-0136) as specified in the project contract. As noted previously, the four different test booklets (symbol orderings) were created to reduce the likelihood of carryover effects (see Appendix B).

The second page contained a sample (non-tested) symbol that served as a vehicle for instructing participants as to what constituted "good" versus "inadequate" answers (described more fully below). The next twenty pages of the test booklets contained the twenty to-be-tested graphical symbols, each accompanied by contextual information (a brief statement and a photograph) intended to communicate the types of products on which the symbol might appear. Each symbol was sized on the page in accordance with how it would be expected to appear on actual product packaging/labeling. Some symbols were presented at the smallest allowable size specified in a consensus standard (e.g., ASTM). Finally, the last page of the test booklet requested the following demographic information: age, biological sex, highest level of education attained, marital status, whether they had children, race, and current occupation.

After reading and signing an informed consent form, participants received a test booklet along with a detailed set of oral instructions from a member of the research team. The instructions included a review of a sample graphical safety symbol not being tested presented on page two of the booklets (i.e., a hand being crushed by gears). The sample symbol was accompanied by examples of both "good" and "inadequate" answers to the three open-ended questions below, as specified in ANSI Z535.3 (2011; R2017). The purpose of this part of the instruction was to establish a shared mental model among the respondents regarding what constituted a complete answer.

The next twenty pages of the booklet contained the (20) test symbols, their respective supporting contextual information, and space to answer the following three questions: (1) "What do you think this symbol means?"; (2) "What should you do or not do in response to this symbol?"; and (3) "What could happen if you do not follow the symbol's message?" After completing the test booklets, participants were given the $25 cash incentive and thanked for their participation. Participants typically completed the test booklets in about one hour.

Focus Groups

Forty of the 80 participants who completed a test booklet also participated in one of the six focus group sessions. As noted previously, the focus groups were held in the period between July and September 2019 (see Appendix C for more detail). After participants had completed the test booklets and read and signed an informed consent form for the focus group, a member of the research team guided and moderated group discussion of the symbols to gain a better understanding of how the participants understood each symbol, the positive and negative attributes of each one, and specific recommendations for improving each symbol's ability to correctly communicate its intended message. On average, the focus group discussions lasted about an hour in duration. Audio was recorded and transcribed for each of the six focus group sessions.

Participants' suggestions from the focus group discussions for improving each of the twenty symbols are reported in the Results section. Although none of the participants had specific expertise in the areas of warnings and risk communication, their suggestions provided valuable insight into how they understood the symbols.

Cognitive Interview Scoring Procedure

Open ended responses and critical confusions. Two raters scored the test booklets, independently, for each of the three open-ended comprehension questions and identified critical confusions based on these responses. For the three open-ended questions, raters used a binary scoring system in which correct responses were marked as "1" and incorrect responses as "0" according to a scoring rubric developed by the contractor in cooperation with CPSC staff (refer to Appendix D). Critical confusions were scored as a "1" if the open-ended responses to the three questions overall indicated the participant understood the symbol in a manner that was opposite its intended meaning or if their interpretation could otherwise lead to potentially hazardous behavior. Otherwise, critical confusion was marked as a "0."

After the initial scoring, the contractor and the raters met in person to review instances of low inter-rater agreement and discuss discrepancies to improve consistency. For critical confusions, the team reviewed and discussed every scoring discrepancy until 100% consensus was reached. After this process, the final interrater agreement for each of the three open-ended comprehension questions for all twenty symbols exceeded 90%, ranging from 91% to 100%.

Overall correct interpretations (pass score). Next, the project team developed a rubric for assigning an overall correct interpretation score (passing score) for each participant's responses to each symbol. This overall comprehension score was derived using both a lenient (i.e., partially correct) and a strict (i.e., fully correct) criterion. Thus, for each symbol, participants' answers were scored as either fully correct, partially correct, or incorrect. This distinction enabled us to tabulate the frequency (and percentage) of participants who correctly understood each symbol according to both the strict and lenient criteria, as well as the frequency (and percentage) of participants who did not.

The criteria for a partially correct or fully correct response were developed individually for each symbol. An overall correct score did not necessarily correspond to the correctness of the individual

open-ended questions, which were scored strictly based on the rubric, but critical confusions were automatically scored as overall incorrect. The specific criteria used to ascribe an incorrect, partially correct, or fully correct score are presented in the Results section for each symbol, respectively.

Results

Responses from the test booklets were scored for correctness for each of the three open-ended response elements (described previously) based on a scoring rubric, critical confusions based on the responses, and overall correct interpretation (pass score) according to both a "strict" (i.e., fully correct) and "lenient" (i.e., at least partially correct) criterion. Content analysis of the focus group transcripts provided additional detailed information regarding why participants responded the way they did.

Testing for Carryover Effects

As noted previously, four different symbol orderings were employed (i.e., Test Booklets 1, 2, 3, 4) to counteract the potential for carryover effects. The orderings were arranged such that symbols intended to communicate the same or similar message (e.g., there were three symbols related to furniture tip-over; there were two symbols intended to communicate "stay within arms' reach of baby) were separated from each other by at least three non-similar symbols.

A series of one-way ANOVAs (Analyses of Variance) were performed for each of the twenty symbols. Symbol ordering (tracked using the four different booklet numbers) was the between-subjects independent variable and overall pass score was the dependent variable. There was a significant effect of symbol ordering only for Symbol 17 (intended to communicate an age restriction), $F(3,76) = 3.35$, $p < 05$. Post-hoc comparisons using the Sidak procedure (to provide some protection against Type I error) revealed a significant difference in comprehension pass score between test booklet 1 ($M = 1.24$, $S.D. = 0.94$) and test booklet 2 ($M = 1.89$, $S.D. = 0.46$) ($p < .05$). All other pairwise comparisons were non-significant (p's > .05). The ANOVAs performed on the other nineteen symbols were all non-significant (p's > .05).

Overall, the disproportionately large number of non-significant results indicates that carryover effects were not a significant contributing factor to participants' comprehension of the test symbols.

Testing for Demographic Effects

Additional analyses were performed to examine whether demographic variables, including age, biological sex, whether participants had children, education, and race, were significantly related to comprehension. Overall, there were relatively few instances in which the demographic characteristics played a differential role in comprehension for the twenty graphical symbols.

Age. Participants' age was significantly correlated to overall pass score for only two of the symbols; Symbol 3 (magnetic ingestion hazard), $r = -.35$, $p < .05$, and Symbol 12 (ASTM furniture tip-over hazard), $r = -.25$, $p < .05$. These results indicate that overall pass score, at least for these two symbols, was inversely related to age.

Sex. A series of independent-samples t-tests, in which biological sex was the grouping variable and overall pass score was the dependent variable, were all non-significant (*p*'s >. 05), indicating that men and women did not differ in terms of their overall comprehension of the twenty graphical symbols.

Parenthood. A series of independent-samples t-tests, in which whether participants had children (yes or no) was the grouping variable and overall comprehension pass score was the dependent variable, revealed significant relationships for two symbols.

The t-test for Symbol 3 (magnet ingestion hazard) showed a significant difference, $t(72.47) = 2.77$, $p < .05$, such that participants who reported having no children ($M = 1.70$; *S.D.* = 0.62) had significantly higher overall pass scores than participants who reported having children ($M = 1.25$, *S.D.* = 0.81).

The t-test for Symbol 19 (supervision drowning from ISO 20712) was also significant, $t(52.05) = 2.92$, $p < .05$. Once again, participants who reported having no children ($M = 1.89$, *S.D.* = 0.32) had significantly higher overall pass scores than participants who reported having children ($M = 1.50$, *S.D.* = 0.78).

Education. The relationship of level of education to overall pass score was also assessed. Because of the small sample sizes in some of the original nine categories (i.e., some high school, high school degree, some college, 2-year college degree, 4-year college degree, master's degree, doctoral, other professional degree, other degree), for the purposes of this analysis we collapsed these into the following three categories: (1) some high school/high school/some college; (2) 2-year/4-year college degree; and (3) advanced degree. One-way ANOVAs were then performed on each of the twenty symbols. Level of education was the between-subjects independent variable and overall comprehension pass score was the dependent variable. There was a significant relationship for only three of the symbols.

For education, the ANOVA for Symbol 1 (newly developed tip-over hazard) was significant $F(2,77) = 3.22$, $p < .05$. Post-hoc comparisons showed a difference only between the least ($M = 1.06$, *S.D.* = 0.78) and most well-educated ($M = 1.60$, *S.D.* = 0.63) categories ($p < .05$). No other comparisons were significant, *p*'s > .05).

Similarly, the ANOVA for Symbol 7 (Install restraint to avoid tip-over hazard) was significant, $F(2,77) = 3.28$, $p <$. 05. Post-hoc comparisons showed a marginally significant difference between the least well-educated category ($M = 0.88$, *S.D.* = 0.98) and participants with a 2-year or 4-year degree ($M =$ 1.42, *S.D.* = 0.85), $p = .06$. No other comparisons were significant (*p*'s > .05).

The ANOVA for Symbol 8 (stay within arm's reach of baby) was significant, $F(2,77) = 4.97$, $p <.05$. Post-hoc comparisons showed a significant difference between the least well-educated category ($M =$ 1.32, *S.D.* = 0.77) and the other two categories. Specifically, the groups with either a 2-year or 4-year degree ($M = 1.74$, *S.D.* = 0.58) or an advanced degree ($M = 1.87$, *S.D.* = 0.52). The difference between the latter two categories was not significant, $p > .05$.

Marital status. A similar process was used to reduce the marital status categories from four (single, married, legally separated, divorced) to three categories: (1) single; (2) married; (3) divorced or separated. There were no significant differences found for this variable, all *p*'s > .05.

Race. Finally, we examined whether race was significantly related to overall comprehension pass score. Although the demographic section of the test booklets offered eight racial options (Asian, Black/African, Caucasian, Hispanic/Latino, Native American, Pacific Islander, Mixed Race, Prefer not to answer), all of the 80 study participants fit into five categories: Asian, Black/African, Caucasian, Hispanic/Latino and Prefer not to answer. One-way ANOVAs were then performed on each of the twenty symbols where racial category was the independent variable and overall comprehension pass score was the dependent variable. There was a significant relationship for four of the symbols.

The ANOVA for Symbol 5 (Soft bedding suffocation hazard) was significant, $F(2,77) = 3.26$, $p < .05$. Post-hoc comparisons showed a marginally significant difference between African American ($M = 0.64$, *S.D.* = 0.92) and Caucasian ($M = 1.45$, *S.D.* = 0.84) participants, $p = .06$.

The ANOVA for Symbol 10 (Gas grill burn hazard) was significant, $F(4,75) = 5.18$, $p <. 05$. Post-hoc comparisons showed significant differences between Asian ($M = 0.0$, *S.D.* = 0.0) and Caucasian participants ($M = 1.44$, *S.D.* = 0.83) and between Caucasian and African American participants ($M = 0.64$, *S.D.* = 0.81). No other comparisons were significant, *p*'s > .05.

The ANOVA for Symbol 17 (Age restriction EN71-6-94) was significant, $F(4,75) = 4.42$, $p < .05$. Post-hoc comparisons showed a significant difference only between Hispanic-Latino ($M = 0.86$, *S.D.* = 1.07) and Caucasian participants ($M = 1.82$, *S.D.* = 0.55). No other comparisons were significant, *p*'s > .05.

The ANOVA for Symbol 20 (Intended for a Certain Age, Range, Weight from the EN Report) was significant, $F(4,75) = 3.0$, $p <. 05$. Post-hoc comparisons showed a significant difference between African American ($M = 0.55$, *S.D.* = 0.93) and Caucasian ($M = 1.45$, *S.D.* = 0.79) participants. No other comparisons were significant, *p*'s > .05.

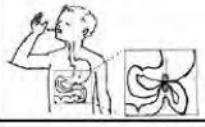
Comprehension Testing Overview

As noted previously, the project team developed a rubric for assigning an overall correct interpretation score for each participant's responses to each symbol. This score was derived using both a lenient (i.e., partially correct) and a strict (i.e., fully correct) criterion. So for each symbol, participants' answers were scored as either fully correct, partially correct, or incorrect. This distinction enabled us to tabulate the frequency (and percentage) of participants who correctly understood each symbol according to both the strict and lenient criteria, as well as the frequency (and percentage) of participants who did not. We also determined the percentage of incorrect responses that constituted critical confusions. These percentages are displayed in Table 4 below.

The criteria for "passing," as defined by ANSI Z535.3 (2016) is at least 85% correct interpretations, with fewer than 5% critical confusions. We used the strict criteria to determine the passing score. More detailed information concerning analyses of the test booklets and focus groups is provided separately for each symbol in the sections that follow.

There were several instances in which respondents failed to write a response to specific questions or wrote "I don't know." Both were treated as incorrect responses, but not as critical confusions. Similarly, there were instances in which the writing was unintelligible, and these were also scored as incorrect. Finally, responses that stated something similar to "follow instructions, "read the manual," or "follow this symbol" were also marked as incorrect, but not as critical confusions.

Table 4. Overall comprehension testing results organized by correct responses according to both the strict (fully correct) and lenient (at least partially correct) criteria *(% Correct)* and critical confusions *(% Critical C's)* as a percentage of total responses for each of the twenty graphical symbols.

Symbol	1 	2 	3 	4 	5 
% Correct					
Strict	56.3	70.0	62.5	88.8	56.3
Lenient	80.0	72.5	85.0	92.5	66.3
% Critical Cs	2.5	21.3	1.3	1.3	23.8
Symbol	6 	7 	8 	9 	10 
% Correct					
Strict	87.5	55.0	70.0	72.5	56.3
Lenient	93.8	63.8	88.8	91.3	68.8
% Critical Cs	1.3	6.3	0.0	0.0	5.0
Symbol	11 	12 	13 	14 	15 
% Correct					
Strict	80.0	63.8	78.8	77.5	55.0
Lenient	93.8	87.5	93.8	80.0	90.0
% Critical Cs	0.0	0.0	1.3	0.0	2.5
Symbol	16 	17 	18 	19 	20 
% Correct					
Strict	72.5	81.3	68.8	78.8	58.8
Lenient	93.8	83.8	83.8	91.3	72.5
% Critical Cs	1.3	6.3	5.0	3.8	18.8

Symbol 1: Furniture Tip-Over

Cognitive Interview Booklet Elements

Table 5a. Percentage and frequency of correct responses to each element according to the grading rubric.		
	**Percent Correct** (# correct)	**Grading Rubric**
What do you think this symbol means?	68.0% (55)	If a child climbs on this piece of furniture, the furniture may tip over.
What should you do or not do in response to this symbol?	62.5% (50)	Do not allow children to climb on the furniture.
What could happen if you do not follow the symbol's message?	80.0% (64)	The furniture could fall/tip over onto the child.

Overall Comprehension

Table 5b. Count and percent of correct and incorrect responses for Symbol 1.		
	Count (n)	**Percent**
Overall Correct	64	80.0%
Strict Criteria	45	56.3%
Lenient Criteria	64	80.0%
Overall Incorrect	16	20.0%
Critical Confusions	2	
As a % of incorrect responses		12.5%
As a % of total responses		2.5%
Total	80	100%

Fully correct response:
- Must mention a child/person climbing dresser (or climbing/standing on dresser drawers) and the furniture tipping/falling

Partially correct response (only mentions one or more of the following):
- Furniture tipping/falling because of open drawers
- Action is to supervise children (i.e., not actively preventing them from climbing)

Table 5c. Critical Confusion Statements and frequency of occurrence for Symbol 1.	
Critical Confusion Statement	**Frequency**
The furniture is unstable; the weight needs to be redistributed	$n = 1$
The furniture is too tall to see over	$n = 1$

For Symbol 1, two responses were marked as critical confusions because these incorrect interpretations could result in people, and in particular young children, climbing on the furniture and potentially getting injured. Other incorrect responses that suggested "keeping furniture away from children," or similar interpretations, still conveyed that the respondent fundamentally would not be putting themselves or others in danger from their misunderstanding.

Focus Groups. Overall, participants expressed a number of concerns with this symbol, as illustrated by the sample "general" quotes below. Participants tended to correctly understand that the image depicts a dresser that is falling and that a person or child is climbing it. However, they were less clear about what to do in response to this symbol. This outcome may have been due, at least in part, to the fact they saw three symbols (Symbols 1, 7, and 12) that involved falling furniture.

"That one was the one that was the most confusing to me, like is it you gotta, like, keep your drawers like shut? Or do you just need to make sure it's secure against the wall? But I mean it I figured both of those things, but I don't know." — Participant in Group 5

"The first one I saw was this one I think — you either secure the dresser or provide supervision. But then when I saw the one with secured dresser where it had the bracket holding it up. I'm thinking, are you supposed to not secure them either? Maybe that's not smart, maybe you should just be watching your children, I mean, I don't know. Obviously, the problem is you don't want a child to be crushed by it, but I'm not quite sure what they were recommending." — Participant in Group 5

Some groups (1 and 6) took the symbol to mean that one should use caution when moving "top-heavy" furniture. Others interpreted the symbol as a caution to lock or secure drawers, explaining that the symbol looks like it is communicating that one should not leave drawers open. Group 1 also talked about how the lines of movement depicted in this symbol were misconstrued as broken restraint straps.

Table 5d. Focus group suggestions for Symbol 1.

Suggestion	From	Quotes
Use the prohibition symbol with this symbol	Groups 1, 4, & 5	"Probably put one of those red signs on it. To like make people know that this situation is serious – it could possibly break the kid's leg or whatever if it fell on top of them… depending on how small they is." — *Participant in Group 4* "I think the other one that had the circle with a slash through it, I thought that was better. " — *Participant in Group 5*
Use an arrow to convey the motion of falling	Group 1	**Mod: So, you're saying you don't need those two [motion] lines behind [the dresser]?** "No, I would put a red arrow. Red is definitely going to stand out and you also have with some other things that pointing out something that's negative. Red will stand out further." — *Discussion in Group 1*
Depict the person as more clearly a child in danger	Group 6	"It looks like he's having a blast." "It's possibly not a child." "He's like, 'woo hoo!'" "How do you know it's a child?" — *Discussion in Group 6*

Symbol 1 Summary

This symbol overall does not pass comprehension criteria. There were only two critical confusions, but correct interpretations did not exceed 85% by either strict (56.3%) and lenient (80%) criteria. The "movement" lines in this symbol were sometimes misconstrued as showing a broken restraint.

Comprehension of this symbol would likely be greatly improved by adding a prohibition symbol and clarifying how installation of an anti-tip restraint can further safeguard against tip-over, essentially combining the three similar furniture tip-over symbols that were tested. Proposed design changes to the furniture tipping symbols will be discussed in more detail in the overall Discussion section.

Symbol 2: Methylene Chloride

Cognitive Interview Booklet Elements

Table 6a. Percentage and frequency of correct responses to each element according to the grading rubric.		
	**Percent Correct** (# correct)	**Grading Rubric**
What do you think this symbol means?	70.0% (56)	If the fumes from this chemical are inhaled, it may result in unconsciousness, serious injury, or death.
What should you do or not do in response to this symbol?	70.0% (56)	Do not inhale fumes.
What could happen if you do not follow the symbol's message?	95.0% (76)	Loss of consciousness, serious injury, death

Overall Comprehension

Table 6b. Count and percent of correct and incorrect responses for Symbol 2.		
	Count (n)	**Percent**
Overall Correct	58	72.5%
Strict Criteria	56	70.0%
Lenient Criteria	58	72.5%
Overall Incorrect	22	27.5%
Critical Confusions	17	
As a % of incorrect responses		77.3%
As a % of total responses		21.3%
Total	80	100%

Fully correct response:
- Must mention avoiding breathing/inhaling a chemical that could cause loss of consciousness or death

Partially correct response (only mentions one or more of the following):
- You could get hurt (i.e., without mentioning how)
- Do not smell

Table 6c. Critical Confusion Statements and frequency of occurrence for Symbol 2.	
Critical Confusion Statement	**Frequency**
Refers to drinking, ingesting, or overdosing	*n* = 17

For Symbol 2, responses marked as critical confusions were all related to misinterpreting the symbol as communicating the dangers of ingesting (swallowing) a chemical rather than inhaling it. These were identified as critical confusions because following this misinterpretation could result in avoiding drinking the chemical while still inhaling its emitted vapors.

Focus Groups. As observed in the booklet response data, many participants said that they thought the symbol meant "no drinking," without noticing or understanding the vapors constitute an inhalation hazard. Some participants stated that they thought the vapor did not look like vapor, so they did not understand that the symbol was communicating the dangers of inhalation. Group 1 talked about how they understood the meaning of the symbol specifically as "use in a ventilated area."

The focus groups indicated that they liked the multiple panels with the second panel showing the consequence of the person impacted by the hazard. The person in the second panel was clearly perceived to be seriously injured: Group 1 and Group 2 disagreed among themselves about whether the person was sick or dead. Some participants did not notice the Xs on the eyes.

Group 5 and Group 6 indicated that they liked the multiple panels and the skull and crossbones. However, a participant in Group 6 also said they did not see or notice the skull and crossbones.

Table 6d. Focus group suggestions for Symbol 2.

Suggestion	From	Quotes
Clearer depiction of vapor	Groups 1, 2, 3, 4, & 6	"What was confusing about me for the picture were the dots. I feel like you wouldn't see dots, and I feel like the fumes would be more wavy lines. […] And then there is also no direction. Like I feel like arrows or what direction of the fumes." — *Participant in Group 2* "If the lines were drawn as more of a cloud, I think the symbol would better represent fumes." — *Participant in Group 3* "When I looked at it, I thought it was vapor because you had the little dots going into what are lungs, but then I thought it was liquid because you had lines including lines that go sort of, not sort of through the mouth to the stomach, but horizontally into the stomach." — *Participant in Group 6* "I think that's what's confusing is the lines — maybe like little puffs of cloud [would be better]." — *Participant in Group 6*
Make lungs or nose more prominent	Groups 1, 3, 4, 5, & 6	**Mod: How do you think we could portray vapor then?** "A nose." **Mod: A nose?** "Yeah, a nose and then the lines going up the nose." "I mean it's going into its neck." — *Discussion in Group 1* "I don't even see a nose. Make the nose more pronounced. Show the fumes going into the nose rather than the mouth." — *Participant in Group 3* **Mod: So, you would want more of a close-up of the nose?** "Yes. Yeah with the little lines up, like the smoke and everything. With a hazardous symbol." **Mod: Do you think that with that would, in your mind, still need to have the second picture? Or would just have that image of the nose with the product?** "I would want the second picture too." **Mod: Okay, so you would just change the first picture?** "Yeah, I would take all the designs out of it. At first, I didn't know what it was. I thought it was a plan or water." **Mod: So, the lines and the dots aren't clear…?**

		"Well, they kind of made it clearer to me that the chemicals are strong smelling. That the aroma, as soon as you untop it, the aroma can go into your lungs." "Well it kind of made it awkward with the lines. I thought he was smoking it." **Mod: So, would you also want to make the lungs more prominent too?** "Yeah, so that at least they could see that it's for the lungs, not the stomach." — *Discussion in Group 4* "Maybe like a pair of lungs. I've seen the pair of lungs over the shoulder [as a separate image] sometimes. They're lung-shaped in retrospect, but I feel kind of silly now, but yeah." — *Participant in Group 5* "Now I'm realizing those are lungs. That's not a stomach." — *Participant in Group 6*
Information about what to do in response to vapor	Groups 3 & 5	**"**Maybe instead of the current second panel you could have the person wearing a ventilation mask. Kind of to drive the point home that the fumes are toxic." — *Participant in Group 3* "It wasn't clear what to do about it. Like, I said [in the booklet] something about ventilating." — *Participant in Group 5* "It doesn't really tell you what to do. Not inhale it, but how much time do you inhale it, do you limit the size of the room, do you ventilate the room? Would a mask help? It doesn't really tell you what to do to prevent breathing it in. Or just don't use those chemicals, I guess." — *Participant in Group 5*
Use color	Group 1	"What about color? It's so plain black and white. What about the green and the yellow, would help in this situation opposed to show a hazard as red." "Make the gas green." [Multiple people agreeing.] "Red eyes, crosses. Make the eyes red so they stand out." — *Discussion in Group 1*

Symbol 2 Summary

Symbol 2 did not pass comprehension criteria. Strict (70%) and lenient (72.5%) scorings of interpretations were below 85%. There were many critical confusions (n = 17) that were all similarly misinterpreting the symbol's meaning as a warning against the hazards of ingesting/swallowing chemicals by mouth rather than inhaling vapors. This symbol's comprehension would likely improve with design changes to clarify the presence of dangerous vapors and to clarify the action of inhaling.

Symbol 3: Magnet Ingestion Hazard

Cognitive Interview Booklet Elements

Table 7a. Percentage and frequency of correct responses to each element according to the grading rubric.		
	**Percent Correct** (# correct)	**Grading Rubric**
What do you think this symbol means?	87.5% (70)	Ingesting magnets can cause them to attract within the digestive system and compress those tissues.
What should you do or not do in response to this symbol?	77.5% (62)	Do not swallow the magnets.
What could happen if you do not follow the symbol's message?	82.5% (66)	Serious injury (predominantly in the digestive track/intestines)

Overall Comprehension

Table 7b. Count and percent of correct and incorrect responses for Symbol 3.		
	Count (n)	**Percent**
Overall Correct	68	85.0%
Strict Criteria	50	62.5%
Lenient Criteria	68	85.0%
Overall Incorrect	12	15.0%
Critical Confusions	1	
As a % of incorrect responses		8.3%
As a % of total responses		1.3%
Total	80	100%

Fully correct response:
- Must mention how swallowing magnets can result in them attracting inside the body and causing injury

Partially correct response (only mentions one or more of the following):
- Swallowing or choking but not the magnet hazard

Table 7c. Critical Confusion Statements and frequency of occurrence for Symbol 3.	
Critical Confusion Statement	**Frequency**
Do ingest the magnets	$n = 1$

There was one critical confusion for Symbol 3, in which a respondent stated that it appeared as if the image was telling you to ingest magnets, which is opposite the intended meaning.

Focus Groups. Overall, the focus group participants agreed that this was a clear symbol. Nearly everyone understood that the symbol indicated that one should not eat magnets. However, the specifics of the injury regarding the magnets attracting one another in the intestines was less clear. Group 1

discussed how it seemed that the symbol communicated that eating one magnet would be safe, but two would be dangerous.

Table 7d. Focus group suggestions for Symbol 3.		
Suggestion	**From**	**Quotes**
Change how the person is shown eating the magnets	Groups 2, 3, & 4	"If you just look at his hand and his mouth, it looks like it could be candy." – *Participant in Group 2* "I did not realize they were magnets. No, I just thought it was any small object." — *Participant in Group 2* "Maybe make the kid younger even?" "Yeah, I would agree. The symbol looked like an adult to me." — *Discussion in Group 3* "At first, I thought he was smoking a cigarette. […] I guess I would make it clearer to make sure to limit the chances of swallowing. They should make sure that the directions are clear in that aspect." — *Participant in Group 4*
Use the prohibition symbol	Groups 1, 2, & 4	"Yeah but it doesn't have a line through it, it looks like it's okay to eat it." — *Participant in Group 1* "Put a big 'X' over the picture." — *Participant in Group 4*
Make adjustments to the look of the intestines	Groups 2 & 6	"When I first saw it like without looking at the close-up picture, I thought it was going to be a choking hazard." — *Participant in Group 2* "I like the top one better. […] I like the panel above [in symbol 2] better where it's full size on both. […] If someone's not familiar with, um, you know, the workings of the stomach, they might not know what that is." — *Participant in Group 6*
Use the horseshoe magnet symbol more than once	Group 2	"I was going to say use the universal symbol of the magnet, which is the horseshoe, add that with the magnets." "Yeah." "Yeah, I didn't know they were magnets." "Yeah, I didn't realize there were horseshoe symbols in there…" "Because they're so small in there." "I thought they were just red spheres with a little white thing in there." "I'd put the horseshoes with these magnets." — *Discussion in Group 2*

Symbol 3 Summary

This symbol did not pass comprehension criteria (85% correct comprehension) when responses were scored according to the strict, fully correct criteria (62.5%). Fully correct scores required that respondents indicate the specific hazard of magnets attracting within the digestive system when swallowed. This symbol's comprehension could likely be improved by adding a prohibition sign to the act of swallowing the magnets and further visually emphasizing the magnets attracting one another inside the digestive tract.

Symbol 4: Make Sure Restraint Fits Snugly

Cognitive Interview Booklet Elements

Table 8a. Percentage and frequency of correct responses to each element according to the grading rubric.		
	**Percent Correct** (# correct)	**Grading Rubric**
What do you think this symbol means?	88.8% (71)	When using this child restraint device, the straps should be tight and secure, not loose.
What should you do or not do in response to this symbol?	91.3% (73)	Tighten the straps.
What could happen if you do not follow the symbol's message?	93.8% (75)	Child may be injured (Implied but not essential).

Overall Comprehension

Table 8b. Count and percent of correct and incorrect responses for Symbol 4.		
	Count (n)	**Percent**
Overall Correct	74	92.5%
Strict Criteria	71	88.8%
Lenient Criteria	74	92.5%
Overall Incorrect	6	7.5%
Critical Confusions	1	
As a % of incorrect responses		16.7%
As a % of total responses		1.3%
Total	80	100%

Fully correct response:

- Must mention tightening straps so child does not fall

Partially correct response (only mentions one or more of the following):

- Buckle child

Table 8c. Critical Confusion Statements and frequency of occurrence for Symbol 4.	
Critical Confusion Statement	**Frequency**
Do not leave child unattended	$n = 1$

For Symbol 4, one response was identified as a critical confusion that indicated not to leave a child unattended. The respondent made no mention of securing the child or tightening the straps. A person who followed this misinterpretation could still neglect to safely buckle their child while attending to them.

Focus Groups. Participants understood and liked this image overall. They said that they generally understood that adult hands were tightening the safety belt to secure the child. A few participants gave small suggestions about improving the image.

Table 8d. Focus group suggestions for Symbol 4.		
Suggestion	**From**	**Quotes**
Make the direction of the seatbelt clear	Group 2	"Well, there is one thing I think in the correct version maybe it could be a little bit better. How the black belt has a point to it, but it could almost look like an arrow if you just add a little bit, that way you could tell what direction it was going." —*Participant in Group 2*
Give the child clothing	Group 4	**Mod: Did you like the design of the baby?** "No. The baby needs a shirt on or something. Why's the baby naked?" — *Discussion in Group 4*
Adjust the look of the hands	Group 6	**Mod: Anything else that would make this better? Or a different way of showing this?** "The extra hands I think throws people off. " **Mod: Extra hands is weird, okay.** "Yeah, it's kinda weird." "It does look like there's two people. Or someone is very bendy." "They're both right hands." — *Discussion in Group 6*

Symbol 4 Summary

Symbol 4 performed well for comprehension. This symbol passed comprehension criteria with just one critical confusion and more than 85% correct comprehension by both strict (88.8%) and lenient (92.5%) scoring criteria. Participants' suggestions for improvements to Symbol 4 were minor and cosmetic.

Symbol 5: Never Add Soft Bedding

Cognitive Interview Booklet Elements

Table 9a. Percentage and frequency of correct responses to each element according to the grading rubric.		
	**Percent Correct** (# correct)	**Grading Rubric**
What do you think this symbol means?	63.8% (51)	Do not put soft materials, such as blankets or pillows, in a baby's sleep environment. They may suffocate the baby.
What should you do or not do in response to this symbol?	62.5% (50)	Do not put blankets, pillows or other soft materials into a baby's sleep environment.
What could happen if you do not follow the symbol's message?	76.3% (61)	Child may suffocate and die.

Overall Comprehension

Table 9b. Count and percent of correct and incorrect responses for Symbol 5.		
	Count (n)	**Percent**
Overall Correct	53	66.3%
Strict Criteria	45	56.3%
Lenient Criteria	53	66.3%
Overall Incorrect	27	33.8%
Critical Confusions	19	
As a % of incorrect responses		70.4%
As a % of total responses		23.8%
Total	80	100%

Fully correct response:
- Must mention that blankets or pillows could cause the baby to suffocate

Partially correct response (only mentions one or more of the following):
- The baby/child could die (without the specific cause)

Table 9c. Critical Confusion Statements and frequency of occurrence for Symbol 5.	
Critical Confusion Statement	**Frequency**
Don't let child sleep on stomach/face down	*n* = 7
Do not remove items from bed	*n* = 4
Don't place loose clothing or blanket on railing	*n* = 2
Don't let blanket cover face	*n* = 2
Keep baby away from rails	*n* = 1
Child can climb on objects in bed and fall out	*n* = 1
Lower bars before lifting child from crib	*n* = 1

Don't use a broken crib	*n* = 1
Don't put crib near curtain	*n* = 1
Baby will fall	*n* = 1
Don't let child sleep on back	*n* = 1

There were several critical confusions for Symbol 5 that stemmed from different misinterpretations. All of these misinterpretations could indirectly lead to behaviors that could put a child at risk of injury. Respondents who misunderstand the symbol in these ways may still put loose blankets, or similar materials, in the baby's sleeping area and potentially cause the baby to suffocate.

Focus Groups. This symbol was unclear to many participants. The connection between the first and second image was not clear — the blanket in the first image was not always clearly understood to be related to the baby in the second image. Two groups (2 and 6) also discussed how some participants thought that the arms depicted in the first image were depicting a child's legs climbing in the crib. Some positive feedback was that the color of the child's face tended to convey that the child had suffocated and that this consequence was clearer than the actual hazard.

Table 9d. Focus group suggestions for Symbol 5.

Suggestion	From	Quotes
Show a correct and incorrect comparison with a baby with a blanket and no blanket	Groups 1, 3, & 5	"What if you have an empty crib with a green check mark and a cluttered crib with a red "X"? Similar to the last one, I guess. And a happy baby and a sad baby." "Yeah." "Because I was confused what was coming out of there." "Or right over here a picture of a pillow or a blanket with that same thing next to it. Because I couldn't figure out what was in there. It looks like she was in there fixing it. Like don't do it like that, don't pile it in the corner. So if it was outside the crib, with the pillow and the blanket and then move the prohibition symbol over it so you know…" "No pillow, no blanket." — *Discussion in Group 1* "I understood that that is a blanket. It just seemed like an odd picture. You wouldn't just put a blob of a blanket in the corner. You would put a blanket on a baby if it was old enough." — *Participant in Group 3* "I would do the correct and incorrect, [it] would be clearer. Show the baby without a blanket." — *Participant in Group 5*
Make the blanket clearer	Groups 3 & 6	"Maybe if the baby were actually in the crib and the mom was putting the blanket with the baby because that just seems weird that you would put a blob of a blanket in the corner." — *Participant in Group 3* "The blanket is on the forehead. It's not over the mouth." — *Participant in Group 6*
Make the position of the arms more natural	Groups 1 & 4	"Well the artist could do better with the arms because it looks like there are two people with right arms going in the crib with two elbows." — *Participant in Group 1* "I would just make the arms littler and the blanket bigger."

		Mod: Oh, so make the blanket bigger and the arms littler? Okay. […] "Okay. And yeah the arms look like feet now that you mention it." "Then I was like you just see like two little squiggles and then some elbows." "Because they're like made long and twisty. I've never seen someone's arms like that." — *Discussion in Group 4*

Symbol 5 Summary

Symbol 5 performed poorly and did not pass comprehension criteria. There were 19 critical confusions that represented 11 different misinterpretations. Just over half of participants (56.3%) interpreted Symbol 5 correctly according to strict criteria. This symbol was overall too complex with too many elements. A symbol design that may yield better comprehension could show a two-panel comparison between correct and incorrect bedding for the baby in a crib.

Symbol 6: Place Baby on Back to Sleep

Cognitive Interview Booklet Elements

Table 10a. Percentage and frequency of correct responses to each element according to the grading rubric.		
	**Percent Correct** (# correct)	**Grading Rubric**
What do you think this symbol means?	93.7% (75)	Lay baby on her/his back, not her/his stomach to sleep to avoid suffocation.
What should you do or not do in response to this symbol?	93.7% (75)	Place baby on his/her/their back in a sleeping environment.
What could happen if you do not follow the symbol's message?	93.7% (75)	Child may suffocate and die.

Overall Comprehension

Table 10b. Count and percent of correct and incorrect responses for Symbol 6.		
	Count (n)	**Percent**
Overall Correct	75	93.8%
Strict Criteria	70	87.5%
Lenient Criteria	75	93.8%
Overall Incorrect	5	6.3%
Critical Confusions	1	
As a % of incorrect responses		20.0%
As a % of total responses		1.3%
Total	80	100%

Fully correct response:
- Must mention that the baby needs to sleep on their back to avoid suffocation

Partially correct response (only mentions one or more of the following):
- The baby/child could die (without the specific cause)

Table 10c. Critical Confusion Statements and frequency of occurrence for Symbol 6.	
Critical Confusion Statement	**Frequency**
No hanging or standing on crib	$n = 1$

The single critical confusion for Symbol 8, "no hanging or standing on crib," could result in potentially hazardous behavior because the person did not fundamentally understand that the baby should be placed on its back.

Focus Groups. This symbol was overall clearly understood by participants with little follow-up discussion. Participants stated that the green checkmark and red X made it easy to understand the intended meaning. However, some participants talked about how this image conveys two different

warnings: that the child should be on its back and that loose blankets could cause suffocation. This overcommunication caused some incorrect responses, but not critical confusions.

Table 10d. Focus group suggestions for Symbol 6.		
Suggestion	**From**	**Quotes**
Clarify the soft bedding	Groups 1, 3	"With that too though, there's a line that represents a hard surface, but when he's faced down the line looks lumpy. In this one there's kind of like a double message: put your baby on his back on a hard surface and don't put your baby faced down on a soft service. So could you put your baby faced down on a hard service?" — *Participant in Group 1* **Mod: What did you guys think about symbol number six?** "Not to put the baby on their stomach to sleep." "And also, to keep the crib without anything underneath the baby." "Oh, I didn't get that second point from the symbol. " "I just thought because of the change in texture underneath the baby." "Yeah, I didn't catch that. I just said don't put the baby on their stomach." "Maybe make the blanket a different color? To show the difference between the mattress and the blanket underneath the child." **Mod: Do you think that the second panel is better suited for this symbol?** "Well I gotta say that I didn't really recognize that there was a different texture. And normally we would put a fitted sheet on the mattress but not extra blankets. "Maybe add more texture to the blanket – make it a quilt or a blanket." — *Discussion in Group 3*

Symbol 6 Summary

This symbol performed well, with passing levels of comprehension (greater than 85%) according to both strict (87.85%) and lenient (93.8%) scoring criteria and only one critical confusion. The comparison of a baby on their back with a green check mark and the baby on their stomach with a red X helped to correctly communicate the hazard.

Symbol 7: Install Anti-Tip Restraint

Cognitive Interview Booklet Elements

Table 11a. Percentage and frequency of correct responses to each element according to the grading rubric.		
	**Percent Correct** (# correct)	**Grading Rubric**
What do you think this symbol means?	56.3% (45)	Secure wall restraint between the wall and piece of furniture to prevent tip over.
What should you do or not do in response to this symbol?	62.5% (50)	Install the wall restraint. (Implied but not essential: Make sure the restraint is secure.)
What could happen if you do not follow the symbol's message?	72.5% (58)	The furniture could fall/tip over onto the child.

Overall Comprehension

Table 11b. Count and percent of correct and incorrect responses for Symbol 7.		
	Count (n)	**Percent**
Overall Correct	51	63.8%
Strict Criteria	44	55.0%
Lenient Criteria	51	63.8%
Overall Incorrect	29	36.3%
Critical Confusions	5	
As a % of incorrect responses		17.2%
As a % of total responses		6.3%
Total	80	100%

Fully correct response:

- Must mention the that the restraint secured on the wall helps prevent furniture falling and the child/person from getting hurt

Partially correct response (only mentions one or more of the following):

- Don't trust the bracket

Table 11c. Critical Confusion Statements and frequency of occurrence for Symbol 7.	
Critical Confusion Statement	**Frequency**
Don't wedge a piece of furniture at the top	*n* = 1

There was one critical confusion for Symbol 7, which made no mention of the important elements of the symbol's intended meaning. This respondent interpreted the symbol to mean "don't wedge a piece of furniture at the top," which could result in potentially hazardous behavior by not understanding the dangers of climbing furniture or the importance of securing furniture. Other incorrect

responses were centered on preventing children from climbing furniture without mention of the bracket, which were not critical confusions.

Focus Groups. Some participants identified this symbol correctly, and others thought it was similar to the other furniture symbols and that it communicated to keep children from climbing furniture. The groups discussed their confusion with how the restraint was depicted. Many participants talked about not recognizing the bracket or restraint in the symbol. Some example quotes about this confusion are below.

> *"That one kind of tripped me up at first because I thought that the object could break the wall. Then I looked again and saw the restraint. So, I had to look twice but I got it eventually. But I looked at it quickly and thought that there was an explosion because the kid pulled something out of the wall." — Participant in Group 3*

> *"I thought this was just like, like the motion of it falling. I didn't realize that was supposed to be a bracket." — Participant in Group 5*

> *"I found that a little confusing because I know they always tell you to anchor it. So, it's anchored, so why is it still falling over?" — Participant in Group 6*

Many participants also focused on the drawers in the symbol, as in Symbol 1, stating that they thought the intended message was to close or lock drawers. Group 2 discussed that even if the dresser does not tip over fully, the drawers can fall out.

Group 6 overall thought that this symbol was indicating to *not* mount a dresser to the wall, a critical confusion. Some of this group thought the symbol was indicating that the anchor was dangerous, or that you should not trust the anchor. One member of this group explained that they understood the symbol correctly because they were aware of a court case involving young children climbing on un-anchored lockers that fell and injured them.

Table 11d. Focus group suggestions for Symbol 7.

Suggestion	From	Quotes
Show comparison of restraint and no restraint	Groups 1, 2, 5, & 6	"I would get rid of the hardware in this one and let it be a tip hazard and then have one where it is installed. Without this it's tipping, it's top heavy. With this, it shows locked in place. Go back to your red check mark and your green check mark." — *Participant in Group 1* "I guess if you had combined the first panel of the dresser falling over with this panel then I understand that this thing is kind of holding it from tipping over. But without that first one for context I might not have understood that this was holding it to the wall." —*Participant in Group 2* "We seem to like the do/don't, like the green and the red, so maybe if there are two pictures of a dresser, falling without it and then stable with it." — *Participant in Group 5*

		"Maybe you have two images and one shows it falling without anything there. And the other shows it with an anchor, to suggest you should have an anchor there." — *Participant in Group 6*
Improve the look of the bracket/restraint	Groups 3, 4, & 5	"You could have a double panel where the first panel shows the restraint and then the second panel shows the furniture toppling over." "Or maybe have the second panel be just of that restraint to show how the restraint should be set up." — *Discussion in Group 3* "I think [the bracket] would be bigger because not only is it small but it's got the red outline to it and you really can't see it because it's not big enough. So you know I would just enlarge the little latch thingy and make it more visible for people that need glasses." — *Participant in Group 4* "Have a green check right on top of this bracket." — *Participant in Group 5* "I think this bracket wasn't going to hold it. I thought that's why there was an arrow on it." — *Participant in Group 5*
Avoid confounding the image with the child	Groups 5 & 6	"It all will probably be better without the child on it because it's making a mixed message for me with the child on it. Maybe if I see the kid missing and the doors even shut, it would make more sense to me." — *Participant in Group 6*

Symbol 7 Summary

Symbol 7 showed poor comprehension, with only 55% of respondents correctly interpreting the symbol according to strict scoring and 63.8% with lenient scoring. There was only one critical confusion, but many non-critical incorrect interpretations. As with Symbol 1, a redesign that combines the strengths of each of the furniture tip-over hazard symbols and improves them could result in higher levels of comprehension.

Symbol 8: Stay Within Arm's Reach

Cognitive Interview Booklet Elements

Table 12a. Percentage and frequency of correct responses to each element according to the grading rubric.		
	**Percent Correct** (# correct)	**Grading Rubric**
What do you think this symbol means?	81.3% (65)	Stay within arm's reach.
What should you do or not do in response to this symbol?	83.8% (67)	Stay within arm's reach. (Implied but not essential: Do not walk away from changing table).
What could happen if you do not follow the symbol's message?	80.0% (64)	Baby may fall and user would be too far to safely catch the baby.

Overall Comprehension

Table 12b. Count and percent of correct and incorrect responses for Symbol 8.		
	Count (n)	**Percent**
Overall Correct	71	88.8%
Strict Criteria	56	70.0%
Lenient Criteria	71	88.8%
Overall Incorrect	9	11.3%
Critical Confusions	0	
As a % of incorrect responses		0%
As a % of total responses		0%
Total	80	100%

Fully correct response:
- Must mention staying an arm's length away, or remaining in contact or close by, so that the child does not fall

Partially correct response (only mentions one or more of the following):
- Keep eyes on child
- Do not leave child unattended (without mention of closeness or distance)

Focus Groups. This symbol was somewhat clear according to focus group discussions. Some interpreted the symbol correctly as "stay within arm's length," and others were partially correct in thinking the symbol meant to watch or "keep eyes" on the baby. The discussions revealed that the dots that were supposed to indicate arm's length introduced some confusion. Some participants stated that the dots also looked like a line of sight, and some thought the line of sight was "pointed" toward the table, as in the example quotes below.

"I thought the lines were coming out of his eyes. 'Don't let your baby get out of sight.'" — Participant in Group 4

"I thought this one was kinda goofy. Because it's telling you to look at the baby and not at the changing table – which is kinda weird." — Participant in Group 3

Table 12c. Focus group suggestions for Symbol 8.

Suggestion	From	Quotes
Make "arm's length" clearer	Groups 2 & 3	"I think where the line terminates is too near his eyes. My initial thought was 'looking at it' but then I realized the person was closer, and it's a distance thing." — *Participant in Group 2* "You could raise the child, the image of the child up so that the arm is reaching straight out instead of— and angle and then put the dotted line underneath so that it wouldn't be eyesight but more arm distance." – *Participant in Group 2* "I would add dimensions. Like 'two feet' right above the dotted lines. To kind of show that this is the distance that you should be rather than lines of eyesight." — *Participant in Group 3*
Show consequence, as in Symbol 9	Groups 1 & 3	"I think maybe show the baby falling off. I think I would understand the seriousness of not watching the baby or not being close to them." — *Participant in Group 3*
Show baby lying down	Group 4	"What baby is sitting up on the changing table? […] When you're changing a baby on the changing table you need them to be flat so you can do what you need to do." — *Participant in Group 4*

Symbol 8 Summary

Although Symbol 8 scored high with comprehension with respect to the lenient, partially correct criteria (88.8%) and showed no critical confusions, this symbol failed comprehension criteria when scored strictly (70%). Many respondents incorrectly identified the meaning of this symbol as being related to line of sight or keeping one's eyes on the child. Comprehension may improve if the symbol is redesigned to show the "arm's length" line indicator below the arm rather than above the arm. Further, participants tended to prefer Symbol 9, which was similar but showed a baby falling as a consequence of the adult not being close enough to catch them quickly.

Symbol 9: Stay Within Arm's Reach

Cognitive Interview Booklet Elements

Table 13a. Percentage and frequency of correct responses to each element according to the grading rubric.		
	**Percent Correct** (# correct)	**Grading Rubric**
What do you think this symbol means?	80.0% (64)	Stay within arm's reach.
What should you do or not do in response to this symbol?	82.5% (66)	Stay within arm's reach. (Implied but not essential: Do not walk away from changing table).
What could happen if you do not follow the symbol's message?	96.3% (77	Baby may fall and user would be too far to safely catch the baby.

Overall Comprehension

Table 13b. Count and percent of correct and incorrect responses for Symbol 9.		
	Count (n)	**Percent**
Overall Correct	73	91.3%
Strict Criteria	58	72.5%
Lenient Criteria	73	91.3%
Overall Incorrect	7	8.8%
Critical Confusions	0	
As a % of incorrect responses		0%
As a % of total responses		0%
Total	80	100%

Fully correct response:
- Must mention staying an arm's length away, or close by, so that the child does not fall

Partially correct response (only mentions one or more of the following):
- Keep eyes on child
- Do not leave child unattended

Focus Groups. This symbol was overall clear and well-liked. As with Symbol 8, some participants thought the dotted lines were meant to depict sight lines. However, the depiction of the baby falling in the second panel better communicated that maintaining a short distance (i.e., arm's length) from the table was important.

Table 13c. Focus group suggestions for Symbol 9.		
Suggestion	**From**	**Quotes**
Show a comparison with an adult too far away	Group 2, 5, & 6	"If in the first picture, the baby wasn't just calmly sitting but maybe getting caught because they're right there, and in the second picture, they're falling but they're not caught because they're too far." — *Participant in Group 5* "The only thing I would say about number nine is the person is still— It still has the baby in view, instead of too far away." — *Participant in Group 6*
Depict child lying on table	Group 3	"But just the fact of the baby sitting [not lying] on the changing table is not safe." — *Participant in Group 3*

Symbol 9 Summary

As with Symbol 8, this symbol passed comprehension testing when assessed against the lenient scoring criteria (91.3%) and critical confusion (n = 0) but not strict scoring (72.5%). Also, as with Symbol 8, confusion emerged from the "arm's length" line that was misinterpreted as a line of sight. Symbol 9 scored better than Symbol 8 but would similarly benefit from small changes to emphasize the "arm's length" message (i.e., placed below rather than above the extended arm) and to avoid confusion with a line of sight.

Symbol 10: Outdoor Grills

Cognitive Interview Booklet Elements

Table 14a. Percentage and frequency of correct responses to each element according to the grading rubric.		
	**Percent Correct** (# correct)	**Grading Rubric**
What do you think this symbol means?	68.8% (55)	Do not light a gas grill with the lid closed. Do light gas grill with the lid open.
What should you do or not do in response to this symbol?	63.8% (51)	Have the lid open when igniting the grill.
What could happen if you do not follow the symbol's message?	81.3% (65)	Serious burns.

Overall Comprehension

Table 14b. Count and percent of correct and incorrect responses for Symbol 10.		
	Count (n)	**Percent**
Overall Correct	55	68.8%
Strict Criteria	45	56.3%
Lenient Criteria	55	68.8%
Overall Incorrect	25	31.3%
Critical Confusions	4	
As a % of incorrect responses		16.0%
As a % of total responses		5.0%
Total	80	100%
Fully correct response: - Must mention that you must light/ignite a grill with the lid open to avoid getting burned *Partially correct response (only mentions one or more of the following):* - Igniting a grill with the lid open could cause explosion or injury, but not burns		

Table 14c. Critical Confusion Statements and frequency of occurrence for Symbol 10.	
Critical Confusion Statement	**Frequency**
Do not turn grill to "high" to light	*n* = 2
Ignite flame outward	*n* = 1
Do not light grill with match	*n* = 1

There were three different statements that we identified as critical confusions for Symbol 10. For each of these, following the misinterpretation could lead to lighting the grill with the lid closed and potential injury. Other incorrect responses focused on having the lid open at all times, which is not a

critical confusion because leaving the lid open at all times would also mean leaving the lid open while lighting the grill.

Focus Groups. Focus group discussions revealed that participants who had personal experience grilling were more likely to correctly identify this symbol's meaning, whereas those who did not know how to grill were less likely to understand it. This difference in grilling experience is exemplified in quotes below.

> *"I kinda was confused because I don't usually light my grill. So, I don't really know what to do. But I guess you're supposed to open it then light it? I wasn't really sure." — Participant in Group 3*
>
> *"I saw it completely differently [from the rest of the group] because I never used a grill." — Participant in Group 5*

Overall, the groups liked that the symbol contained two panels comparing the lid open and shut. The burning consequence of the hazards was clear, but it was less clear under what circumstances the grill lid should be open.

Table 14d. Focus group suggestions for Symbol 10.

Suggestion	From	Quotes
Make ignition action clearer	Groups 1 & 5	"So, what about four panels. You have a guy with an open lid and then successfully igniting it and then you have a guy down here with the lid closed, he hits the button and the lid blows. So instead of two guys you do four. I mean it's a lot of room…" — *Participant in Group 1* "Well, if they talk about igniting, that's a button. You don't see the button there at all, so I think one thing would be to have a picture of the button underneath it." — *Participant in Group 5* "If it had that universal power symbol. […] That might get the idea of how that works. […] So if that was more clear that that was like a 'go,' a start." — *Participant in Group 5*
Show a comparison	Groups 2 & 3	"Maybe getting rid of the fire and the burners on the grill. Just trying to simplify the picture to make it clearer. All you should show is pressing the button with the lid open and one with the lid closed." — *Participant in Group 2* "Or if you had a picture where you try to light it and it doesn't light. And then you turn the gas off and on and then try to light it and show the flames surge because the gas is built up. It doesn't happen the way the symbol depicts it." — *Participant in Group 3*

Symbol 10 Summary

Symbol 10 performed poorly. Just over half (56%) of participants correctly comprehended this symbol according to strict criteria, and with lenient scoring criteria, comprehension was still significantly below passing (68.8%). This symbol also showed 4 (5%) critical confusions. Although the consequence of getting burned was clear, many participants did not understand how to prevent the hazard.

The action of “igniting” the grill could be made clearer by (more clearly) showing a person’s hand pushing the ignition button. It is important to clearly communicate the circumstances under which the grill’s lid should be open.

Symbol 11: Laundry Pods

Cognitive Interview Booklet Elements

Table 15a. Percentage and frequency of correct responses to each element according to the grading rubric.		
	**Percent Correct** (# correct)	**Grading Rubric**
What do you think this symbol means?	88.8% (71)	Keep out of reach of children/Do not let children handle.
What should you do or not do in response to this symbol?	90.0% (72)	Keep out of a child's reach/Keep away from children.
What could happen if you do not follow the symbol's message?	92.5% (74)	Child may be injured (Implied but not essential).

Overall Comprehension

Table 15b. Count and percent of correct and incorrect responses for Symbol 11.		
	Count (n)	**Percent**
Overall Correct	75	93.8%
Strict Criteria	64	80.0%
Lenient Criteria	75	93.8%
Overall Incorrect	5	6.3%
Critical Confusions	0	
As a % of incorrect responses		0%
As a % of total responses		0%
Total	80	100%

Fully correct response:
- Must mention keeping away from children, or storing out of child's reach, or else the child may be injured

Partially correct response (only mentions one or more of the following):
- Do not leave containers open or allow children to remove items from jar (i.e., passive instead of active)

Focus Groups. Participants tended to understand the meaning of this symbol and shared few opinions in the discussion. Many participants indicated that they were familiar with news stories about [redacted] which contributed to their understanding of the symbol's meaning.

Symbol 11 Summary

This symbol scored well. With strict scoring criteria, 80% of respondents correctly interpreted the symbol and there were no critical confusions. Symbol 11 might show even better comprehension if it were altered to additionally depict the importance of keeping the product on a high shelf out of a child's reach.

Symbol 12: Furniture Tip-Over

Cognitive Interview Booklet Elements

Table 16a. Percentage and frequency of correct responses to each element according to the grading rubric.		
	**Percent Correct** (# correct)	**Grading Rubric**
What do you think this symbol means?	81.3% (65)	If a child climbs on this piece of furniture, the furniture may tip over.
What should you do or not do in response to this symbol?	66.3% (53)	Do not allow children to climb on the furniture
What could happen if you do not follow the symbol's message?	81.3% (65)	The furniture could fall/tip over onto the child.

Overall Comprehension

Table 16b. Count and percent of correct and incorrect responses for Symbol 12.		
	Count (n)	**Percent**
Overall Correct	70	87.5%
Strict Criteria	51	63.8%
Lenient Criteria	70	87.5%
Overall Incorrect	10	12.5%
Critical Confusions	0	
As a % of incorrect responses		0%
As a % of total responses		0%
Total	80	100%

Fully correct response:
- Must mention a child/person climbing dresser (or climbing/standing on dresser drawers) and the furniture tipping/falling

Partially correct response (only mentions one or more of the following):
- Furniture tipping/falling because of open drawers
- Action is to supervise children (i.e., not actively preventing them from climbing)

Focus Groups. **Participants tended to indicate that they liked how this symbol contained a prohibition symbol to communicate what not to do. Some participants additionally stated that they thought the prohibition symbol should be red instead of black. Group 2 discussed how, overall, they would prefer Symbol 1 if it also had the prohibition symbol present in Symbol 12.**

Table 16c. Focus group suggestions for Symbol 12.		
Suggestion	**From**	**Quotes**
Make prohibition symbol red	Groups 2, 3, 4, & 5	"I would rather the prohibition circle be red rather than black so it's more of a warning." — *Participant in Group 2*

		"I didn't like this one. I think if you guys were to use it that the circle and the slash should be red." — *Participant in Group 3*

Symbol 12 Summary

This symbol showed poor comprehension by strict scoring criteria (63.8%) but passing comprehension when scored leniently (87.5%). There were no critical confusions. As with the other furniture tip-over symbols, Symbol 12 should be redesigned in conjunction with the others.

Symbol 13: Strangulation Hazard

Cognitive Interview Booklet Elements

Table 17a. Percentage and frequency of correct responses to each element according to the grading rubric.		
	**Percent Correct** (# correct)	**Grading Rubric**
What do you think this symbol means?	93.8% (75)	Cords may act as strangulation hazard.
What should you do or not do in response to this symbol?	91.3% (73)	Keep cords away from the baby.
What could happen if you do not follow the symbol's message?	85.0% (68)	May be strangled and die.

Overall Comprehension

Table 17b. Count and percent of correct and incorrect responses for Symbol 13.		
	Count (n)	**Percent**
Overall Correct	75	93.8%
Strict Criteria	63	78.8%
Lenient Criteria	75	93.8%
Overall Incorrect	5	6.3%
Critical Confusions	1	
As a % of incorrect responses		20.0%
As a % of total responses		1.3%
Total	80	100%

Fully correct response:
- Must mention keeping cords away from babies to avoid strangling (or choking)

Partially correct response (only mentions one or more of the following):
- Nonspecific injury
- Only mentions specific cords (e.g., window blinds or electrical cords) and not baby monitor cords or general cords

Table 17c. Critical Confusion Statements and frequency of occurrence for Symbol 13.	
Critical Confusion Statement	**Frequency**
Do not wrap a cord around a baby's neck (i.e., active meaning)	$n = 1$

There was one statement that we identified as a critical confusion because the respondent indicated that the symbol meant "do not wrap a cord around a baby's neck." We decided that this could lead to potentially hazardous behavior because it refers only to the action of wrapping a cord, not to the passive result of leaving a cord where a child can reach it or become entangled.

Focus Groups. Many participants stated that they thought this symbol was clear and they tended to like it. Group 2 did show some confusion and one participant explained that they needed to use the context image to understand what the symbol meant. The other groups agreed internally on the correct meaning.

Symbol 13 Summary

Symbol 13 scored moderately poorly for comprehension. By strict criteria, 78.8% of respondents correctly understood the symbol, which is below the 85% criterion for passing. There was just one critical confusion. The results suggest that the placement on the product might play a large role in comprehension of the hazard, given that some participants stated they found the context image in the booklet confusing.

Symbol 14: Keep Away From Children

Cognitive Interview Booklet Elements

Table 18a. Percentage and frequency of correct responses to each element according to the grading rubric.		
	**Percent Correct** (# correct)	**Grading Rubric**
What do you think this symbol means?	76.3% (61)	Keep away from children.
What should you do or not do in response to this symbol?	78.8% (63)	Keep out of a child's reach/Keep away from children.
What could happen if you do not follow the symbol's message?	73.8% (59)	Child may be injured (Implied but not essential).

Overall Comprehension

Table 18b. Count and percent of correct and incorrect responses for Symbol 14.		
	Count (n)	**Percent**
Overall Correct	64	80.0%
Strict Criteria	62	77.5%
Lenient Criteria	64	80.0%
Overall Incorrect	16	20.0%
Critical Confusions	0	
As a % of incorrect responses		0%
As a % of total responses		0%
Total	80	100%

Fully correct response:
- Must mention keeping away from children or storing out of child's reach

Partially correct response (only mentions one or more of the following):
- Handling is hazardous to health, without mention of ingestion/injury

Focus Groups. Every focus group talked about the small size of this image, tending to say that they could not see it well. People who did not see the symbol tended to focus their comments on the picture of the batteries. Over half of the participants who did notice the symbol tended to understand its intended meaning. Groups 2 and 3 commented that the image looked like it was a game of "keep-away" (keeping something away from a child).

Table 18c. Focus group suggestions for Symbol 14.		
Suggestion	**From**	**Quotes**
Change the format so it is easier to see	Groups 2, 3, 5, & 6	"Why not just have a picture of a child with a prohibition symbol in front of it?" — *Participant in Group 2* "The no baby icon would work better in this situation. Just have that. Don't let kids near this." — *Participant in Group 3*

		Mod: Is there a different way of depicting this that's easier to see or communicate better? Anything like that? "Make the picture bigger." "Use that circle with the X maybe." "But it— On that size, the circle with the X, then you wouldn't really even be able to see it, though." "I thought for the size and space, it was very good. But yeah, it is small." — *Discussion in Group 5* "Or maybe like the one above, it's red with the X through it." "And bigger, yeah." "It's much too small." "No, no, you don't want the X through it, because you want to keep it away." "Yeah." "You know what I mean, though." *Discussion in Group 6*

Symbol 14 Summary

Symbol 14 scored moderately poorly for comprehension. There were no critical confusions, but the symbol did not pass comprehension (85% or better) by either the strict (77.5%) or lenient criteria (80%). The small size seemed to be the biggest issue, which led some participants to focus their answers on the battery context image. The design of the symbol itself could also be changed so that it is easier to see at a smaller size — for example, depicting a child and age with a prohibition symbol.

Symbol 15: Supervision Combination

Cognitive Interview Booklet Elements

Table 19a. Percentage and frequency of correct responses to each element according to the grading rubric.		
	**Percent Correct** (# correct)	**Grading Rubric**
What do you think this symbol means?	88.8% (71)	Do not leave child unattended
What should you do or not do in response to this symbol?	87.5% (70)	Stay with the child (while they are seated in the highchair).
What could happen if you do not follow the symbol's message?	57.5% (46)	Child may fall out of seat (Implied but not essential: and be injured).

Overall Comprehension

Table 19b. Count and percent of correct and incorrect responses for Symbol 15.		
	Count (n)	**Percent**
Overall Correct	72	90.0%
Strict Criteria	44	55.0%
Lenient Criteria	72	90.0%
Overall Incorrect	8	10.0%
Critical Confusions	2	
As a % of incorrect responses		25.0%
As a % of total responses		2.5%
Total	80	100%

Fully correct response:
- Must mention that child may fall as a consequence of leaving the child unattended or walking away from the child

Partially correct response (only mentions one or more of the following):
- Child could be injured, not specifically by falling
- Do not look away from the child

Table 19c. Critical Confusion Statements and frequency of occurrence for Symbol 15.	
Critical Confusion Statement	**Frequency**
Secure child before walking away	$n = 2$

Two respondents gave a similar response for Symbol 15 that was marked as a critical confusion, which was to secure the child before walking away. This interpretation is opposite the intended meaning, which is essentially to not walk away even if the child is secure.

Focus Groups. Overall, participants indicated that they liked this symbol. It was clear in the image that an adult was depicted as walking away from a child. However, some participants had expected to see the child depicted in a highchair, as in the context photograph, rather than "sitting on the floor" or "flying."

Table 19d. Focus group suggestions for Symbol 15.

Suggestion	From	Quotes
Show baby in a chair or product	Groups 3 & 6	"I thought that was kind of weird. It's like a person walking away from a baby sitting on the floor. So perhaps if they were in the seat, in one of the seats…" "I thought it was an odd picture, but I thought it meant, "Don't put the baby in the seat and then walk away…" "Right – I did write that, but it seems odd to me that the baby would be depicted sitting on the floor. Unless they're in something." — *Discussion in Group 3*
Show consequence	Groups 5 & 6	"Maybe show some of the dangers that they're worried about? Because, yeah, just being on the floor, like 'don't walk away from your child ever' seems extreme. So maybe showing what's going on." — *Participant in Group 5* "Show the baby climbing out, or what could happen to the baby." — *Participant in Group 6*
Show a comparison	Group 3	"I think I'd like a yes or no symbol." "Have the second part of the symbol with the parent turned to the baby and with an eyesight dotted line." — *Discussion in Group 3*

Symbol 15 Summary

This symbol showed poor comprehension according to strict scoring (55%) but "passing" comprehension according to lenient scoring (90%). The reason for this disparity is that many respondents indicated that the child could get hurt but did not mention falling specifically, as the rubric required. There were just two critical confusions. Comprehension could be improved by adjusting the appearance of the baby to ensure the symbol is depicting a child being left alone rather than an unsecure child, or by showing potential consequences of leaving the child unattended.

Symbol 16: Always Use Restraints

Cognitive Interview Booklet Elements

Table 20a. Percentage and frequency of correct responses to each element according to the grading rubric.		
	**Percent Correct** (# correct)	**Grading Rubric**
What do you think this symbol means?	93.8% (75)	Buckle child/baby when using this product.
What should you do or not do in response to this symbol?	91.3% (73)	Make sure the child/baby is buckled when using product.
What could happen if you do not follow the symbol's message?	72.5% (58)	Child may fall out of seat (Implied but not essential: and be injured).

Overall Comprehension

Table 20b. Count and percent of correct and incorrect responses for Symbol 16.		
	Count (n)	**Percent**
Overall Correct	75	93.8%
Strict Criteria	58	72.5%
Lenient Criteria	75	93.8%
Overall Incorrect	5	6.3%
Critical Confusions	1	
As a % of incorrect responses		20.0%
As a % of total responses		1.3%
Total	80	100%
Fully correct response: - Must mention that child must be buckled to avoid falling *Partially correct response (only mentions one or more of the following):* - Child could be injured, not specifically by falling		

Table 20c. Critical Confusion Statements and frequency of occurrence for Symbol 16.	
Critical Confusion Statement	**Frequency**
Your fingers can get caught	$n = 1$

We identified one critical confusion for Symbol 16, which was "your fingers can get caught." We interpreted this response as a warning of the dangers of buckling a seatbelt, which could result in a person avoiding its use.

Focus Groups. Participants tended to state that they liked this symbol. There were few comments besides that the symbol was clear and easy to understand. Two groups (1 and 6) mentioned that this symbol could be construed as merely a suggestion because it does not seem to communicate danger, but there were no specific suggestions for improvement in the focus groups.

Symbol 16 Summary

Symbol 16 showed poor comprehension according to strict criteria (72.5%) and higher, "passing" comprehension according to lenient criteria (93.8%). There was just one critical confusion. Similar to Symbol 15, there were substantially lower strict scores than lenient scores because the rubric requires that respondents specifically indicate that the child could fall as a consequence. Focus group discussions suggested that participants tended to correctly understand this symbol.

Symbol 17: Age Warning Label

Cognitive Interview Booklet Elements

Table 21a. Percentage and frequency of correct responses to each element according to the grading rubric.		
	**Percent Correct** (# correct)	**Grading Rubric**
What do you think this symbol means?	83.8% (67)	Not for use by children ages 0 to 3 years
What should you do or not do in response to this symbol?	82.5% (66)	Do not allow children younger than three years of age to play with the toy. Only allow children 3 years of age or older to play with the toy.
What could happen if you do not follow the symbol's message?	88.8% (71)	Child could be injured (Implied but not essential).

Overall Comprehension

Table 21b. Count and percent of correct and incorrect responses for Symbol 17.		
	Count (n)	**Percent**
Overall Correct	67	83.8%
Strict Criteria	65	81.3%
Lenient Criteria	67	83.8%
Overall Incorrect	13	16.3%
Critical Confusions	5	
As a % of incorrect responses		38.5%
As a % of total responses		6.3%
Total	80	100%

Fully correct response:
- Must mention that the product is not for ages 0-3 and that a child who is too young could be injured

Partially correct response (only mentions one or more of the following):
- If the initial response was years, but raised the possibility it could be referring to months

Table 21c. Critical Confusion Statements and frequency of occurrence for Symbol 17.	
Critical Confusion Statement	**Frequency**
For children 0-3 *years*	*n* = 3
Not for children ages 0-3 months	*n* = 2

Two responses for Symbol 17 were scored as critical confusions. One misinterpretation was that the symbol communicates an age range in months, with no reference to years. The other confusion was that the symbol communicates that the product is intended for children ages 0-3 years, which is opposite the intended meaning.

For scoring, we considered responses correct if they referred to the age as some variant of children three and over, children four and over, or not for children under three. A more detailed breakdown of the language used in these correct responses is in Table 21e below.

Table 21e. Correct responses for Symbol 17.	
Responses	**Count (n)**
Children Four and Over	4
Children Three and Over	1
Children Over Three	1
Not for Children Three and Under	3
Not for Children Ages 0-3	25
No Children Under Three	29

Focus Groups. The groups frequently discussed whether this image was referring to months or years. Some were unsure, though most correctly guessed "years" in their booklet responses. Some participants suggested that the symbol include the word "months" or "years," or the letter M or Y. However, responses to Symbol 20 suggest the letter M by itself could similarly be misinterpreted in this context.

Some participants said that their responses were influenced by the context image of a product that seemed like it was too small for a 3-year-old and too large (and advanced) for a 3-month old. Groups 2, 3, and 6 all commented that the baby in this symbol looked like a pumpkin, citing the hair curl as a distraction.

Table 21e. Focus group suggestions for Symbol 17.		
Suggestion	**From**	**Quotes**
Specify months or years	Groups 2, 4, & 6	"I think there needs to be a specification of a Y or an M." – *Participant in Group 2* "I would put years next to the numbers or maybe a Y." — *Participant in Group 4*
Show a comparison	Groups 3 & 5	"Maybe something that showed a happy baby being three plus and, I don't know, an unhappy baby […] falling off it." — *Participant in Group 5* "Or even just have a yes panel with a kid and it says 3+ years or something." — *Participant in Group 3*
Adjust how the baby looks	Group 3	"I would take out the hair curl." "I would just have the head." **Mod: Would you want to have a body as well?** "I think I'd want to see a silhouette of the baby like symbol one." — *Discussion in Group 3*

Symbol 17 Summary

This symbol showed moderate levels of comprehension (81.3% for strict and 83.8% for lenient scoring) but did not achieve passing criteria of 85%. There were also 5 (6.3%) critical confusions. Specifying “years” as the age metric could improve comprehension for this symbol.

Symbol 18: Supervision, Drowning

Cognitive Interview Booklet Elements

Table 22a. Percentage and frequency of correct responses to each element according to the grading rubric.		
	**Percent Correct** (# correct)	**Grading Rubric**
What do you think this symbol means?	83.8% (67)	Supervise swimmers.
What should you do or not do in response to this symbol?	77.5% (62)	Make sure someone doesn't swim alone. Supervise people when they are using the pool.
What could happen if you do not follow the symbol's message?	78.8% (63)	Someone may drown and die.

Overall Comprehension

Table 22b. Count and percent of correct and incorrect responses for Symbol 18.		
	Count (n)	**Percent**
Overall Correct	67	83.8%
Strict Criteria	55	68.8%
Lenient Criteria	67	83.8%
Overall Incorrect	13	16.3%
Critical Confusions	4	
As a % of incorrect responses		30.8%
As a % of total responses		5.0%
Total	80	100%

Fully correct response:
- Must mention supervising or watching swimmers/children to avoid drowning

Partially correct response (only mentions one or more of the following):
- Don't swim alone in pool
- Consequence is a swimmer could get hurt

Table 22c. Critical Confusion Statements and frequency of occurrence for Symbol 18.	
Critical Confusion Statement	**Frequency**
No jumping/diving	$n = 4$

Four individuals gave responses that were marked as critical confusions. Specifically, they believed Symbol 18 communicates to not jump or dive in the pool. This interpretation could lead to potentially hazardous behavior by avoiding jumping but still swimming alone or not supervising other swimmers.

Focus Groups. Though many participants interpreted the meaning correctly, most tended to state that they did not like this image and found it distracting. Many of the groups joked that it was

"creepy," and the person depicted as supervising looked more like an alien, goblin, vampire, or witch, while the swimmer looked like a monkey or a person dancing.

Some participants also commented that the waves did not look like water, but rather like brain waves, as if the person depicted were watching someone drown or causing someone to drown. One participant in Group 1 also thought that these waves were depicting electrical wires, and Group 6 discussed how it looked like the symbol communicates "don't jump" in the pool because it seems to show shallow water. The groups generally suggested that this symbol be replaced by Symbol 19.

Symbol 18 Summary

Symbol 18 was generally disliked and overall it scored poorly. Many participants joked about how this symbol looked. When scored according to the lenient criteria, comprehension comes near to a passing score (83.8%), but not when judged according to the strict criteria (68.8%). Moreover, four respondents (5%) critically confused the symbol to mean "no jumping" or "no diving." Many focus group participants immediately suggested replacing this symbol with Symbol 19, which they believe depicted the same hazard more clearly.

Symbol 19: Supervision, Drowning

Cognitive Interview Booklet Elements

Table 23a. Percentage and frequency of correct responses to each element according to the grading rubric.		
	**Percent Correct** (# correct)	**Grading Rubric**
What do you think this symbol means?	90.0% (72)	Supervise swimmers.
What should you do or not do in response to this symbol?	87.5% (70)	Make sure someone doesn't swim alone. Supervise people when they are using the pool.
What could happen if you do not follow the symbol's message?	85.0% (68)	Someone may drown and die.

Overall Comprehension

Table 23b. Count and percent of correct and incorrect responses for Symbol 19.		
	Count (n)	**Percent**
Overall Correct	73	91.3%
Strict Criteria	63	78.8%
Lenient Criteria	73	91.3%
Overall Incorrect	7	8.8%
Critical Confusions	3	
As a % of incorrect responses		42.9%
As a % of total responses		3.8%
Total	80	100%

Fully correct response:
- Must mention supervising or watching swimmers/children to avoid drowning

Partially correct response (only mentions one or more of the following):
- Don't swim alone in pool
- Consequence is a swimmer could get hurt

Table 23c. Critical Confusion Statements and frequency of occurrence for Symbol 19.	
Critical Confusion Statement	**Frequency**
No jumping/diving	$n = 2$
Supervise those who can't swim	$n = 1$

For Symbol 19, two respondents believed the symbol was communicating not to jump or dive in the water, which could still result in drowning in the absence of supervision. One respondent believed the symbol meant to supervise those who are unable to swim. We reasoned that this interpretation could give rise to the belief that it is unnecessary to supervise all swimmers.

Focus Groups. Participants generally said that they liked this image, especially in contrast to Symbol 18. Group 2 agreed that this symbol looked more like water than Symbol 18. Compared to Symbol 18, participants were more likely to identify the person in the water specifically as a child, as exemplified in the quotes below.

> *"It shows the difference in size between the two people which kinda shows distance or that the other person is small. […] This person is in water and the other one is looking or watching them." — Participant in Group 3*

> *"That's the parent one [referring to 18], but this one means lifeguard on duty [referring to 19]. This one [18] means 'parents supervise your kids otherwise they will drown." — Participant from Group 4*

However, one participant in Group 1 also thought the symbol was specifically showing "waist high" water, possibly explaining why some participants misunderstood this symbol to mean "no jumping or diving," though Symbol 18 showed slightly more of those confusions.

Table 23d. Focus group suggestions for Symbol 19.

Suggestion	From	Quotes
Specify that the supervisor is watching	Group 2	"One thing that 18 does positively though is that it does show lines coming from the eyes. Even though they're kind of drawn in a weird way it this just kind of shows that the whole head is pointing in one way." "So maybe on 19 there should be an eye just watching the swimmer." *— Discussion in Group 2*

Symbol 19 Summary

Comprehension for this symbol was better than for Symbol 18, but correct interpretations still failed according to strict scoring criteria (78.8%). The incorrect interpretations were largely because many respondents did not explicitly identify the possible consequence of drowning, which was required by the rubric. Overall, the symbol clearly communicated that there is a person swimming in water while another person is watching.

Symbol 20: Intended for a Certain Age

Cognitive Interview Booklet Elements

Table 24a. Percentage and frequency of correct responses to each element according to the grading rubric.		
	**Percent Correct** (# correct)	**Grading Rubric**
What do you think this symbol means?	72.5% (58)	For use only with children between 0-36 months of age.
What should you do or not do in response to this symbol?	75.0% (60)	Do not use with children over 36 months of age.
What could happen if you do not follow the symbol's message?	67.5% (54)	Child could be injured. (Implied but not essential).

Overall Comprehension

Table 24b. Count and percent of correct and incorrect responses for Symbol 20.		
	Count (n)	**Percent**
Overall Correct	58	72.5%
Strict Criteria	47	58.8%
Lenient Criteria	58	72.5%
Overall Incorrect	22	27.5%
Critical Confusions	15	
As a % of incorrect responses		68.2%
As a % of total responses		18.8%
Total	80	100%

Fully correct response:
- Must mention that the product is for children between 0-36 months of age or else the child could get hurt

Partially correct response (only mentions one or more of the following):
- Consequence is that product could break, without mention of the child getting hurt

Table 24c. Critical Confusion Statements and frequency of occurrence for Symbol 20.	
Critical Confusion Statement	**Frequency**
Maximum weight of child (n = 5)	*n* = 5
Maximum time in product (n = 3)	*n* = 3
Maximum weight and height of child (n = 3)	*n* = 3
Maximum height of child (n = 2)	*n* = 2
Not for children under 36 months (n = 1)	*n* = 1
Maximum height of product (n = 1)	*n* = 1

There was a total of 15 critical confusions for Symbol 20. These specific responses varied, but most misinterpretations could lead to product use by a child of the inappropriate age and result in injury. Several respondents believed the symbol was referring to the size of the child rather than the age. Three respondents interpreted the symbol as a maximum time to spend in the product, and one thought it references a maximum height of the product. One respondent interpreted the opposite meaning as intended, which is that the product was not for children under 36 months.

As with Symbol 17, the age-related answers that we scored as correct were phrased a few different ways. Below is a breakdown of the language used in correct responses. Though most correct responses referenced months, five participants referenced years in their responses.

Table 24d. Correct responses for Symbol 20.

Responses	**Count (n)**
For Children 0-36 Months Old	53
No Children Older Than Three	2
Children Under Three	3

Focus Groups. Many participants mistook the months label ("m") as something besides months, or they guessed correctly but were unsure. Groups 2 and 5 talked about how they thought the "m" could denote a time limit for leaving a child in the product.

Table 24e. Focus group suggestions for Symbol 20

Suggestion	**From**	**Quotes**
Spell out months	Groups 1, 2, 4, & 6	"I like the 'MO' better." — *Participant in Group 2* "I thought it meant 0-36 minutes. [Laughs] Don't leave your baby in this for more than 36 minutes. I was like why would somebody leave their baby for 0 minutes." **Mod: Would you want to change this symbol in any way?** "Put months, I guess. Yeah, 'mo.'" — *Discussion in Group 4* "The symbol 'm' could be meters or minutes. It's a little bit confusing." — *Participant in Group 6* "It's not clear with their measurements are, what they're really warning you against." — *Participant in Group 6*
Use years rather than months	Groups 2, 3, & 6	"After twelve months, don't use the months. Just use 1, 2, or 3." — *Participant in Group 3* "Maybe people wouldn't know how to do the math too. Not everybody know that twelve months is one, twenty-four months is two…" — *Participant in Group 4*
Use a weight limit rather than age	Groups 2 & 6	"One comment on this: why not put a weight limit rather than age?" — *Participant in Group 2*

Symbol 20 Summary

Symbol 20 did not pass comprehension criteria (85% or better) according to either strict (58.8%) or lenient (72.5%) criteria. There were many critical confusions (*n* = 15) with several different misinterpretations, mostly from respondents misunderstanding the "m" label. To improve this symbol, the word "months" should be written in full or as a longer abbreviation (e.g., "mos").

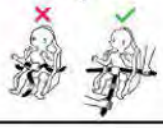
Discussion

The goal of this project was to evaluate a set of twenty graphical safety symbols (ten newly developed and ten existing) for comprehension using a sample of 80 participants diverse in demographics and life experience. The open comprehension test procedures described in ANSI Z535.3 (2011; R2017) were used to collect quantitative data on interpretations and focus group discussions added additional information on participant opinions and suggestions.

According to the strict criteria, only two symbols achieved passing comprehension scores of higher than 85% and fewer than 5% critical confusions: Symbol 4 (Make sure (child's) restraint fits snugly) and Symbol 6 (Place baby on back to sleep (a suffocation hazard).

The rest of the symbols did not pass the ANSI Z535 comprehension criteria. Among those that did not pass, we identified whether they scored moderately or scored poorly. The overall passing and failing of symbols are summarized below.

Table 25. Overall pass/fail results from comprehension testing.

Symbol	1 	2 	3 	4 	5 
Pass/Fail	Fail (Moderate)	Fail (Poor)	Fail (Moderate)	Pass	Fail (Poor)
Symbol	6 	7 	8 	9 	10 
Pass/Fail	Pass	Fail (Poor)	Fail (Moderate)	Fail (Moderate)	Fail (Poor)
Symbol	11 	12 	13 	14 	15 
Pass/Fail	Fail	Fail (Moderate)	Fail (Moderate)	Fail (Moderate)	Fail (Moderate)
Symbol	16 	17 	18 	19 	20 
Pass/Fail	Fail (Moderate)	Fail (Moderate)	Fail (Poor)	Fail (Moderate)	Fail (Poor)

Poorest Performing Symbols

For newly-developed symbols, the symbols that performed worst for comprehension were Symbol 2 (Methylene Chloride), Symbol 5 (never add soft bedding to a baby's sleep environment), Symbol 7 (install anti-tip restraint), and Symbol 10 (start grill with lid open), suggesting these especially need to be redesigned and retested to improve comprehension.

For existing symbols, the poorest-performing symbols were Symbol 18 (Supervision, drowning symbol from ATSM F2666 and ASTM F2729) and Symbol 20 (intended for a certain age). Symbol 18 will be discussed further in the section on recommendations for Supervision (Drowning) symbols. As discussed in the Results section, many participants misunderstood the meaning of Symbol 20 as referring the size of the child (in meters, or unspecified) rather than their age in months, and comprehension would likely improve by using the word "months" or using years.

Recommendations for Furniture Tip-Over Symbols

Symbols 1, 7, and 12 were variants on furniture tip-over warning symbols. Symbol 12 is the one currently in use and Symbols 1 and 7 were variants being tested in the present research. All three symbols failed comprehension testing and Symbol 7 (Install anti-tip restraint) performed worst.

A combined symbol is recommended for improved comprehension. Symbol 1, with the addition of a prohibition symbol and a close-up depiction of the restraint, is the best starting candidate. It could be modified to communicate both the furniture-tip over hazard and the instruction to install anti-tip restraints through the use of the green "check" (for correct) and red x and/or prohibition symbols.

Recommendations for Stay Within Arm's Reach Symbols

Symbols 8 and 9 were newly developed variants on the same message: "stay within arm's reach (of baby)." These symbols performed moderately poorly but Symbol 9 performed better and was better liked in the focus groups. Comprehension would be improved by showing the consequence of the baby falling, and by adjusting the look of the lines intended to depict "arm's length." The lines should be placed below the arm rather than above to reduce misinterpretation of the meaning as "line of sight."

Recommendations for Supervision (Drowning) Symbols

Symbols 18 and 19 were existing symbols intended to communicate supervising swimmers to avoid drowning. Symbol 18 is from ASTM F2666 and ASTM F2729 and Symbol 19 is from ISO 20712. Though both performed moderately poorly, focus group participants overwhelmingly preferred Symbol 19 and suggested that this one is used without modification. Low comprehension scores for both of these symbols were largely because many respondents did not explicitly identify drowning as the possible consequence of this hazard; therefore, it may be beneficial to create symbol variants to test that more explicitly communicate drowning.

Appendices

Appendix A: Cognitive Interview Booklet (Test Booklet)

COGNITIVE INTERVIEW BOOKLET

Name (please print): _____

Today's Date: _____

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3041-0136

EXAMPLE OF AN INADEQUATE ANSWER

Context: This symbol appears on machines used in the home and workplace.

What do you think this symbol means?

Gears and hand

What should you do or not do in response to this symbol?

Be careful

What could happen if you do not follow the symbol's message?

Could get hurt

EXAMPLE OF A GOOD ANSWER

Context: This symbol appears on machines used in the home and workplace.

What do you think this symbol means?

Caution. Moving Gears. Do not stick hand near machine while it is running.

What should you do or not do in response to this symbol?

I would stay away and not put my hand near the machine until someone stopped it.

What could happen if you do not follow the symbol's message?

My fingers or hand could be crushed by the moving gears.

This symbol might appear on containers of laundry detergent packets.

What do you think this symbol means?

What should you do or not do in response to this symbol?

What could happen if you do not follow the symbol's message?

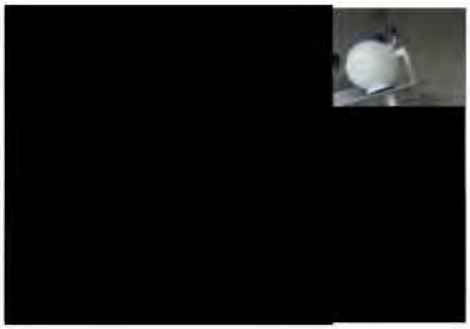
This symbol might appear on baby changing tables or changing pads.

What do you think this symbol means?

What should you do or not do in response to this symbol?

What could happen if you do not follow the symbol's message?

This symbol might appear on baby monitors.



What do you think this symbol means?

What should you do or not do in response to this symbol?

What could happen if you do not follow the symbol's message?

This symbol might appear on above ground residential pools or portable pools.

What do you think this symbol means?

What should you do or not do in response to this symbol?

What could happen if you do not follow the symbol's message?

This symbol might appear on infant sleep products, such as cribs, bassinets, and play yards.

What do you think this symbol means?

What should you do or not do in response to this symbol?

What could happen if you do not follow the symbol's message?

This symbol might appear on children's products such as infant chairs, baby bouncers, infant swings, or toys.

What do you think this symbol means?

What should you do or not do in response to this symbol?

What could happen if you do not follow the symbol's message?

This symbol might appear on products like high chairs, infant bouncers, and other products with seating for a child.

What do you think this symbol means?

What should you do or not do in response to this symbol?

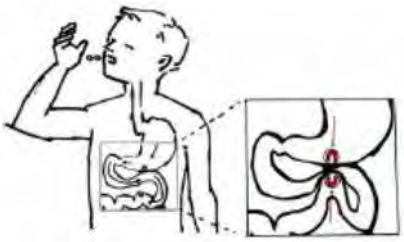
What could happen if you do not follow the symbol's message?

This symbol might appear on certain types of furniture, such as a dresser, chest or clothing storage unit.

What do you think this symbol means?

What should you do or not do in response to this symbol?

What could happen if you do not follow the symbol's message?



This symbol might appear on magnetic building sets or toys that contain small magnets.

What do you think this symbol means?

What should you do or not do in response to this symbol?

What could happen if you do not follow the symbol's message?

This symbol might appear on container labels of chemical solvents, such as paint strippers or paint thinners.

What do you think this symbol means?

What should you do or not do in response to this symbol?

What could happen if you do not follow the symbol's message?

This symbol might appear on various children's products, such as high chairs, baby changing products, strollers, or infant swings.

What do you think this symbol means?

What should you do or not do in response to this symbol?

What could happen if you do not follow the symbol's message?

This symbol appears on potentially hazardous products, such as button cell batteries.

What do you think this symbol means?

What should you do or not do in response to this symbol?

What could happen if you do not follow the symbol's message?

This symbol might appear on certain types of furniture, such as a dresser, chest or clothing storage unit.

What do you think this symbol means?

What should you do or not do in response to this symbol?

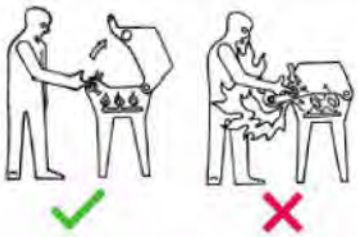
What could happen if you do not follow the symbol's message?

This symbol might appear on infant sleep products, such as cribs, bassinets, and play yards.

What do you think this symbol means?

What should you do or not do in response to this symbol?

What could happen if you do not follow the symbol's message?



This symbol might appear on propane gas grills.

What do you think this symbol means?

What should you do or not do in response to this symbol?

What could happen if you do not follow the symbol's message?

This symbol might appear on children's toys.

What do you think this symbol means?

What should you do or not do in response to this symbol?

What could happen if you do not follow the symbol's message?

This symbol might appear on or near swimming pools.

What do you think this symbol means?

What should you do or not do in response to this symbol?

What could happen if you do not follow the symbol's message?

This symbol might appear on certain types of furniture, such as a dresser, chest or clothing storage unit.

What do you think this symbol means?

What should you do or not do in response to this symbol?

What could happen if you do not follow the symbol's message?

This symbol might appear on baby changing tables or changing pads.

What do you think this symbol means?

What should you do or not do in response to this symbol?

What could happen if you do not follow the symbol's message?

This symbol might appear on children's products, such as high chairs, infant carriers, strollers, or infant swings.

What do you think this symbol means?

What should you do or not do in response to this symbol?

What could happen if you do not follow the symbol's message?

Please answer the following questions about yourself:

Age: _____ Sex: ____ Male ____ Female

Education: (check the option that best describes the highest level of education you have attained)

____ some high school ____ high school degree ____ some college

____ 2-year college degree ____ 4-year college degree ____ master's degree

____ doctoral

____ other professional degree (please specify): _____

____ other degree (please specify): _____

Marital Status:

____ Single ____ Married ____ Legally Separated ____ Divorced

Children: ____ Yes ____ No

(if yes: please indicate the number of children that live in your home, either full-time or part-time, and their ages in the space provided):

Race:

____ Asian ____ Black/African ____ Caucasian

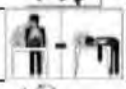
____ Hispanic/Latino ____ Native American ____ Pacific Islander

____ Mixed Race ____ Prefer not to answer

Current occupation: _____

Appendix B: Booklet Orderings

Original Ordering		Order 1		Order 2	
#	Symbol	#	Symbol	#	Symbol
1		11		16	
2		8		9	
3		13		1	
4		18		19	
5		6		17	
6		20		10	
7		4		5	
8		7		12	
9		3		14	
10		2		15	
11		15		2	
12		14		3	
13		12		7	
14		5		4	
15		10		20	
16		17		6	
17		19		18	
18		1		13	
19		9		8	
20		16		11	

Original Ordering		Order 3		Order 4	
#	Symbol	#	Symbol	#	Symbol
1		15		6	
2		1		16	
3		20		3	
4		11		12	
5		9		10	
6		19		8	
7		2		18	
8		13		17	
9		7		5	
10		4		14	
11		14		4	
12		5		7	
13		17		13	
14		18		2	
15		8		19	
16		10		9	
17		12		11	
18		3		20	
19		16		1	
20		6		15	

Appendix C: Focus Group Details

Date, location and number of participants in each of the 6 focus group sessions.			
Focus Group Number	**Date**	**Location**	**Number of Participants**
1	7/24/19	Colonie, New York	8
2	9/03/19	Highwood, Montana	12
3	9/25/19	Troy, New York	3
4	9/26/19	Troy, New York	2
5	9/26/19	Colonie, New York	10
6	9/28/19	Colonie, New York	6

Appendix D: Symbol Comprehension Testing Scoring Rubric

Symbol Comprehension Testing Rubric				
	Symbols	Test Questions		
		What do you think this symbols means?	What should you do or not do in response to this symbol?	What could happen if you do not follow the symbol's message?
1		If a child climbs on this piece of furniture, the furniture may tip over.	Do not allow children to climb on the furniture.	The furniture could fall/tip over onto the child.
2		If the fumes from this chemical are inhaled, it may result in unconsciousness, serious injury, or death.	Do not inhale fumes.	Loss of consciousness, serious injury, death
3		Ingesting magnets can cause them to attract within the digestive system and compress those tissues.	Do not swallow the magnets.	Serious injury (predominantly in the digestive track/intestines)
4		When using this child restraint device, the straps should be tight and secure, not loose.	Tighten the straps.	Child may be injured (Implied but not essential).
5		Do not put soft materials, such as blankets or pillows, in a baby's sleep environment. They may suffocate the baby.	Do not put blankets, pillows or other soft materials into a baby's sleep environment.	Child may suffocate and die.
6		Lay baby on her/his back, not her/his stomach to sleep to avoid suffocation.	Place baby on his/her/their back in a sleeping environment.	Child may suffocate and die.
7		Secure wall restraint between the wall and piece of furniture to prevent tip over.	Install the wall restraint. (Implied but not essential: Make sure the restraint is secure.)	The furniture could fall/tip over onto the child.
8		Stay within arm's reach.	Stay within arm's reach. (Implied but not essential: Do not walk away from changing table).	Baby may fall and user would be too far to safely catch the baby.
9		Stay within arm's reach.	Stay within arm's reach. (Implied but not essential: Do not walk away from changing table).	Baby may fall and user would be too far to safely catch the baby.
10		Do not light a gas grill with the lid closed. Do light gas grill with the lid open.	Have the lid open when igniting the grill.	Serious burns.
11		Keep out of reach of children/Do not let children handle.	Keep out of a child's reach/Keep away from children.	Child may be injured (Implied but not essential).
12		If a child climbs on this piece of furniture, the furniture may tip over.	Do not allow children to climb on the furniture	The furniture could fall/tip over onto the child.
13		Cords may act as strangulation hazard.	Keep cords away from the baby.	May be strangled and die.
14		Keep away from children.	Keep out of a child's reach/Keep away from children.	Child may be injured (Implied but not essential).
15		Do not leave child unattended	Stay with the child (while they are seated in the highchair).	Child may fall out of seat (Implied but not essential: and be injured).

From: Legislative Affairs
To: Hudgins, Christopher
Subject: OLA Letter Database - 12/23/2019
Date: Monday, December 23, 2019 1:55:20 PM

Legislative Affairs

12/23/2019 has been added

Modify my alert settings | View 12/23/2019 | View OLA Letter Database

Date Entered:	12/23/2019
Date of Incoming:	12/19/2019
From:	Sens. Brown and Blumenthal
Subject:	Magnets
Current Office:	
Status/Comments:	
Open/Closed:	Open
#:	779
Date of Outgoing:	

Last Modified 12/23/2019 1:51 PM by Crockett, David

From: Hudgins, Christopher
To: Boyle, Mary; Klein, Sarah; Feinberg, Jennifer; Mullan, John; Ray, DeWane; Martyak, Joseph
Subject: RE: Letter to CPSC: High Powered Magnets
Date: Friday, December 20, 2019 2:37:49 PM
Attachments: image001.png
image002.png
image003.png
image004.png
image005.png

Perfect
Chris

From: Boyle, Mary
Sent: Friday, December 20, 2019 12:30 PM
To: Hudgins, Christopher ; Klein, Sarah ; Feinberg, Jennifer ; Mullan, John ; Ray, DeWane ; Martyak, Joseph
Subject: RE: Letter to CPSC: High Powered Magnets
We already have a meeting on the calendar for January 14 to discuss the magnets petition so we can use that opportunity to discuss the issues raised in this letter.

From: Hudgins, Christopher
Sent: Friday, December 20, 2019 11:00 AM
To: Klein, Sarah <SKlein@cpsc.gov>; Feinberg, Jennifer <JFeinberg@cpsc.gov>; Mullan, John <GMullan@cpsc.gov>; Boyle, Mary <MBoyle@cpsc.gov>; Ray, DeWane <jray@cpsc.gov>; Martyak, Joseph <JMartyak@cpsc.gov>
Subject: FW: Letter to CPSC: High Powered Magnets
See attached.
Chris

From: Brockington, Alyssa (Brown) [mailto:Alyssa_Brockington@brown.senate.gov]
Sent: Thursday, December 19, 2019 3:09 PM
To: Crockett, David <DCrockett@cpsc.gov>
Cc: Rodriguez, Kate (Brown) <Kate_Rodriguez@brown.senate.gov>; Duggan, Abigail (Brown) <Abigail_Duggan@brown.senate.gov>; Kalonia, Maya (Blumenthal) <Maya_Kalonia@blumenthal.senate.gov>; Figures, Shomari (Brown) <Shomari_Figures@brown.senate.gov>
Subject: Letter to CPSC: High Powered Magnets
Good Afternoon Mr. Crockett,
We hope this email finds you well. Sens. Brown and Blumenthal have co-led a letter the CPSC regarding the health and safety risks of high-powered magnet sets. Please see the scanned correspondence attached. We are also sending a physical copy, which will be mailed out today.
Thank You,
Alyssa

Alyssa R.J. Brockington | U.S. Senator Sherrod Brown (OH) | 202-224-2315
503 Hart Senate Office Building | Washington, DC 20510
Connect with Senator Brown:


Pa


Pa

From:	Fatula, Shannell </O=CPSC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=96ADC207E6754D38B24D74B46A52AE11-SFATULA>
To:	Everyone - Feds Only </O=CPSC/OU=CPSC/cn=Recipients/cn=listEveryoneFeds>
Subject:	Newslog 20-038: CPSC, Carbon Monoxide, Magnet Ingestions and More
Date:	2019/12/26 14:01:06
Priority:	Normal
Type:	Note

1. CPSC IN THE NEWS

Sen. Maria Cantwell Discusses Investigation Into Consumer Product Safety Commission
NPR.org, District of Columbia, December 23, 2019
https://www.npr.org/2019/12/23/790929816/sen-maria-cantwell-discusses-investigation-into-consumer-product-safety-commissi
CPSC Reporting: Best Practices for Investigating Safety Complaints
RetailConsumerProductsLaw.com, District of Columbia, December 23, 2019
https://www.retailconsumerproductslaw.com/2019/12/cpsc-reporting-best-practices-for-investigating-safety-complaints/

2. CARBON MONOXIDE POISONING

Scores suffer poisoning at Christmas mass in France
BigNewsNetwork.com, Dubai Media City, Dubai, UAE, December 26, 2019
https://www.bignewsnetwork.com/news/263509218/scores-suffer-poisoning-at-christmas-mass-in-france

3. MAGNET INGESTIONS

Magnet ingestions by children surge as industry rules relax (CPSC commissioner Elliot Kaye)
Inquirer.com, Philadelphia, Pa., December 25, 2019
https://www.inquirer.com/health/rare-earth-magnet-ingestions-surge-20191226.html

4. TOY SAFETY

New York consumer agency urges federal recall of Dollar Tree doll
DailyPress.com, Newport News, Va., December 24, 2019
https://www.dailypress.com/business/consumer/vp-bz-dollar-tree-recall-20191225-yjtghv7zzjaptfa6n6nq7lftwa-story.html

5. TRAMPOLINE INJURIES

Trampoline-related injuries, broken bones continue to rise

WTHR.com, Indianapolis, Ind., December 25, 2019
https://www.wthr.com/article/trampoline-related-injuries-broken-bones-continue-rise

6. E-BIKES & ELECTRIC SCOOTERS

E-bikes show distinct pattern of severe injuries
KFGO.com, Fargo, N.D., December 25, 2019
https://kfgo.com/news/articles/2019/dec/25/e-bikes-show-distinct-pattern-of-severe-injuries/969439/?refer-section=health

7. ATVS

Driver of ATV killed in crash with Atlanta fire engine
AJC.com, Atlanta, Ga., December 26, 2019
https://www.ajc.com/news/breaking-news/driver-atv-killed-crash-with-atlanta-fire-engine/74RSekxujeyAu9KjGm8YBO/

Shannell M. Fatula
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Bethesda, MD 20814
SFatula@cpsc.gov
(301) 504-7245

cid:image001.png@01D5954D.2BA5BC40

Sender:	Fatula, Shannell </O=CPSC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=96ADC207E6754D38B24D74B46A52AE11-SFATULA>
Recipient:	Everyone - Feds Only </O=CPSC/OU=CPSC/cn=Recipients/cn=listEveryoneFeds>
Sent Date:	2019/12/26 14:00:56
Delivered Date:	2019/12/26 14:01:06
ProgramOffice:	9
RelatedFOIARequest:	360

From:	Fatula, Shannell </O=CPSC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=96ADC207E6754D38B24D74B46A52AE11-SFATULA>
To:	Davis, Patty </O=CPSC/OU=CPSC/cn=Recipients/cn=PDavis>
CC:	Martyak, Joseph </o=CPSC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9bcc6692083b4ad2b9cd3b3878d8d870-JMartyak>
Subject:	Newslog 20-039: Magnets, Infant Sleepers, Recalled Products and More
Date:	2019/12/30 09:58:56
Priority:	Normal
Type:	Note

1. MAGNET INGESTION

Senator urges regulators to take action on ingestion of magnets (Joe Martyak)
WashingtonPost.com, District of Columbia, December 27, 2019
https://www.washingtonpost.com/business/2019/12/27/senator-urges-regulators-take-action-magnet-ingestions/

The Conservative Judiciary's Fatal Attraction to Deregulation (*Zen Magnets v. Consumer Product Safety Commission*)
Prospect.org, District of Columbia, December 27, 2019
https://prospect.org/justice/conservative-judiciary-fatal-attraction-to-deregulation/

Number of children swallowing dangerous magnets surges as industry largely polices itself
WashingtonPost.com, District of Columbia, December 25, 2019
https://www.washingtonpost.com/business/economy/number-of-children-swallowing-dangerous-magnets-surges-as-industry-largely-polices-itself/2019/12/25/77327812-2295-11ea-86f3-3b5019d451db_story.html?arc404=true

2. SAFER SLEEP FOR INFANTS

Building a Better World, Together
ConsumerReports.org, Yonkers, N.Y., December 26, 2019
https://www.consumerreports.org/consumer-protection/building-a-better-world-together-february-2020/

2019 year in review: consumer, public health and environmental highlights (Inadequate infant sleeper recall exposed)

YubaNet.com, Nevada City, Calif., December 26, 2019

https://yubanet.com/life/2019-year-in-review-consumer-public-health-and-environmental-highlights/

3. RECALLED PRODUCTS

Marshalls, TJ Maxx Accused of Selling 19 Recalled Items

HudsonValleyPost.com, Poughkeepsie, N.Y., December 30, 2019
https://hudsonvalleypost.com/marshalls-tj-maxx-accused-of-selling-19-recalled-items/

4. NEW YEAR'S EVE FIREWORKS SAFETY

Officials: Use New Year's Eve fireworks safely
RomeSentinel.com, Albany, N.Y., December 27, 2019
https://romesentinel.com/stories/officials-use-new-years-eve-fireworks-safely,89066

5. WINTER SAFETY

Advice on snowblowers: 'Never stick anything in the machine'
Brookline.WickedLocal.com, Framingham, Mass., December 26, 2019
https://brookline.wickedlocal.com/news/20191226/advice-on-snowblowers-never-stick-anything-in-machine

6. TOY SAFETY

What to do about too many toys
TheRecordHerald.com, Waynesboro, Pa., December 29, 2019
https://www.therecordherald.com/entertainmentlife/20191229/what-to-do-about-too-many-toys

7. E-BIKE ACCIDENTS

E-bike injuries found to result in more internal injuries than for scooters or regular bikes
MedicalXpress.com, Douglas, NA – Isle of Man, Isle of Man, December 27, 2019
https://medicalxpress.com/news/2019-12-e-bike-injuries-result-internal-scooters.html

8. HOVERBOARD

CPSC Warns of Hoverboard Dangers After 1 Caused House Fire in Hurst
DFW.CBSLocal.com, Hurst, Texas, December 26, 2019
https://dfw.cbslocal.com/2019/12/26/cpsc-warns-of-hoverboard-dangers-after-1-caused-house-fire-in-hurst/

9. FIREARM LOCKS & SAFES

Blumenthal, Murphy introduce redundant gun violence prevention measures to solve a problem that doesn't exist
Courant.com, Hartford, Conn., December 29, 2019
https://www.courant.com/opinion/op-ed/hc-op-bartozzi-project-childsafe-1229-20191229-ery6myi53fekdlcc5eq5plbs7i-story.html
Sens. Carper, Coons co-sponsor Safe Gun Storage Act
SCSunTimes.com, Smyrna, Del., December 23, 2019
https://www.scsuntimes.com/news/20191223/sens-carper-coons-co-sponsor-safe-gun-storage-act

10. ATV DEATHS & INJURIES

YEAR END: Young woman's death at ATV park leaves young son, partner behind
NWFDailyNews.com, Fort Walton Beach, Fla., December 29, 2019
https://www.nwfdailynews.com/news/20191229/year-end-young-womanrsquos-death-at-atv-park-leaves-young-son-partner-behind
3 Yale youths injured in Pawnee County ATV crash
TulsaWorld.com, Tulsa, Okla., December 27, 2019
https://www.tulsaworld.com/news/yale-youths-injured-in-pawnee-county-atv-crash/article_e3541cb3-0b40-5060-a0bf-926e6b1288c9.html

11. FIREPLACE SAFETY

It's no song and dance: New chimney sweeping business preaches fireplace safety this winter
IdahoPress.com, Boise, Idaho, December 23, 2019
https://www.idahopress.com/news/local/it-s-no-song-and-dance-new-chimney-sweeping-business/article_6a2e4174-a39b-5e5f-ac91-05797b0609fb.html

12. ARTIFICIAL TURF

'Running out of room': How old turf fields raise potential environmental, health concerns
(CPSC is studying children's exposure to chemicals on rubber tire surfaces at playgrounds)
TheIntell.com, Doylestown, Pa., December 28, 2019
https://www.theintell.com/news/20191228/running-out-of-room-how-old-turf-fields-raise-potential-environmental-health-concerns
Shannell M. Fatula
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cid:image001.png@01D5954D.2BA5BC40

Sender:	Fatula, Shannell </O=CPSC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=96ADC207E6754D38B24D74B46A52AE11-SFATULA>
Recipient:	Davis, Patty </O=CPSC/OU=CPSC/cn=Recipients/cn=PDavis>; Martyak, Joseph </o=CPSC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9bcc6692083b4ad2b9cd3b3878d8d870-JMartyak>

Sent Date:	2019/12/30 09:58:56
ProgramOffice:	9
RelatedFOIARequest:	360

From:	Davis, Patty </O=CPSC/OU=CPSC/CN=RECIPIENTS/CN=PDAVIS>
To:	EVERYONE </o=CPSC/ou=CPSC/cn=Recipients/cn=listEveryone>
Subject:	Newslog 20-039: Magnets, Infant Sleepers and E-Bikes
Date:	2019/12/30 16:28:46
Priority:	Normal
Type:	Note

1. MAGNETS

Senator urges regulators to take action on ingestion of magnets (Joe Martyak)
WashingtonPost.com, Washington, D.C., December 27, 2019
https://www.washingtonpost.com/business/2019/12/27/senator-urges-regulators-take-action-magnet-ingestions/
The Conservative Judiciary's Fatal Attraction to Deregulation (*Zen Magnets v. Consumer Product Safety Commission*)
Prospect.org, Washington, D.C., December 27, 2019
https://prospect.org/justice/conservative-judiciary-fatal-attraction-to-deregulation/
Number of children swallowing dangerous magnets surges as industry largely polices itself
WashingtonPost.com, Washington, D.C., December 25, 2019
https://www.washingtonpost.com/business/economy/number-of-children-swallowing-dangerous-magnets-surges-as-industry-largely-polices-itself/2019/12/25/77327812-2295-11ea-86f3-3b5019d451db_story.html?arc404=true

2. INFANT INCLINED SLEEP PRODUCTS

While They Were Sleeping (CPSC is mentioned starting in the section titled 'A Shroud of Silence')
How a product tied to 73 infant deaths came to market and stayed for a decade, as government and industry knew the risks
ConsumerReports.org, Yonkers, N.Y., December 30, 2019
https://www.consumerreports.org/child-safety/while-they-were-sleeping/

3. E-BIKE

E-bike injuries found to result in more internal injuries than for scooters or regular bikes
MedicalXpress.com, Douglas, NA – Isle of Man, Isle of Man, December 27, 2019
https://medicalxpress.com/news/2019-12-e-bike-injuries-result-internal-scooters.html

Sender:	Davis, Patty </O=CPSC/OU=CPSC/CN=RECIPIENTS/CN=PDAVIS>
Recipient:	EVERYONE </o=CPSC/ou=CPSC/cn=Recipients/cn=listEveryone>
Sent Date:	2019/12/30 16:28:40
Delivered Date:	2019/12/30 16:28:46
ProgramOffice:	9

RelatedFOIARequest:	360

Fatula, Shannell

From: Davis, Patty
Sent: Tuesday, December 31, 2019 11:40 AM
To: EVERYONE
Subject: Newslog 20-040: Magnets, Infant Sleepers, New Years & Fire Safety

1. MAGNETS

Consumer advocates are crucial in protecting children's safety
WashingtonPost.com, Washington, D.C., December 30, 2019
https://www.washingtonpost.com/opinions/consumer-advocates-are-crucial-in-protecting-childrens-safety/2019/12/30/676cf288-28e7-11ea-9cc9-e19cfbc87e51_story.html

Philadelphia mom warns of danger of tiny magnet toys
WPVI, Philadelphia, Pa., December 30, 2019
https://6abc.com/health/philadelphia-mom-warns-of-danger-of-tiny-magnet-toys/5799742/

2. INFANT INCLINED SLEEPERS

Infant Inclined Sleepers: The Rise and Fall of a Dangerous Baby Product
ConsumerReports.org, Yonkers, N.Y., December 30, 2019
https://www.consumerreports.org/product-safety/inclined-sleeper-safety/

3. NEW YEARS SAFETY

Ways to stay safe while ringing in the new year
AJC.com, Atlanta, Ga., December 31, 2019
https://www.ajc.com/news/crime--law/ways-stay-safe-while-ringing-the-new-year/uEsrHWyBInWfwjxK0372lK/

Burn Center urges caution
BlufftonToday.com, Bluffton, S.C., December 30, 2019
https://www.blufftontoday.com/news/20191230/burn-center-urges-caution

4. FIRE SAFETY

VERIFY: Do experts recommend fire blankets in case of fire?
WXIA, Atlanta, Ga., December 31, 2019
https://www.11alive.com/article/news/verify/verify-are-fire-blankets-recommended/85-0021fad7-a637-4892-aa60-68cf08e0d5f7

From:	Davis, Patty </O=CPSC/OU=CPSC/CN=RECIPIENTS/CN=PDAVIS>
To:	EVERYONE </o=CPSC/ou=CPSC/cn=Recipients/cn=listEveryone>
Subject:	Newslog 20-041: Magnets, Winter Safety and Fireworks
Date:	2020/01/02 16:15:58
Priority:	Normal
Type:	Note

1. MAGNETS

Number of kids swallowing neodymium magnets soars since industry killed consumer protections
AmericanLegalNews.com, Lakewood, Colo., January 2, 2020
https://americanlegalnews.com/number-of-kids-swallowing-neodymium-magnets-soars-since-industry-killed-consumer-protections/
Tale of the gut-shredding magnets show where de-regulation zealotry can take us
STLToday.com, St. Louis, Mo., January 1, 2020 (Editorial)
https://www.stltoday.com/opinion/editorial/editorial-tale-of-the-gut-shredding-magnets-shows-where-de/article_c64083d8-a607-5ea7-b1a4-2856c8003e23.html

2. WINTER SAFETY

Warm up to these winter safety tips

USA Today's Modern Wellness Guide (blog), December 31, 2019

https://www.modernwellnessguide.com/winter-safety-home-improvement/warm-up-to-these-winter-safety-tips/#
Winter weather safety
WCMH, Columbus, Ohio, January 1, 2020
http://mms.tveyes.com/PlaybackPortal.aspx?SavedEditID=89a26f2e-44b0-4315-880d-23c16f52440d
Durham residents could get answers after some sickened by carbon monoxide exposure
WRAL, Raleigh-Durham, N.C., January 2, 2020
https://www.wral.com/durham-residents-could-get-answers-after-some-sickened-by-carbon-monoxide-exposure/18863811/
Winter sledding safety
WHTM, Harrisburg, Pa., January 1, 2020
http://mms.tveyes.com/PlaybackPortal.aspx?SavedEditID=5781c5d5-731c-46c2-ae6d-93185d0a6dee
Don't slip a disk or anywhere else
WDJT, Milwaukee, Wis., January 2, 2020
https://www.cbs58.com/news/dont-slip-a-disk-or-anywhere-else

3. FIREWORKS

New Year's reveler in Chico blows off fingers with midnight fireworks celebration
KRCR, Chico, Calif., January 1, 2020
https://krcrtv.com/news/butte-county/new-years-reveler-in-chico-blows-off-fingers-with-midnight-fireworks-celebration
Fire district warns against dangers of fireworks
LehighAcresCitizen.com, Lehigh Acres, Fla., January 1, 2020
http://www.lehighacrescitizen.com/page/content.detail/id/545313/Fire-district-warns-against-dangers-of-fireworks.html

Sender:	Davis, Patty </O=CPSC/OU=CPSC/CN=RECIPIENTS/CN=PDAVIS>
Recipient:	EVERYONE </o=CPSC/ou=CPSC/cn=Recipients/cn=listEveryone>
Sent Date:	2020/01/02 16:15:53
Delivered Date:	2020/01/02 16:15:58
ProgramOffice:	9
RelatedFOIARequest:	360

From:	Fatula, Shannell </O=CPSC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=96ADC207E6754D38B24D74B46A52AE11-SFATULA>
To:	Davis, Patty </O=CPSC/OU=CPSC/cn=Recipients/cn=PDavis>
CC:	Martyak, Joseph </o=CPSC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9bcc6692083b4ad2b9cd3b3878d8d870-JMartyak>
Subject:	Newslog 20-043: Anchor It!, Recalls, Magnets and More
Date:	2020/01/07 09:50:49
Priority:	Normal
Type:	Note

1. ANCHOR IT!

IKEA to Pay $46 Million to Parents of Child Killed by Falling Dresser
WSJ.com, District of Columbia, January 7, 2020
(attached)
Ikea to Pay $46 Million Settlement to Parents of Calif. Toddler Killed by a Falling Dresser
People.com, N.Y., January 7, 2020
https://people.com/human-interest/ikea-pay-family-of-toddler-killed-dresser-46-million-dollars/
Ikea Will Pay $46 Million to Parents of Toddler Crushed to Death by a Dresser (Elliot F. Kaye)
NYTimes.com, N.Y., January 6, 2020
(attached)
IKEA will pay $46M to parents of tot killed in dresser tip-over
NYPost.com, N.Y., January 6, 2020
https://nypost.com/2020/01/06/ikea-will-pay-46m-to-parents-of-tot-killed-in-dresser-tip-over/

2. RECALLS

College student on a mission to warn families of possible hidden dangers in their homes (Joe Martyak)
CBS News, Los Angeles, Calif., January 2, 2020
https://www.winknews.com/2020/01/02/college-student-on-a-mission-to-warn-families-of-possible-hidden-dangers-in-their-homes/

3. MAGNETS

Editorial: Tale of the gut-shredding magnets shows where de-regulation zealotry can take us.
STLToday.com, St. Louis, Mo., January 1, 2020
https://www.stltoday.com/opinion/editorial/editorial-tale-of-the-gut-shredding-magnets-shows-where-de/article_c64083d8-a607-5ea7-b1a4-2856c8003e23.html

4. TOXIC TOYS

Manufacturers must do more to keep toxins out of our toys
USPIRG.org, Denver, Colo., January 3, 2020
https://uspirg.org/blogs/blog/usp/manufacturers-must-do-more-keep-toxins-out-our-toys

5. LITHIUM-ION BATTERIES (CELLPHONES)

Don't go to bed with a charging cellphone
TheStar.com.my, 100062 Beijing, China, January 6, 2020
https://www.thestar.com.my/tech/tech-news/2020/01/06/dont-go-to-bed-with-a-charging-cellphone

6. PAINTBALL, BB, PELLET GUNS

City man arrested in shooting arraigned on enhanced charge, released on bond
CortlandVoice.com, N.Y., January 6, 2020
https://cortlandvoice.com/2020/01/06/city-man-arrested-in-shooting-arraigned-on-enhanced-charge-released-on-bond/
Paintball injuries; Journal of Pediatrics - eye injuries amongst children linked to paintball, BB and pellet guns jumped 30% from 1990 & 2016)
TVEyes.com WFOX, Jacksonville, January 3, 2020
http://mms.tveyes.com/PlaybackPortal.aspx?SavedEditID=39da38ab-18ce-436e-94a9-4c42d008e2ed
Shannell M. Fatula
Administrative Officer
U.S. Consumer Product Safety Commission
Office of Communication, Room 717
4330 East West Highway 7th Floor
Bethesda, MD 20814
SFatula@cpsc.gov
(301) 504-7245

cid:image001.png@01D5954D.2BA5BC40

Sender:	Fatula, Shannell </O=CPSC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=96ADC207E6754D38B24D74B46A52AE11-SFATULA>
Recipient:	Davis, Patty </O=CPSC/OU=CPSC/cn=Recipients/cn=PDavis>; Martyak, Joseph </o=CPSC/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=9bcc6692083b4ad2b9cd3b3878d8d870-JMartyak>
Sent Date:	2020/01/07 09:50:49
ProgramOffice:	9
RelatedFOIARequest:	360

From:	Fatula, Shannell </O=CPSC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=96ADC207E6754D38B24D74B46A52AE11-SFATULA>
To:	Everyone - Feds Only </O=CPSC/OU=CPSC/cn=Recipients/cn=listEveryoneFeds>
Subject:	Newslog 20-044: Anchor It!, Magnets, SHARE Information Act and More
Date:	2020/01/10 17:08:31
Priority:	Normal
Type:	Note

1. ANCHOR IT!

Holidays were bittersweet for Sterling mom
Telegram.com, Worcester, Mass., January 10, 2020
https://www.telegram.com/item/20200110/holidays-were-bittersweet-for-sterling-mom
Going Old School: CPSC Issues Rare Safety Warning on Dressers (Acting Chairman Bob Adler)
NatLawReview.com, Western Springs, Ill., January 9, 2020
https://www.natlawreview.com/article/going-old-school-cpsc-issues-rare-safety-warning-dressers
Is Ikea doing enough to make sure its furniture stops killing kids?
FastCompany.com, N.Y., January 8, 2020
https://www.fastcompany.com/90449790/is-ikea-doing-enough-to-make-sure-its-furniture-stops-killing-kids?partner=rss
Ikea agrees to pay $46 million after tipped dresser kills toddler
USAToday.com, N.Y., January 7, 2020
https://www.usatoday.com/story/news/investigations/2020/01/06/ikea-settles-46-million-after-dresser-kills-child/2821182001/

2. MAGNETS

Uptick in magnetic bead removal surgeries in kids prompts warning
NewsChannel5.com, Nashville, Tenn., January 9, 2020
https://www.newschannel5.com/news/uptick-in-magnetic-bead-removal-surgeries-in-kids-prompts-warning
S.C. family warns others after 8-year-old swallows magnets: 'Other kids are not so lucky'
WECT.com, Wilmington, N.C., January 8, 2020
https://www.wect.com/2020/01/09/sc-family-warns-others-after-year-old-swallows-magnets-other-kids-are-not-so-lucky/

3. SHARE INFORMATION ACT

New Bill Would Allow Prompt Public Disclosure of Product Safety Risks – The SHARE Information Act seeks to change a decades-old law that keeps consumers in the dark about dangers

ConsumerReports.org, Yonkers, N.Y., January 9, 2020
https://www.consumerreports.org/product-safety/new-bill-would-allow-prompt-public-disclosure-of-product-safety-risks-share-information-act/

4. TOY SAFETY

Toy-Related Injuries Hurt Over 200,000 Children Each Year: Tips for Parents
NewYork.LegalExaminer.com, Tampa, Fla., January 8, 2020
https://newyork.legalexaminer.com/home-family/toy-related-injuries-hurt-over-200000-children-each-year-tips-for-parents/

5. GENERATOR SAFETY

Tips for safely using your portable generator and utility plans
ABC12.com, Flint, Mich., January 9, 2020
https://www.abc12.com/content/news/566857691.html

6. E-SCOOTER

E-Scooter Injuries Continue to Climb
ConsumerReports.org, Yonkers, N.Y., January 8, 2020
https://www.consumerreports.org/electric-scooters/e-scooter-injuries-continue-to-climb/

7. LITHIUM-ION BATTERIES

Be a Good Battery Steward, Don't Charge Your Phone in Bed
Governing.com, Folsom, Calif., January 8, 2020
https://www.governing.com/news/headlines/Be-a-Good-Battery-Steward-Dont-Charge-Your-Phone-in-Bed.html

Shannell M. Fatula
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4330 East West Highway 7th Floor
Bethesda, MD 20814
SFatula@cpsc.gov
(301) 504-7245

cid:image001.png@01D5954D.2BA5BC40

Sender:	Fatula, Shannell </O=CPSC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=96ADC207E6754D38B24D74B46A52AE11-SFATULA>
Recipient:	Everyone - Feds Only </O=CPSC/OU=CPSC/cn=Recipients/cn=listEveryoneFeds>
Sent Date:	2020/01/10 17:08:24

Delivered Date:	2020/01/10 17:08:31
ProgramOffice:	9
RelatedFOIARequest:	360

From:	Fatula, Shannell </O=CPSC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=96ADC207E6754D38B24D74B46A52AE11-SFATULA>
To:	Everyone - Feds Only </O=CPSC/OU=CPSC/cn=Recipients/cn=listEveryoneFeds>
Subject:	Newslog 20-045: Anchor It!, Magnets, Section 6(b) and More
Date:	2020/01/14 15:58:53
Priority:	Normal
Type:	Note

1. ANCHOR IT!

A dresser sold by major retailers could tip over and hurt a child. But a recall hasn't been issued.
KATC.com, Lafayette, La., January 13, 2020
https://www.katc.com/news/national/a-dresser-sold-by-major-retailers-could-tip-over-and-hurt-a-child-but-a-recall-hasnt-been-issued
IKEA to give $46 million pay-out to family of toddler killed by recalled dresser
DeZeen.com, London N1 5QJ, January 13, 2020
https://www.dezeen.com/2020/01/13/ikea-settlement-recalled-malm-dresser/

2. MAGNETS

Magnetic Bead Toys Pose Danger to Children
WilliamsonSource.com, Franklin, Tenn., January 13, 2020
https://williamsonsource.com/magnetic-bead-toys-pose-danger-to-children/

3. SECTION 6(b)

Product recalls under Trump fall to lowest level in 16 years, but new signs emerge of a tougher regulator (Joe Martyak & Robert Adler)
WashingtonPost.com, District of Columbia, January 13, 2020
(attached)

The U.S. government knows some household items aren't safe but won't tell you. Here's why.

Chicago.SunTimes.com, Chicago, Ill., January 10, 2020

https://chicago.suntimes.com/2020/1/10/21058713/consumer-product-safety-commission-section6b-ikea-dresser-fisher-price-inclined-sleeper-recalls

4. SHARE INFORMATION ACT

Lifting Inaccurate CPSC Disclosures Legislation
NatLawReview.com, Western Springs, Ill., January 13, 2020
https://www.natlawreview.com/article/lifting-inaccurate-cpsc-disclosures-legislation

5. GENERATOR SAFETY

Consumer Reports: Buy a safer generator
KY3.com, Springfield, Mo., January 13, 2020
https://www.ky3.com/content/news/Consumer-Reports-Buy-a-safer-generator-566953211.html
Shannell M. Fatula
Administrative Officer
U.S. Consumer Product Safety Commission
Office of Communication, Room 717
4330 East West Highway 7th Floor
Bethesda, MD 20814
SFatula@cpsc.gov
(301) 504-7245

cid:image001.png@01D5954D.2BA5BC40

Sender:	Fatula, Shannell </O=CPSC/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=96ADC207E6754D38B24D74B46A52AE11-SFATULA>
Recipient:	Everyone - Feds Only </O=CPSC/OU=CPSC/cn=Recipients/cn=listEveryoneFeds>
Sent Date:	2020/01/14 15:58:42
Delivered Date:	2020/01/14 15:58:53
ProgramOffice:	9
RelatedFOIARequest:	360

From: Kentoff, Maureen
To: Agenda Planning
Subject: Agenda for this week
Date: Thursday, January 09, 2020 8:14:17 AM
Attachments: FOUO_BP_Status 1.7.20.pdf
ATT00001.htm

See attached - thanks!

Page 002

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information Act

From: Schall, Brandon
To: Baiocco, Dana; Yahr, Dorothy; Asplen, Michael
Subject: Canceled: Meeting With Nancy Nord
Importance: High

Regarding: On December 26, 2019, the Washington Post published a story by Todd Frankel that discussed, in a rather negative manner, ongoing efforts at ASTM to draft a safety standard for adult magnet sets with small loose magnets.

I am chairing the ASTM subcommittee that is undertaking this activity. The CPSC staff has been involved, although they have made clear that they do not believe that any standard, short of a ban, will adequately address the risk. And, as no surprise, the story has generated interest in the CPSC's activities with respect to this product from elements on the Hill.

Given both the tenor of the story and the interest it has elicited, I am requesting a meeting with you to discuss the background of the ASTM activities and plans for moving forward.

From:	Mills, Alberta E.
To:	Adler, Robert; Klein, Sarah; Feinberg, Jennifer; Kentoff, Maureen; Kaye, Elliot; Fong-Swamidoss, Jana; Midgett, Jonathan; Steinle, Allison; Baiocco, Dana; Asplen, Michael; Yahr, Dorothy; Schall, Brandon; Feldman, Peter; Tanzer, Theodore
Cc:	Mullan, John; Hampshire, Melissa; Pollitzer, Patricia; Mosheim, Abioye; Murphy, Mary; Boyle, Mary; Ray, DeWane; Summitt, Monica; Covell, Michelle; McGoogan, Stephen; Boniface, Duane; Recht, Joel; Kaye, Robert; Tarnoff, Howard; Sultan, Jennifer; Martyak, Joseph; Davis, Patty; Hudgins, Christopher; Mathis, Shelby; Murchison, Keisha
Subject:	Federal Court Litigation Report - OGC - Div. of Enforcement and Information - December 31, 2019 (FOR OFFICIAL USE ONLY) (b)(5)
Date:	Tuesday, December 31, 2019 5:16:07 PM
Attachments:	Federal Court Litigation Status Report - OGC - (b)(5) Dec 31 2019.pdf

Good afternoon,

Please find attached the following report:

Federal Court Litigation Report – Office of the General Counsel – Division of Enforcement and Information (b)(5)

Paper copies will not be distributed.

Thank you,

Alberta E. Mills
Commission Secretary
U.S. Consumer Product Safety Commission
Office of the General Counsel
Division of the Secretariat
amills@cpsc.gov
301-504-7479

Page 006

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information Act

Page 007

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information Act

Page 008

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information Act

Page 009

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information Act

Page 010

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information Act

Page 011

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information Act

Page 012

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information Act

Page 013

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information Act

From: Baiocco, Dana
To: Mullan, John
Subject: FW: request for meeting
Date: Thursday, January 09, 2020 2:24:42 PM

---

fyi

From: Baiocco, Dana
Sent: Thursday, January 09, 2020 2:24 PM
To: 'Nancy A. Nord' <nnord@ofwlaw.com>
Cc: Yahr, Dorothy <DYahr@cpsc.gov>; Schall, Brandon <BSchall@cpsc.gov>; Baiocco, Dana <DBaiocco@cpsc.gov>
Subject: RE: request for meeting

HI Nancy – I understand that Brandon found a good date to satisfy your meeting request. However, I have discussed your request with our General Counsel given that the subject matter at issue relates to magnets, which are at the center of pending litigation. I have been advised that it would be most prudent to postpone our discussion until that litigation is resolved. I agree with that advice and therefore must postpone our meeting until a more appropriate time.

For us to have a substantive discussion as you propose below, it would necessarily require me to understand the nature and background of Staff's position to which you refer and to then understand your position, which I presume from your email below is conflicting. That puts me in a position of having to evaluate facts and issues in a matter that may later be brought before the Commission given the pending litigation. Indeed, the Court in this particular litigation has already opined on the risks involved when a Commissioner makes or appears to make findings or determinations on a matter that may inevitably come before it.

Thank you for reaching out to me for my input. I do appreciate it.

Dana

From: Nancy A. Nord [mailto:nnord@ofwlaw.com]
Sent: Monday, January 06, 2020 6:28 PM
To: Baiocco, Dana <DBaiocco@cpsc.gov>
Cc: Yahr, Dorothy <DYahr@cpsc.gov>; Schall, Brandon <BSchall@cpsc.gov>
Subject: RE: request for meeting

Thanks so much. I will look forward to hearing from Brandon.

Nancy

From: Baiocco, Dana <DBaiocco@cpsc.gov>

Sent: Monday, January 06, 2020 5:46 PM
To: Nancy A. Nord <nnord@ofwlaw.com>
Cc: Yahr, Dorothy <DYahr@cpsc.gov>; Schall, Brandon <BSchall@cpsc.gov>
Subject: [EXTERNAL] RE: request for meeting

Hello Nancy. Thursday won't work but Brandon will reach out to you about getting a workable date/time.

Thanks. Dana

From: Nancy A. Nord [mailto:nnord@ofwlaw.com]
Sent: Monday, January 06, 2020 4:58 PM
To: Baiocco, Dana <DBaiocco@cpsc.gov>
Cc: Yahr, Dorothy <DYahr@cpsc.gov>
Subject: request for meeting

Dear Dana, On December 26, 2019, the Washington Post published a story by Todd Frankel that discussed, in a rather negative manner, ongoing efforts at ASTM to draft a safety standard for adult magnet sets with small loose magnets. I am chairing the ASTM subcommittee that is undertaking this activity. The CPSC staff has been involved, although they have made clear that they do not believe that any standard, short of a ban, will adequately address the risk. And, as no surprise, the story has generated interest in the CPSC's activities with respect to this product from elements on the Hill.

Given both the tenor of the story and the interest it has elicited, I am requesting a meeting with you to discuss the background of the ASTM activities and plans for moving forward. I would appreciate the opportunity to meet with you at your earliest convenience sometime in the next two weeks. I will be at the agency on Thursday afternoon so that 3 or 3:30 on Thursday would work well for me but I am happy to meet whenever it is convenient. Thank you so much.

Nancy

Nancy A. Nord
OFW Law
2000 Pennsylvania Avenue, NW
Suite 3000
Washington, DC 20006
Office: (202) 789-1212
Direct: (b)(6)

*****!!! Unless otherwise stated, any views or opinions expressed in this e-mail (and any attachments) are solely those of the author and do not necessarily represent those of the U.S. Consumer Product Safety Commission. Copies of product recall and product safety information can be sent to you automatically via Internet e-mail, as they are released by CPSC. To subscribe or unsubscribe to this service go to the following web page: http://www.cpsc.gov/en/Newsroom/Subscribe *****!!!

From: Baiocco, Dana
To: Yahr, Dorothy; Schall, Brandon
Subject: FW: request for meeting
Date: Monday, January 06, 2020 5:44:51 PM

Do either of you have

(b)(5)

Thanks. Dana

From: Nancy A. Nord [mailto:nnord@ofwlaw.com]
Sent: Monday, January 06, 2020 4:58 PM
To: Baiocco, Dana <DBaiocco@cpsc.gov>
Cc: Yahr, Dorothy <DYahr@cpsc.gov>
Subject: request for meeting

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Nancy

Nancy A. Nord
OFW Law
2000 Pennsylvania Avenue, NW
Suite 3000
Washington, DC 20006
Office: (202) 789-1212
Direct: (b)(6)

From: Baiocco, Dana
To: Mullan, John
Cc: Yahr, Dorothy; Schall, Brandon
Subject: FW: request for meeting
Date: Wednesday, January 08, 2020 3:30:34 PM

Hi Gib. Please see attached below.

My office scheduled a meeting as requested and put out the notice consistent with our meeting/notice policy. However, before I proceed, I wanted to get your opinion

(b)(5)

Please let me know your thoughts. Thanks. Dana

From: Nancy A. Nord [mailto:nnord@ofwlaw.com]
Sent: Monday, January 06, 2020 4:58 PM
To: Baiocco, Dana <DBaiocco@cpsc.gov>
Cc: Yahr, Dorothy <DYahr@cpsc.gov>
Subject: request for meeting

Dear Dana, On December 26, 2019, the Washington Post published a story by Todd Frankel that discussed, in a rather negative manner, ongoing efforts at ASTM to draft a safety standard for adult magnet sets with small loose magnets. I am chairing the ASTM subcommittee that is undertaking this activity. The CPSC staff has been involved, although they have made clear that they do not believe that any standard, short of a ban, will adequately address the risk. And, as no surprise, the story has generated interest in the CPSC's activities with respect to this product from elements on the Hill.

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Nancy

Nancy A. Nord
OFW Law
2000 Pennsylvania Avenue, NW
Suite 3000
Washington, DC 20006
Office: (202) 789-1212
Direct: (b)(6)

From: Baiocco, Dana
To: Mullan, John
Cc: Yahr, Dorothy; Schall, Brandon; Asplen, Michael
Subject: Fwd: [EXTERNAL] RE: request for meeting
Date: Friday, January 10, 2020 8:42:56 AM

(b)(5)

Thanks. Dana

Commissioner Dana Baiocco
U.S. Consumer Product Safety Commission
4330 East West Hwy., Suite 720
Bethesda, MD 20814
O: 301-504-7738
DBaiocco@cpsc.gov
www.cpsc.gov

Sent from my iPhone

Begin forwarded message:

From: "Nancy A. Nord" <nnord@ofwlaw.com>
Date: January 9, 2020 at 9:39:48 PM EST
To: "Baiocco, Dana" <DBaiocco@cpsc.gov>
Cc: "Yahr, Dorothy" <DYahr@cpsc.gov>, "Schall, Brandon" <BSchall@cpsc.gov>
Subject: Re: [EXTERNAL] RE: request for meeting

Dana, thanks for your note. To clarify, I do not wish to discuss the issues that are on appeal from the Zen litigation. Those issues deal with 1) whether the commission acted in an arbitrary and capricious manner in overturning the ALJ's decision and 2) whether Acting Chairman Adler's public statements showed a closed mind on this issue, thereby precluding a fair hearing before an impartial tribunal. These are not the issues I wish to talk with you about. Nor do I represent Zen Magnets, the litigant; rather I am counsel to the Magnet Safety Association (of which Zen is a member but certainly not the only one).

Instead, I want to discuss with you the activity going on at ASTM to develop a standard relating to the marketing, labeling, packaging and warnings for small rare earth magnets. The WAPO story suggested that the process was being

conducted in a manner that did not allow for meaningful consumer input and that suggestions by certain stakeholders were being ignored. I was mentioned specifically in the article in a way that called my integrity into question. I was hoping to talk with you about the ASTM process, the status of the voluntary standards development activity, and plans for implementing the voluntary standard assuming it is finalized. These implementation efforts will necessarily involve the commission to be successful.

I am puzzled that you, or the GC, think this would raise issues that are relevant to the appeal and , hence, that are inappropriate for discussion. Obviously, nothing in the commission's rules precludes a commissioner from meeting with a member of the public about an issue that may be subject to rulemaking or enforcement activity in the future. In this case, we are seeking a solution to a problem that the commission has been grappling with for a decade and which, to advance the safety goal we seek, we will need the commissioners to be educated on that solution. Waiting for the litigation to conclude before even discussing the problem—which will remain no matter how the appeal is resolved—does nothing besides continue to put consumers at risk.

I do hope that you will reconsider and grant the request for a meeting.

Nancy

> On Jan 9, 2020, at 2:24 PM, Baiocco, Dana <DBaiocco@cpsc.gov> wrote:
>
> HI Nancy – I understand that Brandon found a good date to satisfy your meeting request. However, I have discussed your request with our General Counsel given that the subject matter at issue relates to magnets, which are at the center of pending litigation. I have been advised that it would be most prudent to postpone our discussion until that litigation is resolved. I agree with that advice and therefore must postpone our meeting until a more appropriate time.
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>
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>
> Dana

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Sent: Monday, January 06, 2020 6:28 PM
To: Baiocco, Dana <DBaiocco@cpsc.gov>
Cc: Yahr, Dorothy <DYahr@cpsc.gov>; Schall, Brandon <BSchall@cpsc.gov>
Subject: RE: request for meeting

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Cc: Yahr, Dorothy <DYahr@cpsc.gov>; Schall, Brandon <BSchall@cpsc.gov>
Subject: [EXTERNAL] RE: request for meeting

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Cc: Yahr, Dorothy <DYahr@cpsc.gov>
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Nancy

Nancy A. Nord
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Office: (202) 789-1212
Direct: (b)(6)

Email secured by Check Point

From: Legislative Affairs
To: Schall, Brandon
Subject: OLA Letter Database - 1/06/2020
Date: Monday, January 06, 2020 1:40:17 PM

Legislative Affairs

1/06/2020 has been added

Modify my alert settings | View 1/06/2020 | View OLA Letter Database

Date Entered:	1/06/2020
Date of Incoming:	12/27/2019
From:	Sen. Klobuchar
Subject:	Magnets
Current Office:	
Status/Comments:	
Open/Closed:	Open
#:	782
Date of Outgoing:	

Last Modified 1/6/2020 1:36 PM by Crockett, David

From: Legislative Affairs
To: Schall, Brandon
Subject: OLA Letter Database - 12/23/2019
Date: Monday, December 23, 2019 1:55:20 PM

Legislative Affairs

12/23/2019 has been added

Modify my alert settings | View 12/23/2019 | View OLA Letter Database

Date Entered:	12/23/2019
Date of Incoming:	12/19/2019
From:	Sens. Brown and Blumenthal
Subject:	Magnets
Current Office:	
Status/Comments:	
Open/Closed:	Open
#:	779
Date of Outgoing:	

Last Modified 12/23/2019 1:51 PM by Crockett, David

From: Legislative Affairs
To: Asplen, Michael
Subject: OLA Letter Database
Date: Monday, December 23, 2019 4:00:19 PM

Legislative Affairs

OLA Letter Database - Daily Summary

Modify my alert settings | View OLA Letter Database

Title		Modified	Modified by	
12/23/2019		12/23/2019 1:51 PM	Crockett, David	New!
Date Entered	12/23/2019			
Date of Incoming	12/19/2019			
From	Sens. Brown and Blumenthal			
Subject	Magnets			
Current Office				
Status/Comments				
Open/Closed	Open			
#	779			
Date of Outgoing				
12/23/2019		12/23/2019 2:12 PM	Crockett, David	New!
Date Entered	12/23/2019			
Date of Incoming	12/20/2019			
From	Sen. Klobuchar and Reps. McCollum, Emmer, Craig, Phillips, and Stauber			
Subject	Lead contaminated toys			
Current Office				
Status/Comments				
Open/Closed	Open			
#	780			
Date of Outgoing				

From: Legislative Affairs
To: Asplen, Michael
Subject: OLA Letter Database
Date: Monday, January 06, 2020 4:00:17 PM

Legislative Affairs

OLA Letter Database - Daily Summary

Modify my alert settings | View OLA Letter Database

Title		Modified	Modified by	
1/06/2020		1/6/2020 1:34 PM	Crockett, David	New!
Date Entered	1/06/2020			
Date of Incoming	12/22/2019			
From	Sen. Schumer			
Subject	TJX Companies re Recalls			
Current Office				
Status/Comments	Acting Chairman Adler was cc'd.			
Open/Closed	Closed			
#	781			
Date of Outgoing				
1/06/2020		1/6/2020 1:36 PM	Crockett, David	New!
Date Entered	1/06/2020			
Date of Incoming	12/27/2019			
From	Sen. Klobuchar			
Subject	Magnets			
Current Office				
Status/Comments				
Open/Closed	Open			
#	782			
Date of Outgoing				

From:	Nancy A. Nord
To:	Schall, Brandon
Cc:	Yahr, Dorothy
Subject:	RE: request for meeting
Date:	Tuesday, January 07, 2020 12:13:35 PM

Brandon, that works well. Thank you and see you then.

From: Schall, Brandon <BSchall@cpsc.gov>
Sent: Tuesday, January 07, 2020 11:47 AM
To: Nancy A. Nord <nnord@ofwlaw.com>
Cc: Yahr, Dorothy <DYahr@cpsc.gov>
Subject: [EXTERNAL] RE: request for meeting

Good Morning Nancy,

Thank you for reaching out. How does Tuesday, January 21, at Noon work for your schedule?

Best,
Brandon

Brandon M. Schall
Counsel
Office of Commissioner Dana Baiocco
U.S. Consumer Product Safety Commission
O: 301.504.7541 | M: 202.329.3373

From: Nancy A. Nord [mailto:nnord@ofwlaw.com]
Sent: Monday, January 06, 2020 6:28 PM
To: Baiocco, Dana <DBaiocco@cpsc.gov>
Cc: Yahr, Dorothy <DYahr@cpsc.gov>; Schall, Brandon <BSchall@cpsc.gov>
Subject: RE: request for meeting

Thanks so much. I will look forward to hearing from Brandon.

Nancy

From: Baiocco, Dana <DBaiocco@cpsc.gov>
Sent: Monday, January 06, 2020 5:46 PM
To: Nancy A. Nord <nnord@ofwlaw.com>
Cc: Yahr, Dorothy <DYahr@cpsc.gov>; Schall, Brandon <BSchall@cpsc.gov>
Subject: [EXTERNAL] RE: request for meeting

Hello Nancy. Thursday won't work but Brandon will reach out to you about getting a workable date/time.

Thanks. Dana

From: Nancy A. Nord [mailto:nnord@ofwlaw.com]
Sent: Monday, January 06, 2020 4:58 PM
To: Baiocco, Dana <DBaiocco@cpsc.gov>
Cc: Yahr, Dorothy <DYahr@cpsc.gov>
Subject: request for meeting

Dear Dana, On December 26, 2019, the Washington Post published a story by Todd Frankel that discussed, in a rather negative manner, ongoing efforts at ASTM to draft a safety standard for adult magnet sets with small loose magnets. I am chairing the ASTM subcommittee that is undertaking this activity. The CPSC staff has been involved, although they have made clear that they do not believe that any standard, short of a ban, will adequately address the risk. And, as no surprise, the story has generated interest in the CPSC's activities with respect to this product from elements on the Hill.

Given both the tenor of the story and the interest it has elicited, I am requesting a meeting with you to discuss the background of the ASTM activities and plans for moving forward. I would appreciate the opportunity to meet with you at your earliest convenience sometime in the next two weeks. I will be at the agency on Thursday afternoon so that 3 or 3:30 on Thursday would work well for me but I am happy to meet whenever it is convenient. Thank you so much.

Nancy

Nancy A. Nord
OFW Law
2000 Pennsylvania Avenue, NW
Suite 3000
Washington, DC 20006
Office: (202) 789-1212
Direct: (b)(6)

From:	Martyak, Joseph
To:	Adler, Robert; Baiocco, Dana; Feldman, Peter; Kaye, Elliot
Cc:	Klein, Sarah; Feinberg, Jennifer; Kentoff, Maureen; Yahr, Dorothy; Asplen, Michael; Schall, Brandon; Tanzer, Theodore; Fong-Swamidoss, Jana; Midgett, Jonathan; Steinle, Allison; Boyle, Mary; Ray, DeWane; Mullan, John; Kaye, Robert; Boniface, Duane
Subject:	WASH POST Magnet Ingestion -
Date:	Thursday, December 26, 2019 1:35:48 PM
Attachments:	Magnet_Ingestion.pdf

Greetings, all,

You will see in today's newslog an article by Todd Frankel about magnets, CPSC, and the voluntary standards process. In case you missed it, I thought you would be interested in seeing the layout, prominent left column front page that jumps to a full page article.

We indicated that "we declined to comment" since we had nothing to add on the record to the status of things at this point.

Joe

Joe Martyak
Director of Communications
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, Maryland 20814

(o) 301.504.7599
(m)703.403.1111

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The Washington Post

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THURSDAY, DECEMBER 26, 2019 · $2

Magnet ingestions surge as rules relax

Children at risk for grave injuries while industry largely regulates itself

BY TODD C. FRANKEL

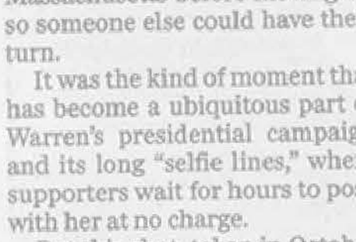
The number of children ingesting rare-earth magnets — powerful tiny balls that are a popular desk toy and can shred a child's intestines — has skyrocketed in the three years since courts blocked the efforts of federal regulators to force changes to the industry, which largely holds the power to regulate itself.

The nation's poison control centers are on track to record six times more magnet ingestions — totaling nearly 1,600 cases — this year than in 2016, when a federal court first sided with industry to lift the Consumer Product Safety Commission's four-year ban on the product. Medical researchers say the only explanation for the spike is the return of these unusually strong magnets to the market after the court ruling.

Now, with the CPSC largely sidelined, magnet industry officials have launched a new effort to prevent product injuries and deaths through voluntary safety standards. Used for thousands of consumer products, these voluntary standards are supposed to reflect a balance between business and safety interests.

But during the creation of voluntary standards for magnets, the priorities of safety groups and regulators have been drowned out by the desires of manufacturers, who often decide which safety

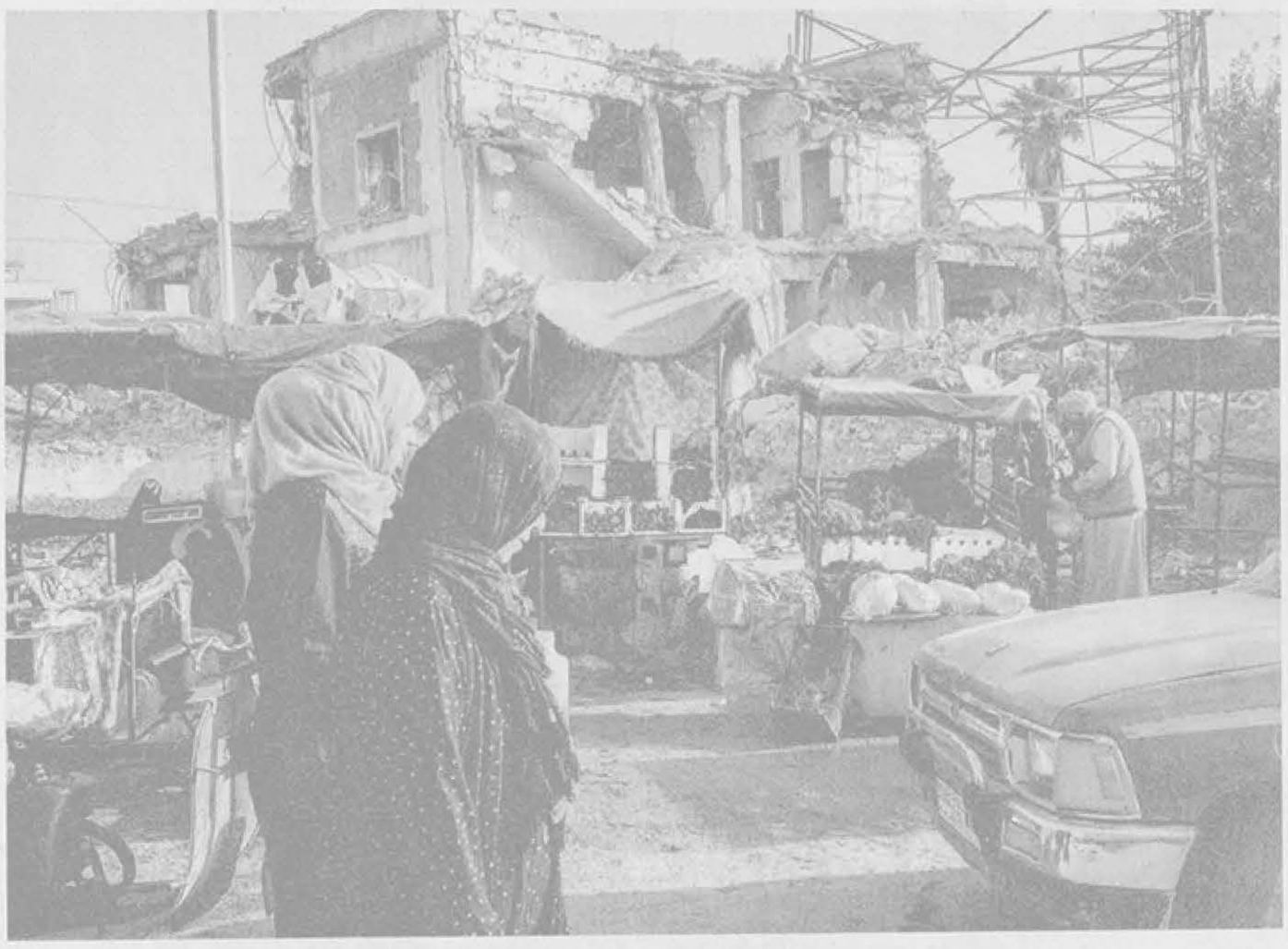
SEE MAGNETS ON A4



ANTHONY CAMERA

Rare-earth magnets, a popular desk toy, can severely damage children's intestines. A court in 2016 overturned a ban on them.

AFTER THE CALIPHATE



A PIVOTAL MOMENT

ISIS regroups in ungoverned spaces, aiming for a rebound

STORY BY LIZ SLY
PHOTOS BY ALICE MARTINS
IN KULAJO, IRAQ

Women pass a produce stall in Raqqa, Syria, once the Islamic State's capital.

In caves tucked into craggy cliffs and tunnels dug deep beneath the desert, the remnants of a vanquished army are converging for what they hope will be the next chapter in their battle for an Islamic State.

Hundreds and perhaps thousands of Islamic State fighters have made their way over recent months into a stretch of sparsely populated territory spanning the disputed border between the Kurdistan region and the rest of Iraq, according to U.S. and Kurdish officials.

Off limits to Kurdish and Iraqi security forces because of historic disputes over who should control it, this area of twisting river valleys dense with vegetation has attracted the biggest known concentration of Islamic State fighters since they lost control of the last village of their once vast caliphate in eastern Syria in March.

In recent weeks, they have been stepping up their attacks, focused on an area of northeastern Iraq in the province of Diyala near the border with Iran, carrying out ambushes by night and firing mortars. Grasses taller than men provide cover for snipers who sneak up on checkpoints and outposts. Government neglect and long-standing grievances foster a measure of sympathy among local residents.

"They have good military plans, they attack when you don't expect them, and they are posing a real threat to people's lives," said Maj. Aram Darwani, the commander of Kurdish peshmerga military forces in the area.

Across many parts of the vast territory it once controlled, the Islamic State is scrambling to reassert its presence in a setting that is no longer as welcoming as it once was. Militant fighters who escaped from the battlefield are assembling in ungoverned spaces such as the no man's land between areas controlled by Kurdish and Iraqi forces. Others are lying low as so-called sleeping cells in cities such as Raqqa in

SEE ISIS ON A10

Threats, mistrust after Ukraine

TRADITIONAL POLICY EXPERTISE A TARGET

Public spite and purges for differing with Trump

BY GREG MILLER AND GREG JAFFE

The new Russia adviser at the White House — the third in just six months — has no meaningful background on the subject. The only expert on Ukraine has never spoken with President Trump, only been mocked by him publicly.

The U.S. Embassy in Kyiv will soon be without its highest-ranking diplomat for the second time in a year, as another ambassador departs after being undermined by the U.S. president and his personal attorney.

The CIA analyst who triggered the impeachment inquiry continues to work on issues relating to Russia and Ukraine, but when threats against him spike — often seemingly spurred by presidential tweets — he is driven to and from work by armed security officers.

Having been impeached by the House, Trump faces trial in the Senate on charges that he abused the power of his office and sought to obstruct Congress. But the jarring developments over the past three months have also exposed the extent to which the

SEE UKRAINE ON A14

U.S. explores information warfare to check Russia

BY ELLEN NAKASHIMA

Military cyber officials are developing information warfare tactics that could be deployed against senior Russian officials and oligarchs if Moscow tries to interfere in the 2020 U.S. elections through hacking election systems or sowing widespread discord, according to current and former U.S. officials.

One option being explored by U.S. Cyber Command would target senior leadership and Russian elites, though probably not President Vladimir Putin, which would be considered too provocative, said the current and former officials who spoke on the condition of anonymity because of the issue's sensitivity. The idea would be to show that the target's sensitive personal data could be hit if the interference did not stop, though officials declined to be more specific.

"When the Russians put implants into an electric grid, it means they're making a credible showing that they have the ability

SEE CYBER ON A15

Warren's fundraising flip-flop

Rejection of high-dollar events she once embraced has rivals crying foul

BY ANNIE LINSKEY AND MICHELLE YE HEE LEE

Chase Williams grinned broadly as he stood for a photo next to Sen. Elizabeth Warren, chatting briefly with the senator from Massachusetts before moving on so someone else could have their turn.

It was the kind of moment that has become a ubiquitous part of Warren's presidential campaign and its long "selfie lines," where supporters wait for hours to pose with her at no charge.

But this shot, taken in October 2017, was at an entirely different kind of event: an exclusive "backstage" reception that took place in the vault of a former Cleveland bank. And that was the day's low-rent affair — donors who agreed to pay more attended an even more exclusive shindig with Warren that day, according to two people familiar with her schedule.

The events were part of a high-dollar fundraising program that Warren had embraced her entire political career, from her first Senate run in 2011 through her reelection last year. Warren was so successful at it that she was able to transfer $10 million of her Senate cash to help launch her presidential bid.

But in the past year Warren has undergone a transformation, moving from one of the Democratic Party's biggest draws at high-dollar fundraisers to a presidential candidate who has sworn them off as sinister attempts to sell access.

In a debate last week, Warren criticized rival Pete Buttigieg for having an exclusive fundraiser in a crystal-filled wine cave in Napa Valley, prompting the South Bend, Ind., mayor to respond that she shouldn't issue "purity tests

SEE WARREN ON A2

MELINA MARA/THE WASHINGTON POST

Sen. Elizabeth Warren, seen with New Hampshire voters, touts her grass-roots support but last year was part of big-donor fundraisers.

IN THE NEWS

ANDREA HERNÁNDEZ BRICEÑO FOR THE WASHINGTON POST

Free-market experiment Venezuelan President Nicolás Maduro is making tentative moves away from socialist policies. A8

Amazon's CBD problem Its online market bans products containing the trendy chemical, but that has proved difficult to enforce. A6

THE NATION

As House general counsel, former Justice Department lawyer Douglas Letter is locked in bitter court battles with the Trump administration. A3

Urbanization has gobbled up habitat, and wild turkeys are fighting back by pecking cars and terrorizing communities. A6

GOP Sen. Lisa Murkowski of Alaska said she was "disturbed" by the Senate majority leader's promise of "total coordination" with the White House on impeachment. A13

THE WORLD

An Afghan analyst with ties to the Taliban was assassinated by unknown gunmen, and some observers say he was targeted for his dissent. A12

A Russian-backed Syrian offensive has displaced tens of thousands in northern Syria, sparking what could become one of the civil war's worst humanitarian crises. A12

Pope Francis urges hope in a time of "economic, geopolitical and ecological conflicts" in his Christmas Day address. A15

THE REGION

Fairfax County's plan to expand solar efforts could spur a change to a Virginia law that has protected Dominion Energy from competition. B1

Montgomery County officials say the wealthy suburb's overall health gains conceal racial disparities that are worsening over time. B1

Hundreds of volunteers spent Christmas delivering gifts and their company to homebound seniors in the District who may have been unable to visit relatives. B1

Police response times in rural parts of Prince George's County have increased, and if they continue to do so, it could stall home development because of a 2005 law. B1

A new transportation app that is expected to be released in January aims to curb traffic-safety hazards in the District by allowing users to easily report violations. B3

STYLE

Six books show how some writers seemed to predict what would happen in the future. C1

SPORTS

Confronted by online trolls, or worse, esports competitors are forming all-female teams and competing in all-female leagues. D1

INSIDE

STYLE

We're not 'OK'

The mockery between generations flowed freely this year. It was funny, except when it wasn't. **C1**

LOCAL LIVING

Off this week

There is no Local Living section this week because of the holiday. It will return next Thursday.

MAGNETS FROM A1

options are considered and hold an advantage in voting on which rules will take effect, according to a Washington Post review that included listening to hours of public standard-setting meetings and obtaining emails about the process, along with interviews and documents.

Problems with voluntary safety standards extend beyond magnets, critics say, to other children's products, including infant inclined sleepers, crib bumpers and furniture at risk of toppling over. In many cases, the CPSC can't act until the voluntary standards have proved inadequate.

"It makes our jobs harder to have to defer by law to an extremely inefficient and industry-focused process," said Elliot Kaye, a CPSC commissioner and former agency chairman. The voluntary standards process, he said, "has cost lives."

In the magnets case, which played out over recent weeks, manufacturers drew clear limits on how far they were willing to go for safety. They would consider only standards that "don't change the utility, functionality and desirability of the product for adults," Craig Zucker, who runs a magnet company, said in an email to others on the committee deciding the proposed safety rules.

But safety advocates said that the committee should look at anything that might avoid accidents. Otherwise, Don Huber, director of product safety for Consumer Reports, said in an email to the committee, "I am struggling to see how it will be anything beyond a marginal improvement."

The magnet makers wanted to rely on written warnings and packaging designs to curb accidental ingestions, according to emails and committee conference calls.

Safety advocates said that wasn't enough. They wanted the magnets either to be too big to swallow or too weak to cause organ damage. The magnets commonly found in desk toys are made up of sometimes hundreds of magnetic balls, and swallowing just two is a medical emergency, doctors say.

Why not try making them too big to swallow? asked pediatric gastroenterologist Bryan Rudolph during a Nov. 21 call to discuss the standard.

"Because nobody would follow it," Zucker replied.

'Gruesome' injuries

Other products that pose dangers to children have highlighted the limitations of the voluntary standards process. Before being recalled this year because they were associated with the deaths of dozens of children, inclined sleepers had been covered by a voluntary standard that pediatricians argued failed to follow established guidelines for safe sleep.

A voluntary safety standard also exists for crib bumpers, despite warnings from medical authorities that the products are unnecessary and dangerous.

And safety advocates had been struggling for years to get furniture manufacturers to agree to stricter voluntary standards aimed at preventing furniture tip-overs, a problem responsible for the deaths of at least 200 children since 2000. Under pressure from victims' families, industry officials finally tightened the standard earlier this year.

"It's a flawed process," said Nancy Cowles, who sits on several voluntary standard committees as executive director of the advocacy group Kids in Danger. "There are times when it works. But it often feels like we are only slowing down the process."

Shihan Qu, who heads the company that makes Zen Magnets, said in an interview that he agrees that high-powered magnets are "an inherently dangerous product. That's what it is."

Shihan Qu

Qu said he supports efforts to keep the products away from children. But he disagreed with actions that would either fundamentally change the product or ban it. He previously led the court fight against the CPSC that resulted in the magnet ban being overturned in 2016.

"You can't just make all small things big so kids won't choke on them," Qu said.

Rare-earth magnets are unusually dangerous because they are often 10 times stronger than the ordinary magnets used to hold a shopping list to a refrigerator. If multiple rare-earth magnets — each the size of a BB pellet — are swallowed, they can pull together inside the intestines, potentially causing life-threatening holes and blockages. Emergency surgery is the usual result.

"This is one of the most dangerous products on the market," said Rudolph, the pediatric gastroenterologist who participated in the standards process.

Rudolph said the risks were greater than with other ingestions he sees involving children, such as coins or button batteries.

"These injuries are gruesome," he said.

Julie Brown, a pediatric emergency-room doctor, said she sees on average one case a month at her hospital, Seattle Children's. Yet most people don't understand the risks posed by these magnets, she said, and the injuries can be severe.

"They can make kids very sick," Brown said.

Accidental ingestion of high-powered magnets emerged as a problem in 2005. The magnets were breaking free from toys. Magnetic construction sets soon were blamed for at least one death and dozens of intestinal injuries, according to the CPSC. In response, a voluntary safety standard was created in 2007 to limit the power of loose magnets in toys and to require powerful magnets to be permanently connected so they can't be swallowed.

The problem subsided.

But sales of high-powered magnet sets exploded two years later. This time, the magnets were found in desk toys popular for playing or modeling different shapes. And they were not covered by the toy safety standard because they were not meant for children.

In 2011, the CPSC issued its first public warning about the "hidden hazard" associated with "these innocent looking magnets." The next year, as the ingestions continued, the agency passed mandatory regulations that essentially banned the strong magnet sets. Most companies agreed to stop selling them. But two firms refused. The CPSC asked a judge to force a recall against them.

Zucker, who referred questions from The Post to other industry representatives, ran one of the recalcitrant firms, Maxfield & Oberton, which made popular magnets called Buckyballs. Zucker launched a public-relations campaign painting the agency as overzealous and trying to shut down freedom-loving entrepreneurs. He worked with Nancy Nord, a former CPSC commissioner working as a lawyer for companies facing regulatory action.

"No one is discounting the severity of the injuries," Nord said in an interview. "But the question is, how do you address the problem?"

Eventually, Zucker stopped selling the magnets as part of an agreement with the CPSC. His company was also voluntarily dissolved.

But the other company, Zen Magnets, and its leader, Qu, kept fighting. He convinced a federal judge that the CPSC made mistakes when it declared the magnets a "substantial product hazard." And a federal appellate court in 2016 overturned the agency's mandatory rule that served as a product ban, criticizing the CPSC for "critical ambiguities and complexities in the data" used to justify its actions.

So in late 2016, for the first time in four years, rare-earth magnets were legal to sell.

That ended what appeared to be a successful experiment in injury prevention: Magnet ingestions had fallen by almost half during the four-year timeout, from an estimated 3,617 hospital emergency-room visits in 2012 to 1,907 visits three years later, according to a medical study published last year in the Journal of Pediatric Gastroenterology and Nutrition.

The sudden loss of the 2016 ban left no regulations in place on high-powered magnets. Qu thought this was a problem.

He saw competitors selling magnets with no warnings at all. His Zen Magnets are sold with warnings that include, "These magnets are not a toy for children." He petitioned the CPSC to ask it to write a mandatory rule requiring warning labels and packaging designs to prevent children from using the product. Safety groups opposed his effort because they said it didn't go far enough, according to documents and interviews.

But the CPSC was frozen, unable to agree on how to pursue new regulations in light of the court decisions, according to Kaye, who was the agency's chairman at the time. A CPSC spokesman declined to comment.

Meanwhile, the public was mostly unaware of the debate over magnet safety.

Two magnets swallowed

"I had no idea they were dangerous," said Sara Cohen, a pediatric nurse and mother in Philadelphia who bought a set of high-powered magnets as a toy for her 7-year-old son, Aaron, for Christmas in 2016.

Three nights later, her son was in a hospital, complaining of stomach pains. An X-ray revealed he'd swallowed two magnetic balls. Surgeons removed one. Rather than make a second incision in his intestines, they decided to monitor the boy. He had frequent X-rays until the magnet passed two months later.

"It never occurred to me that this could happen," Cohen said.

In February, the same group that worked to defeat the CPSC's mandatory standards — Qu, Zucker and Nord — turned its attention to drafting a voluntary safety standard.

The process for creating voluntary safety standards for most consumer products is handled through ASTM International, an organization that helps develop technical standards for thousands of products. ASTM officials said that the organization emphasizes a consensus approach designed to allow all parties a chance to influence the outcome.

The CPSC's role is limited. Agency employees had been barred by agency regulations from taking leadership positions or voting on proposed standards until 2016, when the commissioners decided to relax the rules. Since then, CPSC staff have been allowed to take on larger roles with the blessing of the agency's executive director. Permission was granted for magnets.

As a result, a CPSC staff member wrote a letter to the magnets committee in October saying that the agency didn't think warnings and packaging changes were enough to address the potential danger.

ASTM guidelines also are designed to prevent manufacturers from gaining too much control. With magnets, still, the companies had a head start, meeting for several months before safety advocates joined the process.

"They'd already started by the time we learned about it," said Cowles, of Kids in Danger.

The committee discusses proposed safety rules before voting. Each member has one vote. Product manufacturers are not allowed to account for more than 49 percent of voters.

But the number of voters is fluid. It can change as people join or leave the committee, according to ASTM officials. And ASTM said it does not share the voting roster publicly, making it hard to detect changes in a committee's composition.

The magnets committee had 36 voting members shortly before year's end, according to Nord, the committee chairwoman. That included nine members listed as producers, such as magnet makers. Nord said she included herself as a producer because of her role working with companies.

But an earlier version of the magnets committee roster, reviewed by The Post, showed 33 voting members. Eight were listed as producers. An additional 10 of 15 voters listed as "general interest" members had ties to industry. For example, Nord was listed as a general interest member. She later said she never listed herself in that category.

But according to that roster, that meant 18 of the 33 voters — 55 percent — either were magnet manufacturers or had ties to industry.

Both versions of the roster were consistent on one point: Each had just four voters listed as safety advocates, including the CPSC and the American Academy of Pediatrics. Their power is helped by ASTM rules that require all "no" votes to be addressed. Objections can be dismissed by a two-thirds vote of the committee.

The process often feels "predetermined," said Ben Hoffman, a pediatrician in Portland, Ore., who leads the academy's Council on Injury, Violence and Poison Prevention.

'A huge trade-off'

In late November, the magnets committee held a conference call, which a Post reporter listened to with the committee's knowledge. The committee members were close to finalizing the wording of the voluntary standard. Once they agreed on a standard, it would be taken up by a larger committee for all consumer products.

The magnets committee began with a focus on using warnings and packaging to prevent accidental swallowing by children. But then it explored other ideas.

One person suggested moving away from spherical shapes. Another wondered whether colored magnetic balls looked too much like candy.

Then Rudolph, the gastroenterologist, brought up size.

"How large would these have to be in order not to be swallowed?" Rudolph asked.

The answer was 1.25 inches in diameter — a little smaller than a ping-pong ball, but also six times larger than the existing magnetic balls.

Qu, in an email to committee members, had said there was a practical problem with making them so big: They would be "so strong that they would sever fingers if two magnets were to snap together."

That spurred a discussion about ways to dial down the magnets' strength.

But the magnet producers said that wasn't technically feasible.

On the conference call, Rudolph said that changing the size or strength of the magnets was the only way to avoid the injury patterns.

"It's the one thing that will really, we think, protect children," he said.

"If you have some real data to show that these other things won't make a significant dent," Qu replied, "then please do show it."

Another committee member, Al Kaufman, a senior vice president of the Toy Association, jumped in to say that a standard that changes the product so much is unlikely to be followed by manufacturers.

Rudolph didn't give in.

"It's a huge, huge trade-off that we'd be giving up by not taking that route," he said.

Kaufman spoke up.

"I think we've got a disagreement that we're not likely to resolve with regard to size," he said.

But he eventually threw his support behind the magnet industry's proposal.

"I think half a loaf is better than none," Kaufman said.

Others agreed with him.

That sounded like a final concession to the safety advocates on the call.

"So what we're admitting," Cowles said, "is that there is no way to make this product not be an ingestion hazard."

In early December, the voting members of the magnets committee received a ballot containing a proposed voluntary standard for magnets sets. The votes are due in early January.

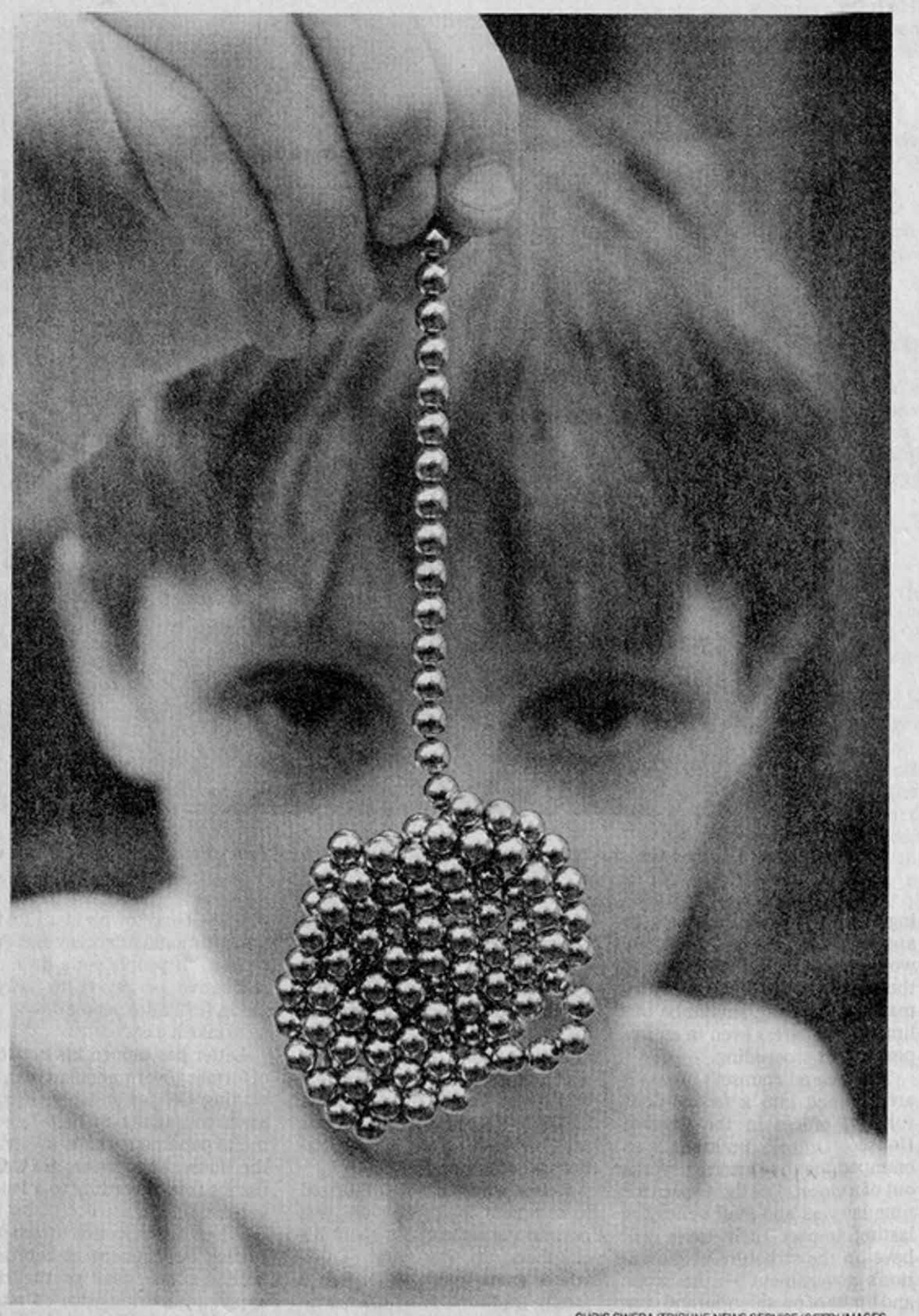
The proposed new standard would require safety warning labels and packaging changes, including a way to visually check that all loose magnets are inside.

But, if approved, the proposed standard would leave the magnets themselves untouched.

They would still be just as small and powerful as ever.

todd.frankel@washpost.com

Magnet industry largely holds power to police itself

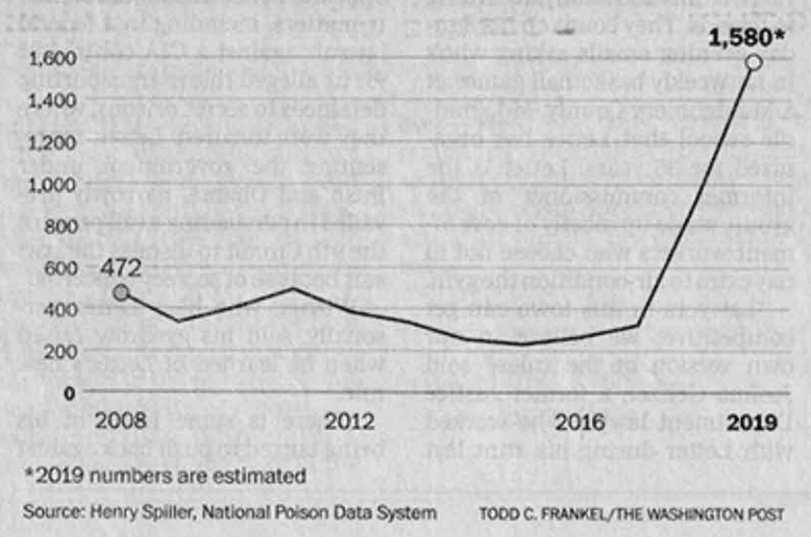


CHRIS SWEDA/TRIBUNE NEWS SERVICE/GETTY IMAGES

Brandon Bruski, 9, accidentally swallowed two Buckyballs. The magnets left him with a small and large intestine bound together, which required emergency surgery.

A surge in swallowed magnets

A federal ban on small rare-earth magnet sets was put in place in 2012 and lifted by a court challenge in 2016. A surge in accidental ingestions of magnets followed. Poison control calls do not capture all incidents.



*2019 numbers are estimated

Source: Henry Spiller, National Poison Data System TODD C. FRANKEL/THE WASHINGTON POST

JULIE BROWN

An X-ray of a 2-year-old boy with 16 magnets in his intestines. Critics say magnet companies' calls for voluntary safety standards won't protect children.

From:	House, Mary
To:	Kaye, Elliot; Fong-Swamidoss, Jana; Steinle, Allison; Baiocco, Dana; Asplen, Michael; Yahr, Dorothy; Schall, Brandon; Feldman, Peter; Tanzer, Theodore
Cc:	Colvin, Amy; Vieira, Patricia; Mullan, John
Subject:	Zen"s Cross-Appeal/Response Brief - Zen Magnets, LLC v. CPSC (10th Circuit)
Date:	Friday, December 06, 2019 8:35:36 AM
Attachments:	12-05-2019 10th Cir Zen"s Cross Appeal and Response.pdf

Good Morning,

Attached please find Zen's Cross-Appeal/Response brief in the above-referenced matter.

Zen also filed an Appendix, which I can provide if requested.

Mary A. House
Attorney, Regulatory Affairs Division
U.S. Consumer Product Safety Commission
4330 East West Highway, Suite 702
Bethesda, MD 20814
301-504-6810
mhouse@cpsc.gov

[ORAL ARGUMENT REQUESTED]

Case Nos. 19-1168; 19-1186

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ZEN MAGNETS, LLC,

Plaintiff-Appellee/Cross-Appellant,

v.

U.S. CONSUMER PRODUCT SAFETY COMMISSION,

Defendant-Appellant/Cross-Appellee.

On Appeal from the United States District Court
for the District of Colorado
[District Court Case No. 1:17-cv-2645 (Judge R. Brooke Jackson)]

APPELLEE'S PRINCIPAL/RESPONSE BRIEF

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STATEMENT OF RELATED APPEALS
PURSUANT TO 10th Cir. R. 28.2(C)(3)

Counsel for Appellee/Cross-Appellant is aware of the Appellant/Cross-Appellee's Appeal in Case No. 19-1168, but is unaware of any other related appeals. This Court previously vacated a rule addressing the same consumer products at issue in the proceeding underlying this appeal in *Zen Magnets, LLC v. Consumer Product Safety Commission*, 841 F.3d 1141 (10th Cir. 2016).

GLOSSARY

ALJ	Administrative Law Judge
APA	Administrative Procedure Act
CPSA	Consumer Product Safety Act
CPSC	United States Consumer Product Safety Commission
FDO	Final Decision and Order
FTC	Federal Trade Commission
IDO	Initial Decision and Order
SREMs	Small Rare Earth Magnets

INTRODUCTION

While this matter began as an enforcement action by the U.S. Consumer Product Safety Commission ("CPSC" or "Commission"), ostensibly to protect children, it no longer resembles such a proceeding. After the Commission's staff refused to negotiate with Zen Magnets, LLC ("Zen") regarding how magnet sets could be sold and used safely, CPSC staff's Complaint Counsel prosecuted Zen in an administrative adjudication, culminating in a Final Decision and Order ("FDO") of the Commission. Zen successfully appealed the legality of the FDO in the District Court. The Commission chose not to resolve the merits of the 2012 complaint, but to appeal to this Court regarding a matter entirely unrelated to the question of whether Zen's products present a substantial product hazard – likely resulting in many months of further delay.

Whether the magnets sold by Zen present a substantial product hazard is irrelevant in this present proceeding. The Commission's characterization that this case concerns its attempt to protect children from serious injuries (Aplt. Br. at 7)[1] therefore misses the point. Although the matter underlying this case concerned the Commission's attempted regulation of small rare earth magnets ("SREMs"), the case at bar concerns only constitutional questions wholly separate from the question of

[1] Citations to the Commission's October 22, 2019 Brief for Appellant/Cross-Appellee are referred to herein as "Aplt. Br."

whether Zen's products present a substantial product hazard pursuant to the Consumer Product Safety Act ("CPSA"), 15 U.S.C. § 2064. Those constitutional matters are what Zen asks this Court to address before this case is remanded to the Commission.

Commissioners Kaye, Robinson, and Adler did more than "merely participate" in the rulemaking; they issued press releases and gave public speeches evidencing not only their bias against Zen, but also that their minds were made up in advance of hearing Complaint Counsel's appeal. The District Court did not err in disqualifying Commissioner Adler from participating in the appeal on remand to the Agency. On the other hand, the District Court did err in finding other statements made by Commissioner Adler and certain statements made by Commissioners Robinson and Kaye were not constitutionally problematic.

JURISDICTIONAL STATEMENT

(A) The District Court had general federal-question jurisdiction over Zen's constitutional claims of agency bias and prejudgment pursuant to 28 U.S.C. § 1331. *See Assn. of Natl. Advertisers v. FTC*, 627 F.2d 1151, 1157 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). The District Court also had jurisdiction over Zen's Administrative Procedure Act ("APA") claims pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 702, and because the defendant was an agency of the U.S. Government, 28 U.S.C. § 1346(a)(2).

(B) The District Court entered a final judgment and order regarding Zen's constitutionally based claims, including the disqualification of Commissioner Adler. Zen then brought a Fed. R. Civ. P. 59(e) motion, to which the Commission did not object procedurally. (Aplt. App. at 534-542.)[2] The District Court granted in part and denied in part Zen's Rule 59(e) motion. (Aplt. App. at 549-556.) This Court has jurisdiction over Zen's cross-appeal regarding the constitutional claims raised in the District Court pursuant to 28 U.S.C. § 1291, Fed. R. App. P. 4(a)(4), Fed. R. Civ. P. 54(a), and Fed. R. Civ. P. 59(e). *See also Balla v. Idaho State Bd. of Corrections*, 869 F.2d 461, 466 (9th Cir. 1989); *Nolan v. U.S. Dept. of Justice*, 973 F.2d 843, 846 (10th Cir. 1992); *B. Willis CPA, Inc. v. BNSF Ry. Corp.*, 531 F.3d 1282, 1295-1296 (10th Cir. 2008).

(C) The District Court issued its final judgment and order on June 12, 2018. Zen filed its Rule 59(e) motion on July 10, 2018. The District Court entered an amended final judgment on March 6, 2019. Pursuant to Fed. R. App. P. 4(a)(1)(B), the Government file its notice of appeal on May 6, 2019. Zen filed its notice of appeal pursuant to Fed. R. App. P. 4(a)(3) on May 20, 2019.

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[2] Citations to the Appendix filed with the Commission's Brief for Appellant/Cross-Appellee are cited herein as "Aplt. App." and citations to the Supplemental Appendix filed with Zen's Principal/Response Brief are cited herein as "Aplee. Supp. App."

(D) Zen's cross-appeal is from a final judgment and order of the District Court; additional information establishing this Court's jurisdiction is found in Argument § 1, *infra*, pursuant to this Court's August 12, 2019 Order.

STATEMENT OF THE ISSUES

(1) Whether the District Court erred in finding that Commissioners Kaye and Robinson did not violate Zen's Fifth Amendment due process rights.

(2) Whether the District Court erred in finding that the Commission did not prejudge the issues presented in both the administrative adjudication and the rulemaking.

(3) Whether the District Court issued an unconstitutional advisory opinion that the Commission's findings and conclusions it set aside as unlawful would have survived review under 5 U.S.C. § 706(2)(A).

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are produced in the addendum to this Brief.

STATEMENT OF THE CASE

Sets of small rare earth magnets ("SREMs") began emerging in the U.S. consumer market around 2009. While rare earth magnets had existed for quite some time, firms then began manufacturing and marketing SREMs in new ways – as manipulatives for art, science, research, and therapy. Some firms did not recognize nor respect the effects of magnetic strength of SREMs, which strength is a necessary

quality for SREMs to function as manipulatives. The Commission responded to this new marketing of SREMs by determining SREMs were categorically unsafe and requesting that all firms stop sale.

While most firms complied with the Commission's demands, several firms opted to have the Commission demonstrate that their products (the "Subject Products") presented a "substantial product hazard," as defined in the CPSA, 15 U.S.C. § 2064, pursuant to a formal adjudication under 5 U.S.C. § 554. The Commission authorized its staff to initiate an administrative complaint against those remaining firms in 2012, including Zen Magnets, LLC. Eventually, Zen became the only firm in the adjudicatory action (CPSC Docket No. 12-2), where the sole question was whether the Subject Products presented a substantial product hazard.

At the same time that the adjudication was pending, the Commission also decided to adopt mandatory requirements for SREMs pursuant to 5 U.S.C. § 553 (the "Magnet Rule") and engaged in the rulemaking process. Even though the Commission admitted that the Magnet Rule would ban the Subject Products from the U.S. market (*see e.g.* Aplt. App. at 355, lines 11-12),[3] the Commission claimed the purpose of the Magnet Rule was not removal of SREMs from the market. (Aplee. Supp. App. at 58-59; Aplt. App. at 223-225.) The draft final Magnet Rule was

[3] *See also* Aplee. Supp. App. at 26.

approved by the Commission on September 24, 2014. 79 Fed. Reg. 59962 (Oct. 3, 2014). The administrative hearing against Zen began on December 1, 2014.

On December 2, 2014, Zen filed a petition to review the Magnet Rule in this Court seeking to vacate the Magnet Rule. In November of 2016, in a 2-1 decision, Judge Ebel and now-Justice Gorsuch found that the Commission's required factual findings under the CPSA, 15 U.S.C. §§ 2051-2089, were incomplete and inadequately explained. *See Zen Magnets, LLC v. CPSC*, 841 F.3d 1141, 1144 (10th Cir. 2016). Consequently, this Court vacated and remanded the Magnet Rule. Rather than address this Court's concerns, the Commission voted to remove the Magnet Rule from the Federal Register on March 1, 2017, 82 Fed. Reg. 12716 (March 7, 2017), and has subsequently abandoned its public rulemaking efforts.

Prior to vacatur of the Magnet Rule, the Commission made legal and factual findings regarding the Subject Products. Then, after the draft final Magnet Rule had been approved by the Commission, but still before the administrative hearing in December of 2014, four commissioners issued press releases and made public speeches regarding not only the Subject Products, but also Zen Magnets, LLC, specifically. The statements made by the commissioners were not in furtherance of any agency action; they were not made to advance nor fulfill any function of the Commission. Commissioner Kaye stated in a press release, for instance, that it was his belief that Zen put profits before the safety of children and the law. (Aplt. App.

at 275-276.) He also made additional statements that evidenced his inability to fairly judge the issues presented in the adjudication. The statements also demonstrated that Commissioners Robinson and Adler had already made up their minds that the magnets could not be used safely, irrespective of labeling, marketing, or warnings, and that the Subject Products should be taken off the market. According to the Commission, whether to keep the magnets on the market was not even an issue in the rulemaking. (Aplee. Supp. App. at 58-59; Aplt. App. at 223-225.)

Prior to the administrative hearing, on October 20, 2014, Plaintiff filed a motion with the ALJ seeking dismissal of the Second Amended Complaint based on the bias and prejudgment of facts at issue by three Commissioners and then-Chairman Kaye. (*See* Aplt. App. at 170-184.) On November 19, 2014, the ALJ denied Zen's motion on two grounds: (1) he did not believe he had jurisdiction to rule on a motion to dismiss based on due process violations; and (2) even if he had the authority to rule on the questions of bias and prejudgment by members of the Commission, the ALJ deemed the matter unripe because the case was not yet before the Commission on appeal. The ALJ explained: "[i]n the event there is an appeal, this prejudgment issue is more appropriately raised to the Commission and, if need be, upon further appeal to the federal courts." (Aplt. App. at 186.)

On March 16, 2016, the ALJ issued an Initial Decision and Order ("IDO"). (Aplt. App. at 97-134.) Complaint Counsel promptly appealed the IDO to the

Commission. Zen filed a motion to disqualify certain commissioners from deciding the appeal because of the findings they made in the rulemaking and the statements they made in press releases and in public speeches. Then-Acting Chairwoman Buerkle agreed with Zen that her colleagues were biased and had irrevocably closed minds (Aplt. App. at 169), but the Commission declined to disqualify any of its members (Aplt. App. at 217-239). With Chairwoman Buerkle dissenting in part, the Commission vacated the IDO in its entirety on October 26, 2017 in its Final Decision and Order ("FDO"). (Aplt. App. at 41-96.)

Zen then filed its appeal in the United States District Court for the District of Colorado pursuant to the Administrative Procedure Act. The District Court found that the FDO did not violate §706(2)(A) of the APA, but that the Commission had violated Zen's due process rights. Zen asked the Court to reconsider its order to reflect that 5 U.S.C. § 706(2)(B) required the Court to also hold unlawful the CPSC's findings and conclusions in the FDO, and, as a result, to also refrain from opining on whether those unlawful findings and conclusions were arbitrary, capricious, and/or were supported by substantial evidence. The Court agreed that the Commission's findings and conclusions in the FDO were unlawful and must be set aside pursuant to § 706(2)(B). (Aplt. App. 552-554.) However, the District Court refused to find that the remainder of its APA analysis was an advisory opinion. (Aplt. App. at 554-555.)

SUMMARY OF THE ARGUMENT

The Commission is statutorily permitted to take different administrative and legal approaches to regulation, including simultaneously *initiating* a rulemaking and an adjudication. Upon doing so, however, the Commission is required to conduct itself in accordance with the Constitution, including the Due Process Clause. The Commission failed to do so when it made factual and legal findings in the rulemaking while those same questions were pending in the adjudication, and after which when its members made public speeches and issued press releases evincing their bias against Zen and demonstrating their irrevocably closed minds on the question of whether the Subject Products should be taken off the market (which was not even the purpose of the rulemaking). Under any objective standard, Commissioners Adler and Kaye should be disqualified from participating in Complaint Counsel's appeal of the IDO. Further, this Court should find that the participation of Commissioners Adler, Kaye, and Robinson in deciding the appeal of the IDO violated Zen's due process rights.

Additionally, because the District Court vacated the FDO and remanded the matter to the Commission, it was manifest error for the District Court to answer the hypothetical question of whether the Commission's actions, findings, and conclusion *would have been* arbitrary and capricious pursuant to 5 U.S.C. § 706(2)(A) had the Commission not violated Zen's due process rights.

STANDARD OF REVIEW

This Court's "standard of review of the lower court's decision in an APA case is de novo." *New Mexico Cattle Growers v. U.S. Fish & Wildlife*, 248 F.3d 1277, 1281 (10th Cir. 2001). Allegations of due process violations are also reviewed de novo. *U.S. v. Nichols*, 169 F.3d 1255, 1267 (10th Cir. 1999).[4]

A district court's ruling on a Fed. R. Civ. P. 59(e) motion is reviewed under an abuse of discretion standard. *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997) (citing *Brown v. Presbyterian Healthcare Serv.*, 101 F.3d 1324, 1331 (10th Cir. 1996), *cert. denied sub. nom. Miller v. Brown*, 520 U.S. 1181 (1997)).

ARGUMENT

I. This Court has Jurisdiction Over Zen's Cross-Appeal.

A. The District Court Entered a Final, Appealable Judgment Regarding the Disqualification of Commission Members Based on Due Process; Denial of a Fed. R. Civ. P. 59(e) Motion is a Final, Appealable Judgment.

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[4] The Commission incorrectly states that the District Court disposed of Zen's Complaint pursuant to Fed. R. Civ. P. 56. (Aplt. Br. at 17.) The District Court made clear it was not analyzing the parties' cross-motions for summary judgment pursuant to Fed. R. Civ. P. 56, but was reviewing the motions pursuant to the APA, as mandated by this Court in *Olenhouse v. Community Credit Corp.*, 42 F.3d 1560, 1579-80 (10th Cir. 1994). (Aplt. App. at 499.)

The District Court entered a final order and judgment on June 12, 2018. Zen filed a timely Fed. R. Civ. P. 59(e) Motion to Alter or Amend Judgment, asking that the District Court hold unlawful and set aside the CPSC's final agency action as required by 5 U.S.C. § 706(2)(B). Zen further requested that the court refrain from issuing an advisory opinion by opining on whether the Commission's findings and conclusions in the FDO were supported by substantial evidence and were not arbitrary and capricious, while simultaneously holding those same findings and conclusions unlawful and remanding the IDO appeal to the Commission. While the Commission objected to the Rule 59(e) motion on a substantive basis, it did not challenge the motion on procedural or jurisdictional grounds. The District Court granted Zen's motion in part, holding unlawful and setting aside the FDO pursuant to § 706(2)(B), but the court denied Zen's request that it find that the remainder of the Court's APA discussion constituted an advisory opinion. (Aplt. App. at 549-555.) The District Court remanded the matter to the Commission with instructions to allow Commission staff to appeal the IDO without the participation of Commissioner Adler. (Aplt. App. 556.)

As the Supreme Court has explained, "[t]he term 'judgment' is defined in Rule 54 (a) of the Federal Rules of Civil Procedure to mean a 'decree and any order from which an appeal lies.'" *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 370-71 (1981). The District Court here intended for the judgment to be a final, appealable order, as

evidenced by its awarding Zen its costs[5] pursuant to Fed. R. Civ. P. 54(d)(1), D.C.COLO.LCivR 54.1, and 28 U.S.C. § 2412(a)(1).

Further, "Rule 59(e) 'clearly contemplates entry of judgment as a predicate to any motion.'" *Balla v. Idaho State Bd. of Corrections*, 869 F.2d 461, 466 (9th Cir. 1989) (quoting *Stephenson v. Calpine Conifers II, Ltd.*, 652 F.2d 808, 812 (9th Cir. 1981), *overruled in part on other grounds*, *In re Washington Public Power Supply Syst. Securities Litigation*, 823 F.2d 1349, 1350-52, 1358 (9th Cir. 1987) (en banc)). "[T]he denial of a Rule 59(e) motion is itself a final, appealable judgment." *Id.* at 467 (citing *Walker v. Bank of America Natl. Trust and Sav. Assn.*, 268 F.2d 16, 25 (9th Cir. 1959)).

Thus, the District Court's final judgment and order concerning Zen's constitutionally-based arguments is final and appealable pursuant to Fed. R. App. P. 4(a)(4) and Fed. R. Civ. P. 54(a); and, the District Court's partial denial of part of Zen's Fed. R. Civ. P. 59(e) Motion is itself a final, appealable order. Further, because Zen's notice of appeal designated the judgment and order disposing of Zen's Fed. R. Civ. P. 59(e) Motion, this Court has jurisdiction over Zen's cross-appeal in this instant matter. *See e.g. Nolan v. U.S. Dept. of Justice*, 973 F.2d 843, 846 (10th Cir. 1992); *B. Willis CPA, Inc.*, 531 F.3d at 1295-1296; 28 U.S.C. § 1291.

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[5] As of the date of filing of this Brief, the Commission has failed to comply with that order of the court.

B. Alternatively, this Court has Jurisdiction Over Zen's Cross-Appeal Pursuant to the Collateral Order Doctrine.

One exception to the general administrative-remand rule, *see Trout Unlimited v. U.S. Dept. of Agric.*, 441 F.3d 1214, 1219 (10th Cir. 2006) (quoting *Bender v. Clark*, 744 F.2d 1424, 1426-27 (10th Cir. 1984)); *Western Energy All. v. Salazar*, 709 F.3d 1040, 1047 (10th Cir. 2013), is the collateral order doctrine. The collateral order doctrine requires an appellant to show that the district court's order "(1) conclusively determined the disputed question, (2) resolved an important issue completely separate from the merits of the case, and (3) is effectively unreviewable on appeal from a final judgment." *Gray v. Baker*, 399 F.3d 1241, 1245 (10th Cir. 2005); *accord Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

All three requirements for the application of the collateral order doctrine are satisfied in the case at bar. First, the District Court conclusively determined that only one commissioner violated Zen's constitutional rights. The Court further directed which commissioners could participate on remand to the Commission. (*See generally* Aplt. App. 549-555.) The District Court also conclusively determined that its APA analysis was proper notwithstanding its vacatur-and-remand order directing the Commission to rehear the administrative appeal.

Second, the District Court resolved two important constitutional issues: whether the Court issued an advisory opinion, and whether the Commission violated Zen's Fifth Amendment rights. Whether the Commission violated Zen's due process

rights was precisely at issue before the District Court; however, the due process issue is separate from the merits of the case before the agency, *viz.*, whether Zen's products present a substantial product hazard pursuant to 15 U.S.C. § 2064. Additionally, the District Court's advisory opinion ruling is a separate constitutional matter entirely and is distinct from both Zen's Fifth Amendment claim as well as Zen's arguments made pursuant to the APA, 5 U.S.C. §§ 702 and 706.

Third, should this Court find that it does not have jurisdiction over the constitutional questions identified above, it will foreclose later appellate review of those matters once the case is back before the Commission. Zen will not have the opportunity to re-litigate the constitutional issues decided by the District Court in any subsequent appeal. (*See* Aplt. Br. at 19-20 (noting it would be moot to challenge the District Court's due-process holding after remand)). In this instance, which commissioners may participate on remand would also be *res judicata* should this Court find that the District Court's order regarding disqualification is a final judgment. *City of Eudora v. Rural Water Dist. No. 4*, 875 F.3d 1030, 1034-35 (10th Cir. 2017).

The collateral order doctrine therefore applies to Zen's cross-appeal, and this Court has appellate jurisdiction now over Case. No. 19-1186 pursuant to that doctrine and 28 U.S.C. § 1291.

C. The *Bender* Balancing Test, the "Practical Finality Rule," and Basic Judicial Principles Justify this Court's Exercise of Jurisdiction over Zen's Cross-Appeal.

Should this Court exercise appellate jurisdiction over the Commission's appeal, Zen asks that this Court exercise jurisdiction over Zen's cross-appeal in the interests of basic judicial principles and pursuant to the balancing test set forth in *Bender*, 744 F.2d 1424 (10th Cir. 1984), and its progeny. *Bender* explained that the administrative remand rule should not be applied if doing so "would violate basic judicial principles," *id.* at 1427, and that the finality rule of 28 U.S.C. § 1291 "must be applied practically rather than technically," *id.* (citing, *inter alia*, *Cohen*, 337 U.S. at 546).

"In the context of a district court order remanding a matter to an administrative agency, jurisdiction may be appropriate when the issue presented is both urgent and important." *Trout Unlimited*, 441 F.3d at 1218. According to *Bender*, "in the unique instance where the issue is not 'collateral' but justice may require immediate review, a balancing approach should be followed to make this jurisdictional decision." *Bender*, 744 F.3d at 1427. "The critical inquiry is whether the danger of injustice by delaying appellate review outweighs the inconvenience and costs of piecemeal review." *Id.* (citations omitted).[6]

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[6] Zen concedes that, should this Court find the Commission did not violate Zen's Due Process rights, Zen will be able to file a later, separate appeal challenging the District Court's arbitrary-and-capricious and substantial-evidence findings. For that

In the case at bar, the need for immediate review heavily outweighs concerns over potential piecemeal review. As discussed above, this case involves questions concerning Zen's constitutional rights, as well as the proper exercise of Article III powers in the District Court, both of which will effectively be unreviewable after remand to the Commission. Which commissioners may participate in the administrative appeal is not subject to further appellate review upon remand to the Commission, and is more akin to a "threshold legal issue" proper for appeal now. *See e.g. Cotton Petroleum v. U.S. Dept. of Interior*, 870 F.2d 1515, 1521-1522 (10th Cir. 1989) (noting the district court remand order resolved "threshold legal issues" and holding that "the issues presented in this appeal are of such importance that any delay in review by this court would likely result in further disputes and litigation, confusion and danger of injustice."). Thus, the "practical finality rule" espoused in the *Bender* line of cases justifies this Court's exercise of appellate jurisdiction over Zen's cross-appeal.

Basic judicial principles also justify this Court's exercise of 28 U.S.C. § 1291 jurisdiction over Zen's cross-appeal if the Court exercises appellate jurisdiction over the Government's appeal. Where federal courts have discretion over their exercise

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reason, Zen has only sought review of the constitutional issues raised in the District Court. *See Sierra Club v. U.S. Dept. of Argic.*, 716 F.3d 653, 657 (D.C. Cir. 2013) (noting that "a private party dissatisfied with the action on remand may still challenge the remanded proceedings").

of jurisdiction, the exercise of such jurisdiction is justified when it would serve the interests of judicial economy, as well as the convenience and fairness to litigants. *Cf. Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966); *Estate of Harshman v. Jackson Hole Mountain Resort*, 379 F.3d 1161, 1165 (10th Cir. 2004). Additionally, it would be patently unfair to Zen if this Court were to exercise its jurisdiction over the Commissions' claims on the same subject matter as Zen's while simultaneously declining to exercise its jurisdiction over Zen's cross-appeal.

Zen therefore respectfully requests that, in the alternative, this Court exercise jurisdiction over Zen's cross-appeal under 28 U.S.C. § 1291 pursuant to the *Bender* balancing test and basic judicial principles.

II. The Commission did not Preserve its Arguments for Appeal.

In its principal brief, the Commission urges this Court to adopt a *sui generis* standard for disqualification of agency officials pursuant to *Liteky v. United States*, 510 U.S. 540 (1994). (Aplt. Br. at 24-30.) The Commission did not make that argument in the District Court and has therefore waived it. *Wilburn v. Mid-South Health Development, Inc.*, 343 F.3d 1274, 1280 (10th Cir. 2003). Indeed, the Commission conceded in the District Court that "commissioners may be disqualified if their minds were 'irrevocably closed,'" citing *Federal Trade Commission v.*

Cement Institute, 333 U.S. 683, 701 (1948)[7] and *NEC Corp. v. United States*, 151 F.3d 1361, 1373 (Fed. Cir. 1998). (Aplt. App. at 479.) The Commission further admitted that a prior "statement on the merits" is a basis for a due process violation. (Aplt. App. at 466.) Rather than making its current *Liteky* "extrajudicial source doctrine" argument below, the Commission alleged the statements complained of by Zen simply did not demonstrate bias nor prejudgment. (Aplt. App. at 478-80.) And even though the Commission characterized Zen's argument as "spurious" (*id.* at 415) and "hav[ing] no merit" (*id.* at 414), the District Court evidently disagreed. What the Commission said in the District Court was: "Zen urges this Court to break new ground and find bias on the basis of action authorized by statute apart from the adjudication and on-the-record statements made about those official actions. No court has done so before on facts such as these, and this Court should decline Zen's invitation to do so." (*See* Aplt. App. at 463-64.) This is a different argument than they are making now. And, it is not a correct recitation of Zen's argument.

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[7] In the District Court, the Commission also cited *Cement Institute* to support the following proposition: "In any event, agency officials may reach pre-adjudication legal conclusions, as long as parties are later given a chance to present their own evidence and arguments in the adjudication." (Aplt. App. at 470.) Even a cursory reading of *Cement Institute*, 333 U.S. at 701, reveals the Supreme Court gave no such carte blanche to agency officials to say whatever they please on condition that they later hold a hearing. The CPSC commissioners' statements identified in this Brief and in the District Court evidence their irrevocably closed minds. No amount of evidence and argument presented at a subsequent hearing can remedy that.

The Commission next argues that "Because Commissioner Adler was not disqualified from the adjudication by virtue of his participation in the rulemaking, he also was not disqualified by virtue of opinions he appropriately formed and expressed in connection with that rulemaking." (Aplt. Br. at 25.) Again, the Commission did not make this argument in the District Court, and has therefore waived it here. *See Wilburn*, 343 F.3d at 1280 ("we will not consider a new theory 'that falls under the same general category as an argument presented [before the district court] or . . . a theory that was discussed in a vague and ambiguous way.'") (quoting *Bancamerica Commercial Corp. v. Mosher Steel of Kansas, Inc.*, 100 F.3d 792, 798-99 (10th Cir. 1996)). While this Court has discretion to hear new arguments on appeal, "this discretion should be exercised only sparingly." *Margheim v. Buljko*, 855 F.3d 1077, 1088 (10th Cir. 2017) (citing *U.S. v. Jarvis*, 499 F.3d 1196, 1202 (10th Cir. 2007) ("This court has characterized its willingness to exercise its discretion to hear issues not raised below only in the most unusual circumstances." (quotations omitted)); *see also Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1540 (10th Cir. 1992) (*citing Hicks v. Gates Rubber Col*, 928 F.2d 966, 970-71 (10th Cir. 1991), and noting "basic policies which underlie the waiver rule include considerations of fairness to both the district court and the opposing party, avoidance of surprise on appeal necessitating remands for additional findings, and the need for

finality of litigation."). Nonetheless, Zen addresses the Commission's arguments below.

III. The Commission Violated Zen's Due Process Rights by Denying Zen a Fair Tribunal in the Administrative Adjudication.

A "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). "This applies to administrative agencies which adjudicate as well as to courts." *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975) (citing *Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973)). An administrative hearing "must be attended, not only with every element of fairness but with the very appearance of complete fairness." *Cinderella Career and Finishing Schools v. FTC* (*Cinderella II*), 425 F.2d 583, 591 (D.C. Cir. 1970) (quoting *Texaco, Inc. v. FTC*, 336 F.2d 754, 760 (D.C. Cir. 1964), *vacated and remanded on other grounds*) (quotation marks omitted); *accord Amos Treat & Co. v. SEC*, 306 F.2d 260, 267 (D.C. Cir. 1962).

The statements by the Commissioners in this case are the equivalent of a judge issuing a press release after rendering a judgment against a defendant, in which the judge not only extolls the virtues of his or her findings, but also states that if the defendant appeared before them again (which was known to be a likelihood), there would be no circumstance in which that judge could find for the defendant. Were that defendant to come before that judge again, especially on the same questions of

law and fact, under any judicial- or administrative-disqualification standard, recusal would be required. Basic principles of due process mandate such a result.

A. Zen Demonstrated an Unconstitutional Risk of Bias in the Administrative Adjudication Because of the Commission's Actions in the Rulemaking.

The facts of this case are unique and are readily distinguishable from *Cement Institute*, *Withrow*, and their progeny. Indeed, this case is distinguishable from all those cited by the Commission in which reviewing courts rejected due process arguments premised on the agency both investigating and adjudicating certain matters. The reason for that is simple: the Commission did not act as an investigatory and adjudicatory body; rather, it acted as a rulemaking body and as an adjudicatory body. Zen did not, as the District Court wrote, "concede" that the Commission "did not necessarily prejudge the issues in the adjudication simply by having promulgated a related rule." (Aplt. App. at 514.)[8] To the contrary, Zen argued that because there was such a high degree of overlap concerning the facts and laws at issue, the Commission *did* necessarily prejudge those matters in advance. At the very least, the Commission created the probability of unfairness and bias on such

[8] What Zen stated was that "The Commission was free to initiate a rulemaking and administrative action simultaneously." (Aplt. App. at 432.) "However," Zen, continued, "the Commission's actions in the rulemaking combined with the public comments by the majority, as well as the systematic, systemic, and legally inconsistent attacks on Zen in various fora all lead to the conclusion that the ultimate determination of the merits was only going to move in predestined grooves." (*Id.*)

a high level as to be constitutionally intolerable. *See Withrow*, 421 U.S. at 47; *In re Murchison*, 349 U.S. at 136. Zen acknowledges that its burden of persuasion was high; however, Zen met its burden. The District Court therefore erred by finding that that Commission did not prejudged the adjudication[9] because of the actions it took in the rulemaking.

In *Cement Institute*, after the taking of testimony had concluded in the administrative matter, members of the FTC presented a required report to Congress in which some of its members expressed the opinion that a multiple basing point system violated the law. *Cement Institute*, 333 U.S. at 700. That is a separate question from whether the FTC believed that the respondents had engaged in such an illegal multiple basing point system. What the FTC did not do was conclude, as a matter of law *and fact*, that the respondents in that case had engaged in an illegal multiple basing point system.

Conversely, the CPSC in the instant matter made *findings of fact* and law in advance of the administrative adjudication that *Zen's products* (the "Subject Products") *should not remain on the market under any circumstance.* The Commission did not, for instance, opine that selling products that were unreasonably

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[9] The "adjudication," as discussed herein, refers to the final adjudication of CPSC Docket 12-2, consummated by the Commission's FDO, and including Complaint Counsel's appeal of the IDO to the Commission. Zen does not claim that its due process rights were violated in the administrative hearing conducted by the ALJ.

hazardous to children violated the CPSA, which would have been similar to the permissible actions set forth in *Cement Institute*.

Despite the Commission's protestations, it appears that the goal of both the administrative proceeding and the rulemaking was removing the Subject Products from the market. In September 2014, the majority of commissioners voted to do just that,[10] finding, irrespective of how the Subject Products could be sold or marketed, the Subject Products would endanger the lives of children if made available for sale. (Aplt. App. at 188-201, 419-425.) That the magnets sold by Zen are the same as those covered by the rule is not in question. *See e.g.* 79 Fed. Reg. at 59962-59963. Both proceedings also sought prospective relief, barring Zen from selling the Subject Products in the future. (Aplt. App. at 94, 266.); *see also* 15 U.S.C. § 2064(c)(1).[11]

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[10] While the Tenth Circuit did not reach the issue of whether the rule "banned" the Subject Products, the Commission has acknowledged that the Rule barred Zen from selling its products. (*See* Aplt. App. at 355, lines 11-12.)

[11] The District Court agreed with the Commission's argument that the rulemaking and the adjudication did not both seek prospective relief because the rule "was an effort to prevent future harm from SREMs, whereas the adjudication of Zen's case was the Commission's attempt to recall magnets already in consumers' hands." (Aplt. App. at 517.) Not only is the court's reasoning expressly contradicted by 15 U.S.C. § 2064(c)(1) and the administrative complaint against Zen (Aplt. App. at 262), it is also without logic. The Commission cannot prevent harm that has already occurred. Therefore, the Commission's efforts must all be efforts to prevent *future* harm. In this case, the Commission sought to do that by removing the Subject Products from the market in both the rulemaking and in the adjudication.

While Zen does not contest the general proposition that an agency can utilize different regulatory tools at their disposal, the unique facts presented by this case demonstrate that the Commission violated Zen's due process rights when it chose to make factual findings in the rulemaking concerning the exact same questions before it in the adjudication. Those findings evidenced the commissioners' irrevocably closed minds. Additionally, *after* having made such findings, the commissioners made public speeches and issued press releases commending the righteousness of their actions. These facts are what sets this case apart from ones in which valid deliberations of commissioners were held *prior* to a vote. Because the rulemaking and adjudication sought the same outcome, comments made after the rulemaking and during the pendency of the adjudication were improper. And, as such, it was error for the District Court to find that the rulemaking deliberations and the adjudication were seeking different outcomes.

B. The District Court Properly Disqualified Commissioner Adler from the Adjudication, but Erred in not Disqualifying Commissioners Kaye and Robinson.

The District Court did not err in finding that Commissioner Adler's participation in the FDO process violated Zen's due process rights. But, the District

Court did err in ignoring additional statements made by Commissioners Kaye, Robinson, and Adler that also demand their disqualification.[12]

The Commission's new argument that, because the Commission may, in theory, undertake a rulemaking and an administrative adjudication, anything a commissioner says during that same temporal span of the rulemaking is necessarily insulated from a due-process challenge, has no basis in law. In this case, the statements complained of by Zen were not made in the furtherance of any agency action, and they were certainly not required to be made. Rather, the comments were made *about* the rulemaking, *about* Zen's products, specifically, and were made in *press releases* and in public *speeches after* voting to approve the draft final Magnet Rule. The Commission has acknowledged these facts. (*See* Aplt. App. at 464 (stating the statements were "made *about* official actions") (emphasis added) *id*. at 464 (the statements were "on-the-record" and "about" "official actions"); *id*. at 467 (Commissioner Robinson's statement made "[a]fter the vote"); *id*. at 399 (stating there is no difference among different brands of SREMs); *id*. at 462 ("the

[12] Acting Chairman Adler and Commissioner Kaye are the only two remaining members of the Commission who participated in the rulemaking and adjudication. Even though Commissioner Robinson is no longer on the Commission, if this Court finds that Commissioner Robinson's participation in the IDO appeal violated Zen's due process rights, that alone would be sufficient to invalidate the FDO. *See Cinderella II*, 425 F.2d at 592. Therefore, her departure from the Commission does not render her involvement a moot question.

Commissioners do not dispute that they made remarks attributed to them. . . ."). Even if one applies *Liteky* to the instant case (discussed below), there is no question that the statements made by Commissioners Kaye, Robinson, and Adler were "extrajudicial." The Commission's *post hoc* attempt to characterize the statements as being made "in the course of a rulemaking" is not only contradicted by the Commission's prior examination of the statements (Aplt. App. at 464), it is also legally flawed.

Even if, *arguendo*, one accepts that the rulemaking was unrelated to the adjudication, the statements complained of by Zen nonetheless were not made in order to advance any function of the Commission. For instance, Commissioner Adler's statement specifically identified by the District Court as constitutionally problematic was made *after* the vote on the approval of the Final Draft Safety Standard: "[T]he conclusion that I reach is that if these magnet sets remain on the market irrespective of how strong the warnings on the boxes in which they're sold or how narrowly they are marketed to adults, children will continue to be at risk of debilitating harm or death from this product." (Aplt. App. at 519.) That he made the statement "in [his] role[] as Commissioner[]" (Aplt. App. at 461) is apropos of nothing other than that he had already made up his mind in his role as a commissioner. Commissioner Adler's statement served no administrative function, and was, in fact, unrelated to the purpose of the rulemaking (which the CPSC insists

was not the removal of the Subject Products from the market). (*See* Aplee. Supp. App. at 58-59.) Rather, Commissioner Adler's statement was nothing short of an affirmation that he had already made up his mind that the Subject Products must be removed from the market, which was the requested remedy in the administrative action (Aplt. App. at 262), but was not the purpose of the rulemaking, according to the CPSC (Aplee. Supp. App. at 58-59).

Further, as the District Court correctly explained:

> The role of warnings and marketing efforts were of central relevance in the adjudication. One of Zen's key arguments was that its warnings, instructions, and marketing could prevent the misuse of its product from which the risk of injury arises. *See* ECF No. 36 at 13. The ALJ had found in the Initial Decision and Order that "the nature of the risk of injury which the product presents is negligible when accompanied by proper warnings and appropriate age restrictions." Zen Magnets, LLC, CPSC Docket 12-2, No. 141 at 19. . . .
>
> The Commission's own stance that . . . "the physical characteristics of SREMs that give rise to a risk of injury are shared by all brands" indicates that the risks it associated with any magnets would necessarily be imputed to Zen. ECF No. 1-2 at 23. As a result, the only factors Zen might manipulate to establish the safety of its magnets over other distributors' [magnets] would be the warnings, instructions, or marketing. Therefore, Commissioner Adler's statement indicating that he would deem any brand of SREM dangerous regardless of the efficacy of a particular brand's warnings foreclosed the possibility that Zen could present any evidence about its warnings or marketing that would convince him that Zen was capable of mitigating the risk of injury from its product.

(Aplt. App. at 521.)

Further still, Commissioner Adler's opinion about needing to remove the Subject Products from the market was not at issue in the rulemaking, according to the Commission. That statement must therefore be "extrajudicial." But Commissioner Adler's comments were not only extrajudicial, they also demonstrated prejudgment on a critical issue in the administrative adjudication. The District Court therefore properly disqualified Commissioner Adler from participating in Complaint Counsel's appeal. *See* Aplt. App. at 522, 525 (analogizing Commissioner Adler's statements with those made in *McClure v. Independent School Dist. No. 16*, 228 F.3d 1205, 1215-16 (10th Cir. 2000), and *Staton v. Mayes*, 552 F.2d 908, 914 (10th Cir. 1977), and ordering that Commissioner Adler not participate in the appeal of the IDO.)

Even though Commissioner Robinson's statements were "admittedly similar to Commissioner Adler's" (Aplt. App. at 523), the District Court did not find them to be constitutionally problematic (*id.*). That was error. Commissioner Robinson made clear her position that the dangers posed by the Subject Product were more than "unreasonable," that the Subject Products had caused multiple deaths (which was controverted by the evidence presented in the administrative adjudication), and that the Subject Products would continue to be deadly to children regardless of how they were marketed. (Aplt. App. at 423.) As the District Court correctly acknowledged, "the only factors Zen might manipulate to establish the safety of its

magnets over other distributors' would be the warnings, instructions, or marketing." (Aplt. App. at 521.) Commissioner Robinson had taken away the possibility that Zen could demonstrate its marketing set it apart from other brands of SREMs, and evidenced that her mind was irrevocably closed on that question.

Additionally, as the Commission noted, Commission Robinson's statements were "that young children and teenagers were being severely harmed by SREMs that presented a hidden hazard." (Aplt. App. at 470.) But, the Commission continued, stating, "Nothing about these general statements shows any prejudgment of Zen's evidence and arguments that would later be presented in the adjudication." (*Id.*) The latter statement is patently incorrect. Three of the issues in the adjudication were (1) the obviousness of the risk of SREMs, which, again, were, according to the Commission, shared by all brands of SREMs, (2) the ability of Zen's warnings to mitigate that risk, and (3) the nature of the risk of injury. (*See* Aplt. App. at 113-114, 120-121.) Commissioner's Robinsons comments spoke directly to those three issues, and demonstrated that her opinion would not be swayed by any evidence Zen presented in the adjudication. Commissioner Robinson therefore should have been disqualified along with Commissioner Adler. *See Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 80 (10th Cir. 1972); *Cinderella II*, 425 F.2d at 591; *NEC Corp. v. U.S.*, 151 F.3d 1361, 1373 (Fed. Cir. 1998).

Those comments identified by Zen and made by then-Chairman Kaye were also not required and were made after he had already voted to approve the final draft rule. In one press release, Commissioner Kaye extolled the moral virtue of banning magnet sets, invoking the "significant hurt and loss" that he believed the magnet sets visited upon children, and publicly naming two minor children in the process whom he believed had been harmed by the Subject Products. (Aplt. App. at 272-273.) In a second press release, issued by the Department of Justice about a case to which the CPSC was not a party, then-Chairman Kaye chided Zen for placing its desire for profit ahead of not only "the rule of law" but also the "safety of children." (Aplt. App. at 275.) Neither press release was required, nor was either public statement made to advance any function of the CPSC. Then-Chairman Kaye also went on the record and read a statement directly to Mr. Qu, Zen's principal, indicating to Mr. Qu that he would no longer be able to sell the Subject Products. (Alpt. App. at 422.)

Then-Chairman Kaye went even further, still. Just as Commissioner Adler decided to issue a public statement about his own opinions, then-Chairman Kaye decided to publicly announce how he felt about Zen's products:[13]

> We all have fears in life. Every single one of us. For me, the biggest without any question, is something tragic happening to one of my boys. Every night, EVERY NIGHT, long after we have put them to bed, I

[13] The CPSC also believed that all SREMs are indistinguishable, fungible objects, where the dangers of one brand of SREMs are necessarily shared by all others. (Aplt. App. at 63.)

> sneak back into their rooms to kiss them one more time. As I do that, I feel tremendous gratitude they are alive and well, and that I am so blessed to have the privilege of hearing in the dark of their rooms the soothing and rhythmic sound of their breathing. I hug them tight, trying not to wake them, all the while knowing that, as long as I might hang on that particular evening, that moment is rather fleeting. And I also know each night that there is certainly no guarantee I will have even one more night to hold onto them tight.
>
> As a parent and as the Chairman of the CPSC, I hurt so much for [AC's] family. I was so deeply moved that [AC's] mother, brothers, grandmother, aunt, and cousin took the time to drive from Ohio to attend the Commission's vote. I will always think of [AC] when it comes to this rule and the action the Commission has approved, and I am so deeply sorry for [AC's] family's loss.

(Aplt. App. at 422.) (Additional statements and opinions offered by the commissioners are found in the record on appeal at Aplt. App. pages 266-277, and the Commission has acknowledged that the quotes attributed to the commissioners were indeed made by those commissioners, *id*. at 462.)

The District Court found Commissioner Kaye's March 2016 "troublesome" (Aplt. App. at 524), but declined to find that Commissioner Kaye should be disqualified (*id*.). That was error. He should be disqualified. Commissioner Kaye's statements did not advance any purpose other than to publicly announce his own opinions about Zen and Zen's products, and demonstrated Commissioner Kaye's bias towards Zen and prejudgment of the question of whether Zen's products should remain on the market. At the very least, Commissioner Kaye's extrajudicial

statements gave the reasonable appearance of prejudgment, which is sufficient to require disqualification. *See Kennecott Copper*, 467 F.2d at 80.

C. Even Though *Liteky* is not the Proper Standard to Apply in this Case, the Public Statements Complained of Were Extrajudicial and Require Disqualification of Commissioners Adler, Robinson, and Kaye Under any Standard.

The Commission relies heavily on *Liteky v. U.S.*, 510 U.S. 540 (1994), which espoused the "extrajudicial source doctrine." That reliance is misplaced. The Commission's insistence on treating the disqualification of agency officials the same as judges is not only *sui generis*, it also ignores decades of jurisprudence addressing the unique constitutional strictures imposed on administrative decisionmakers who necessarily wear multiple hats.[14] Nonetheless, the forced application of judicial recusal standards to the commissioners in this case yields the same result.

Liteky involved the question of whether the extrajudicial source doctrine applied to 28 U.S.C. § 455(a), which states that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Though due process considerations no doubt undergird § 455(a), *Liteky* was wholly unrelated

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[14] *See e.g. Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975); *Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973); *Cinderella II*, 425 F.2d at 591; *Texaco, Inc. v. FTC*, 336 F.2d 754, 760 (D.C. Cir. 1964), *vacated and remanded on other grounds*; *Amos Treat & Co. v. SEC*, 306 F.2d 260, 267 (D.C. Cir. 1962); *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 80 (10th Cir. 1972); *FTC v. Cement Inst.*, 333 U.S. 683, 701 (1948); *NEC Corp. v. U.S.*, 151 F.3d 1361, 1373 (Fed. Cir. 1998).

to either what standards govern disqualification of agency officials in administrative adjudications, or to due process considerations, generally. Rather, it was a case interpreting the statutory construction of § 455. (*Liteky* does not mention due process or the Fifth Amendment *once*.) But, as the Supreme Court subsequently explained in *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 872 (2009), the reason for recusal is not that Congress passed a law; rather it is due process: "Under our precedents there are objective standards that require recusal when 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Id.* (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

To the best of Zen's knowledge, no court has previously applied 28 U.S.C. § 455(a) to agency adjudications. Although the Commission states in a parenthetical that this Court applied "*Liteky* in due-process challenge to agency adjudicator" in *St. Anthony Hosp. v. U.S. Dept. of Health & Human Servs.*, 309 F.3d 680, 713 (10th Cir. 2002), that characterization is misleading at best. (*See* Aplt. Br. at 31.) *St. Anthony* dealt with the disqualification of an administrative law judge, not agency officials, the latter of which involves a different legal standard. *Compare Bunnell v. Barnhart*, 336 F.3d 1112, 1115 (9th Cir. 2003) ("the recusal standard for ALJs is a showing of actual bias) *with Withrow*, 421 U.S. at 47 (unconstitutional risk of bias as standard in administrative adjudications) *and Kennecott Copper*, 467 F.3d at 80

(a reasonable appearance of prejudgment requires disqualification in administrative adjudication).

The Commission also seemingly focuses on *where* the statements were made, not on *what* was actually said. Even *Liteky* recognized that, regardless of whether an expressed opinion is derived from an extrajudicial source, if it "reveal[s] such a high degree of favoritism or antagonism as to make fair judgment impossible," recusal is required. *Liteky*, 510 U.S. at 555-56. In the instant case, the statements made by Commissioners Kaye, Robinson, and Adler not only revealed their "strong view[s] about the dangers of SREMs," they also gave the appearance that those commissioners had precisely prejudged the administrative case against Zen.

As Zen argued in the District Court, "Though various tests have been applied by other circuits to determine whether a showing of bias and prejudgment has been made, under any standard, and to any independent observer, the FDO majority's conduct and statements show their irrevocably closed minds, bias and prejudgment." (Aplt. App. at 427-428 (footnote omitted).) Moreover, as previously discussed, Commissioner Adler's, Robinson's, and Kaye's statements were not made as part of any administrative action, and were necessarily extrajudicial in nature. For that reason, the District Court did not err in disqualifying Commissioner Adler, but did err in finding that the participation of Commissioners Kaye and Robinson in the FDO did not violate Zen's due process rights.

D. Chairwoman Buerkle Believed Her Colleagues Were Biased and Had Prejudged the Issues in the Administrative Adjudication.

Then-acting Chairwoman Buerkle agreed that her colleagues were biased against Zen and had already made up their minds before hearing Complaint Counsel's appeal of the IDO. (Aplt. App. at 169.) Commissioner Buerkle correctly noted that, in addition to making findings in the rulemaking, her fellow Commissioners "made public statements that could cause a 'disinterested observer' to conclude that they have 'in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.' *Cinderella II*, 425 F.2d at 591." (*Id.*)

Commissioner Buerkle concluded that, regardless of the standard applied, "I regret to say that the statements made by my colleagues suggest nothing less" than having "irrevocably closed" minds. (*Id.*) That alone would be sufficient to lead any objective observer to conclude that the Commission was incapable of judging this particular controversy fairly on the basis of its own circumstances. *See Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Assn.*, 426 U.S. 482, 493 (1976). This Court need not even proceed any further in its inquiry into whether Zen's due process rights were violated. Nevertheless, as discussed above, ample additional evidence exists that Commissioners Kaye and Robinson should have been disqualified along with Commissioner Adler.

IV. The District Court Erred by Opining on Whether the Unlawful Opinions and Conclusions in the FDO Were not Arbitrary and Capricious and Were Supported by Substantial Evidence.

The District Court's Amended Final Judgment found that the FDO was unlawful, setting aside and vacating the FDO in its entirety. (Aplt. App. at 556.) *Ipso facto*, there was no FDO at all after the District Court's amended order and judgment. It was therefore a manifest error of law for the District Court to hold that the findings and conclusions in that nonexistent FDO were not arbitrary and capricious, and were supported by substantial evidence. Additionally, the court's legal findings and opinion that the FDO's findings and conclusions *could have* survived an arbitrary-and-capricious review had the same FDO not been vacated, constituted an unconstitutional advisory opinion.

Relying on the "deeply rooted" doctrine that the court "ought not pass on questions of constitutionality . . . unless such adjudication is unavoidable," *Rosenberg v. Fleuti*, 374 U.S. 449, 451 (1963) (cited in *Olenhouse*, 42 F.3d at 1580)), the District Court declined to find its arbitrary-and-capricious and substantial-evidence findings were improper advisory opinions. (Aplt. App. at 555.) However deeply rooted that doctrine may be, it does not supplant the jurisdictional mandate that the federal courts abstain from deciding the merits of a moot case or issue, because doing so would exceed the court's Article III powers. *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1336 (11th Cir. 2001) (citation omitted). "It is fundamental

that federal courts do not render advisory opinions and that they are limited to deciding issues in actual cases and controversies. U.S. Const. art. 3, § 1 et seq. . . . Judicial restraint should be exercised to avoid rendition of an advisory opinion." *Norvell v. Sangre de Cristo Development Co., Inc.*, 519 F.2d 370, 375 (10th Cir. 1975) (citations omitted). A federal court "should not render decisions absent a genuine need to resolve a real dispute." *Lehn v. Holmes*, 364 F.3d 862, 876 (7th Cir. 2004) (citations omitted).

When the District Court vacated the FDO and remanded consideration of the IDO to the Commission, the question of whether the FDO could have, in theory, withstood review pursuant to 5 U.S.C. § 706(2)(A) was moot. *See Republic of Venezuela v. Philip Morris Inc.*, 287 F.3d 192, 199-200 (D.C. Cir. 2002) ("Article III does not authorize a federal court 'to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.'" (quoting *California v. San Pablo & T.R. Co.*, 149 U.S. 308, 314 (1893)); *see also Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1110 (10th Cir. 2010) ("The crucial question is whether granting a *present* determination of the issues offered will have some effect in the real world.") (citing *Wyoming v. U.S. Dept. of Agric.*, 414 F.3d 1207, 1212 (10th Cir. 2005) (emphasis by Court, additional citations and quotations omitted).

Courts routinely refrain from reaching alternative arguments when remanding cases for agencies to take further action in order to avoid issuing advisory opinions. *See e.g. California Wilderness Coalition v. U.S. Dept. of Energy*, 631 F.3d 1072, 1107 (9th Cir. 2011) ("In light of our vacation of the Congestion Study and the NIETCs Designation, we decline to consider the petitioners' challenges (1) under the Endangered Species Act, (2) under the National Historic Preservation Act, and (3) to specific aspects of the Mid-Atlantic Corridor and the Southwest Corridor."); *cf. U.S. v. Gupta*, 572 F.3d 878, 887-88 (11th Cir. 2009) ("Because we conclude that a remand is necessary to correct procedural errors, we decline to evaluate the substantive reasonableness of Gupta's sentence. *See United States v. Collins*, 915 F.2d 618, 622 (11th Cir. 1990). 'We do not know what sentence the district court will impose on remand. Thus, we would be rendering an advisory opinion if we were to pick a sentence and declare it to be reasonable.' *Id.*"); *American Cyanamid Co. v. FTC*, 363 F.2d 757, 772 (6th Cir. 1966) (passing on the substantial evidence inquiry because the court was remanding the matter to the FTC to have the offending commissioner recuse himself from the proceedings). It was error for the District Court not to do likewise.

Not only did the District Court's analysis under 5 U.S.C. § 706(2)(A) constitute an advisory opinion, it is also at odds with the APA. "It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency

itself." *Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 50 (1983) (citations omitted). After the District Court vacated the FDO and the Commission's findings, there were no longer any findings. Because the court proceeded with its additional APA analysis, the District Court resultantly opined that, if the Commission had made those findings in a valid FDO, they would not have been arbitrary and capricious, and would have been supported by substantial evidence. But, because there was no FDO by order of the court, the Commission cannot have articulated *any* basis for its actions. *Cf. CSI Aviation Servs. v. U.S. Dept. of Transportation*, 637 F.3d 408, 416 (D.C. Cir. 2011); *Assn. of Data Processing v. Bd. of Governors*, 745 F.2d 677, 683-84 (D.C. Cir. 1984). Finding otherwise was a manifest error of law and requires vacatur of the District Court's 5 U.S.C. § 706(2)(A) analysis.

CONCLUSION

For the foregoing reasons, Zen Magnets, LLC respectfully requests that the denial of Zen's Fed. R. Civ. P. 59(e) Motion regarding the court's 5 U.S.C. § 706(2)(A) analysis be reversed, that the District Court's disqualification of Commissioner Adler be upheld, and that this Court further find that Commissioner Kaye's and Robinson's participation in the FDO violated Zen's Fifth Amendment due process rights to a fair and impartial tribunal.

Dated this 5th day of December, 2019.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Appellee-Cross Appellant Zen Magnets, LLC believes that oral argument would be of assistance to this Court and respectfully requests oral argument in this matter.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Fed. R. App. 28.1(e)(2) because it contains 9,692 words. This brief also complies with the typeface and type-style requirements of Fed. R. App. 32(a)(2) and 10th Cir. R. 28.2(C)(1) and (C)(2) because it was prepared using Microsoft Word in Times New Roman 14-point font, a proportionately spaced typeface.

s/ David C. Japha
David C. Japha, Esq.

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that (1) all required privacy redactions have been made; (2) any paper copies of this document submitted to the Court are exact copies of the version filed electronically; and (3) the electronic submission was scanned for viruses and found to be virus-free.

s/ David C. Japha
David C. Japha, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2019, I electronically filed the foregoing brief with the Clerk of the court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ David C. Japha
David C. Japha, Esq.

ADDENDUM

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5 U.S.C. § 553

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved-

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include-

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply-

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except-

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

* * * *

5 U.S.C. § 554

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved-

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a [1] administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of-

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for-

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not-

(1) consult a person or party on a fact in issue, unless on notice and opportunity

for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply-

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

* * * *

5 U.S.C. § 702

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

* * * *

5 U.S.C. § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be-

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

* * * *

15 U.S.C. § 2064

§ 2064. Substantial product hazards

(a) "Substantial product hazard" defined

For purposes of this section, the term "substantial product hazard" means--

(1) a failure to comply with an applicable consumer product safety rule under this chapter or a similar rule, regulation, standard, or ban under any other Act enforced by the Commission which creates a substantial risk of injury to the public, or

(2) a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public.

(b) Noncompliance with applicable consumer product safety rules; product defects; notice to Commission by manufacturer, distributor, or retailer

Every manufacturer of a consumer product, or other product or substance over which the Commission has jurisdiction under any other Act enforced by the Commission (other than motor vehicle equipment as defined in section 30102(a)(7) of Title 49), distributed in commerce, and every distributor and retailer of such product, who obtains information which reasonably supports the conclusion that such
product--

(1) fails to comply with an applicable consumer product safety rule or with a voluntary consumer product safety standard upon which the Commission has relied under section 2058 of this title;

(2) fails to comply with any other rule, regulation, standard, or ban under this chapter or any other Act enforced by the Commission;

(3) contains a defect which could create a substantial product hazard described in subsection (a)(2); or

(4) creates an unreasonable risk of serious injury or death,

shall immediately inform the Commission of such failure to comply, of such defect, or of such risk, unless such manufacturer, distributor, or retailer has actual knowledge that the Commission has been adequately informed of such defect, failure to comply, or such risk. A report provided under paragraph (2) may not be used as the basis for criminal prosecution of the reporting person under section 1264 of this title, except for offenses which require a showing of intent to defraud or mislead.

(c) Notice of defect or failure to comply; mail notice

(1) If the Commission determines (after affording interested persons, including consumers and consumer organizations, an opportunity for a hearing in accordance with subsection (f) of this section) that a product distributed in commerce presents a substantial product hazard and that notification is required in order to adequately protect the public from such substantial product hazard, or if the Commission, after notifying the manufacturer, determines a product to be an imminently hazardous consumer product and has filed an action under section 2061 of this title, the Commission may order the manufacturer or any distributor or retailer of the product to take any one or more of the following actions:

(A) To cease distribution of the product.

(B) To notify all persons that transport, store, distribute, or otherwise handle the product, or to which the product has been transported, sold, distributed, or otherwise handled, to cease immediately distribution of the product.

(C) To notify appropriate State and local public health officials.

(D) To give public notice of the defect or failure to comply, including posting clear and conspicuous notice on its Internet website, providing notice to any third party Internet website on which such manufacturer, retailer, distributor, or licensor has placed the product for sale, and announcements in languages other than English and on radio and television where the Commission determines that a substantial number of consumers to whom the recall is directed may not be reached by other notice.

(E) To mail notice to each person who is a manufacturer, distributor, or retailer of such product.

(F) To mail notice to every person to whom the person required to give notice knows such product was delivered or sold.

Any such order shall specify the form and content of any notice required to be given under such order.

(2) The Commission may require a notice described in paragraph (1) to be distributed in a language other than English if the Commission determines that doing so is necessary to adequately protect the public.

(3) If a district court determines, in an action filed under section 2061 of this title, that the product that is the subject of such action is not an imminently

hazardous consumer product, the Commission shall rescind any order issued under this subsection with respect to such product.

(d) Repair; replacement; refunds; action plan

(1) If the Commission determines (after affording interested parties, including consumers and consumer organizations, an opportunity for a hearing in accordance with subsection (f)) that a product distributed in commerce presents a substantial product hazard and that action under this subsection is in the public interest, it may order the manufacturer or any distributor or retailer of such product to provide the notice required by subsection (c) and to take any one or more of the following actions it determines to be in the public interest:

(A) To bring such product into conformity with the requirements of the applicable rule, regulation, standard, or ban or to repair the defect in such product.

(B) To replace such product with a like or equivalent product which complies with the applicable rule, regulation, standard, or ban or which does not contain the defect.

(C) To refund the purchase price of such product (less a reasonable allowance for use, if such product has been in the possession of a consumer for one year or more (i) at the time of public notice under subsection (c), or (ii) at the time the consumer receives actual notice of the defect or noncompliance, whichever first occurs).

(2) An order under this subsection shall also require the person to whom it applies to submit a plan, for approval by the Commission, for taking action under whichever of the preceding subparagraphs under which such person has been ordered to act. The Commission shall specify in the order the persons to whom refunds must be made if the Commission orders the action described in subparagraph (C).1 An order under this subsection may prohibit the person to whom it applies from manufacturing for sale, offering for sale, distributing in commerce, or importing into the customs territory of the United States (as defined in general note 2 of the Harmonized Tariff Schedule of the United States), or from doing any combination of such actions, the product with respect to which the order was issued.

(3)(A) If the Commission approves an action plan, it shall indicate its approval in writing.

(B) If the Commission finds that an approved action plan is not effective or appropriate under the circumstances, or that the manufacturer, retailer, or

distributor is not executing an approved action plan effectively, the Commission may, by order, amend, or require amendment of, the action plan. In determining whether an approved plan is effective or appropriate under the circumstances, the Commission shall consider whether a repair or replacement changes the intended functionality of the product.

(C) If the Commission determines, after notice and opportunity for comment, that a manufacturer, retailer, or distributor has failed to comply substantially with its obligations under its action plan, the Commission may revoke its approval of the action plan. The manufacturer, retailer, or distributor to which the action plan applies may not distribute in commerce the product to which the action plan relates after receipt of notice of a revocation of the action plan.

(e) Reimbursement

(1) No charge shall be made to any person (other than a manufacturer, distributor, or retailer) who avails himself of any remedy provided under an order issued under subsection (d), and the person subject to the order shall reimburse each person (other than a manufacturer, distributor, or retailer) who is entitled to such a remedy for any reasonable and foreseeable expenses incurred by such person in availing himself of such remedy.

(2) An order issued under subsection (c) or (d) with respect to a product may require any person who is a manufacturer, distributor, or retailer of the product to reimburse any other person who is a manufacturer, distributor, or retailer of such product for such other person's expenses in connection with carrying out the order, if the Commission determines such reimbursement to be in the public interest.

(f) Hearing

(1) Except as provided in paragraph (2), an order under subsection (c) or (d) may be issued only after an opportunity for a hearing in accordance with section 554 of Title 5 except that, if the Commission determines that any person who wishes to participate in such hearing is a part of a class of participants who share an identity of interest, the Commission may limit such person's participation in such hearing to participation through a single representative designated by such class (or by the Commission if such class fails to designate such a representative). Any settlement offer which is submitted to the presiding officer at a hearing under this subsection shall be transmitted by the officer to the Commission for its consideration unless the settlement offer is clearly frivolous or duplicative of offers previously made.

(2) The requirement for a hearing in paragraph (1) shall not apply to an order issued under subsection (c) or (d) relating to an imminently hazardous consumer product with regard to which the Commission has filed an action under section 2061 of this title.

(g) Preliminary injunction

(1) If the Commission has initiated a proceeding under this section for the issuance of an order under subsection (d) with respect to a product which the Commission has reason to believe presents a substantial product hazard, the Commission (without regard to section 2076(b)(7) of this title) or the Attorney General may, in accordance with 2061(d)(1)2 of this title, apply to a district court of the United States for the issuance of a preliminary injunction to restrain the distribution in commerce of such product pending the completion of such proceeding. If such a preliminary injunction has been issued, the Commission (or the Attorney General if the preliminary injunction was issued upon an application of the Attorney General) may apply to the issuing court for extensions of such preliminary injunction.

(2) Any preliminary injunction, and any extension of a preliminary injunction, issued under this subsection with respect to a product shall be in effect for such period as the issuing court prescribes not to exceed a period which extends beyond the thirtieth day from the date of the issuance of the preliminary injunction (or, in the case of a preliminary injunction which has been extended, the date of its extension) or the date of the completion or termination of the proceeding under this section respecting such product, whichever date occurs first.

(3) The amount in controversy requirement of section 1331 of Title 28 does not apply with respect to the jurisdiction of a district court of the United States to issue or exend3 a preliminary injunction under this subsection.

(h) Cost-benefit analysis of notification or other action not required

Nothing in this section shall be construed to require the Commission, in determining that a product distributed in commerce presents a substantial product hazard and that notification or other action under this section should be taken, to prepare a comparison of the costs that would be incurred in providing notification or taking other action under this section with the benefits from such notification or action.

(i) Requirements for recall notices

(1) Guidelines

Not later than 180 days after August 14, 2008, the Commission shall, by rule,

establish guidelines setting forth a uniform class of information to be included in any notice required under an order under subsection (c) or (d) of this section or under section 2061 of this title. Such guidelines shall include any information that the Commission determines would be helpful to consumers in--

(A) identifying the specific product that is subject to such an order;

(B) understanding the hazard that has been identified with such product (including information regarding incidents or injuries known to have occurred involving such product); and

(C) understanding what remedy, if any, is available to a consumer who has purchased the product.

(2) Content

Except to the extent that the Commission determines with respect to a particular product that one or more of the following items is unnecessary or inappropriate under the circumstances, the notice shall include the following:

(A) description of the product, including--

(i) the model number or stock keeping unit (SKU) number of the product;

(ii) the names by which the product is commonly known; and

(iii) a photograph of the product.

(B) A description of the action being taken with respect to the product.

(C) The number of units of the product with respect to which the action is being taken.

(D) A description of the substantial product hazard and the reasons for the action.

(E) An identification of the manufacturers and significant retailers of the product.

(F) The dates between which the product was manufactured and sold.

(G) The number and a description of any injuries or deaths associated with the product, the ages of any individuals injured or killed, and the dates on which the Commission received information about such injuries or deaths.

(H) A description of--

(i) any remedy available to a consumer;

(ii) any action a consumer must take to obtain a remedy; and

(iii) any information a consumer needs in order to obtain a remedy or information about a remedy, such as mailing addresses, telephone numbers, fax numbers, and email addresses.

(I) Other information the Commission deems appropriate.

(j) Substantial product hazard list

(1) In general

The Commission may specify, by rule, for any consumer product or class of consumer products, characteristics whose existence or absence shall be deemed a substantial product hazard under subsection (a)(2), if the Commission determines that--

(A) such characteristics are readily observable and have been addressed by voluntary standards; and

(B) such standards have been effective in reducing the risk of injury from consumer products and that there is substantial compliance with such standards.

(2) Judicial review

Not later than 60 days after promulgation of a rule under paragraph (1), any person adversely affected by such rule may file a petition for review under the procedures set forth in section 2060 of this title.

* * * *

28 U.S.C. § 455

§ 455. Disqualification of justice, judge, or magistrate judge

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

* * * *

28 U.S.C. § 1291

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

* * * *

28 U.S.C. § 1331

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

* * * *

28 U.S.C. § 1346

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 7104(b)(1) and 7107(a)(1) of title 41. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of title 18).

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1986.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

(g) Subject to the provisions of chapter 179, the district courts of the United States shall have exclusive jurisdiction over any civil action commenced under section 453(2) of title 3, by a covered employee under chapter 5 of such title.

* * * *

28 U.S.C. § 2412(a)(1)

§ 2412. Costs and fees

(a)(1) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

(2) A judgment for costs, when awarded in favor of the United States in an action brought by the United States, may include an amount equal to the filing fee prescribed under section 1914(a) of this title. The preceding sentence shall not be construed as requiring the United States to pay any filing fee.

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

(c)(1) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this titleand shall be in addition to any relief provided in the judgment.

(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of

the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(D) If, in a civil action brought by the United States or a proceeding for judicial review of an adversary adjudication described in section 504(a)(4) of title 5, the demand by the United States is substantially in excess of the judgment finally obtained by the United States and is unreasonable when compared with such judgment, under the facts and circumstances of the case, the court shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this subparagraph shall be paid only as a consequence of appropriations provided in advance.

(2) For the purposes of this subsection-

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association or for purposes of subsection (d)(1)(D), a small entity as defined in section 601 of title 5;

(C) "United States" includes any agency and any official of the United States acting in his or her official capacity;

(D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

(E) "civil action brought by or against the United States" includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to chapter 71 of title 41;

(F) "court" includes the United States Court of Federal Claims and the United States Court of Appeals for Veterans Claims;

(G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement;

(H) "prevailing party", in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government; and

(I) "demand" means the express demand of the United States which led to the adversary adjudication, but shall not include a recitation of the maximum statutory penalty (i) in the complaint, or (ii) elsewhere when accompanied by an express demand for a lesser amount.

(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in

subsection (b)(1)(C) of section 504 of title 5, or an adversary adjudication subject to chapter 71 of title 41, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

(4) Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

(5)(A) Not later than March 31 of the first fiscal year beginning after the date of enactment of the John D. Dingell, Jr. Conservation, Management, and Recreation Act, and every fiscal year thereafter, the Chairman of the Administrative Conference of the United States shall submit to Congress and make publicly available online a report on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this subsection.

(B) Each report under subparagraph (A) shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information that may aid Congress in evaluating the scope and impact of such awards.

(C)(i) Each report under subparagraph (A) shall account for all payments of fees and other expenses awarded under this subsection that are made pursuant to a settlement agreement, regardless of whether the settlement agreement is sealed or otherwise subject to a nondisclosure provision.

(ii) The disclosure of fees and other expenses required under clause (i) shall not affect any other information that is subject to a nondisclosure provision in a settlement agreement.

(D) The Chairman of the Administrative Conference of the United States shall include and clearly identify in each annual report under subparagraph (A), for each case in which an award of fees and other expenses is included in the report-

(i) any amounts paid under section 1304 of title 31 for a judgment in the case;

(ii) the amount of the award of fees and other expenses; and

(iii) the statute under which the plaintiff filed suit.

(6) As soon as practicable, and in any event not later than the date on which the first report under paragraph (5)(A) is required to be submitted, the Chairman of the Administrative Conference of the United States shall create and maintain online a searchable database containing, with respect to each award of fees and other expenses under this subsection made on or after the date of enactment of the John D. Dingell, Jr. Conservation, Management, and Recreation Act, the following information:

(A) The case name and number, hyperlinked to the case, if available.

(B) The name of the agency involved in the case.

(C) The name of each party to whom the award was made as such party is identified in the order or other court document making the award.

(D) A description of the claims in the case.

(E) The amount of the award.

(F) The basis for the finding that the position of the agency concerned was not substantially justified.

(7) The online searchable database described in paragraph (6) may not reveal any information the disclosure of which is prohibited by law or a court order.

(8) The head of each agency (including the Attorney General of the United States) shall provide to the Chairman of the Administrative Conference of the United States in a timely manner all information requested by the Chairman to comply with the requirements of paragraphs (5), (6), and (7).

(e) The provisions of this section shall not apply to any costs, fees, and other expenses in connection with any proceeding to which section 7430 of the Internal Revenue Code of 1986 applies (determined without regard to subsections (b) and (f) of such section). Nothing in the preceding sentence shall prevent the awarding under subsection (a) of this section of costs enumerated in section 1920 of this title (as in effect on October 1, 1981).

(f) If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be computed at the rate determined under section 1961(a) of this title, and shall run from the date of the award through the day before the date of the mandate of affirmance.

* * * *

From: Tanzer, Theodore
To: Public Calendar,
Cc: Feldman, Peter; Bellet, Cecilia
Subject: Commissioner Feldman and Staff Meeting Nancy Nord
Date: Monday, January 6, 2020 4:18:07 PM

Please add the following post to the public calendar.
Thanks!
-Teddy

Thursday, January 9, 2020
2:00pm-3:00pm
Open
Substantial
Commissioner Feldman and Staff Meeting Nancy Nord

Commissioner Feldman and staff will be meeting with Nancy A. Nord regarding adult magnet set safety and ongoing efforts at ASTM to draft a safety standard for adult magnet sets with small loose magnets. Participants will include Nancy A. Nord of OFW Law. The meeting will be held on Thursday, January 9, 2020, from 2:00 pm - 3:00 pm, in room 723 of CPSC Headquarters, Bethesda Towers. The meeting was requested by Nancy A. Nord. For additional information contact Teddy Tanzer at 301-504-7300.

From: Kirshner, Amy

To: Kirshner, Amy; Kaye, Elliot; Fong-Swamidoss, Jana; McGoogan, Stephen; Adler, Robert; Klein, Sarah; Mullan, John; Yahr, Dorothy; Ray, DeWane; Covell, Michelle; Midgett, Jonathan; Kentoff, Maureen; Feinberg, Jennifer; Crockett, David; Boyle, Mary; Pollitzer, Patricia; Summitt, Monica; Steinle, Allison; Recht, Joel; Rodgers, Samuel Gregory; Stadnik, Andrew; Thaler, Alice; Adair, Patricia; Boniface, Duane; Baiocco, Dana; Hanway, Stephen; Hudgins, Christopher; Feldman, Peter; Martyak, Joseph

Subject: EXHR Activities Report 12 20 2019

Date: Friday, December 20, 2019 8:48:08 AM

Attachments: EXHR Activities Report 12_20_2019_FINAL.pdf

Page 003

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information Act

Page 004

Withheld pursuant to exemption

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(b)(5)

of the Freedom of Information Act

Page 014

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information Act

From: Tanzer, Theodore
To: Feldman, Peter
Subject: FW: Meeting request
Date: Wednesday, January 15, 2020 11:38:29 AM

From: Bryan Rudolph [mailto:BRUDOLPH@montefiore.org]
Sent: Wednesday, January 15, 2020 11:21 AM
To: Tanzer, Theodore
Subject: Meeting request

Teddy,

I am emailing on behalf of NASPGHAN (the North American Society for Pediatric Gastroenterology, Hepatology and Nutrition) to schedule a meeting with Commissioner Feldman regarding high-powered magnet sets, which have injured thousands of children.

Does the Commissioner by chance have availability on March 4th? If not, I'd greatly appreciate you sending any other available dates and times.

Thanks so much,

Bryan Rudolph, MD, MPH
Chair, Public Affairs, NASPGHAN
Bryan Rudolph, MD, MPH, FAAP
Assistant Professor of Pediatrics
Director, Fatty Liver Program
Division of Pediatric Gastroenterology, Hepatology, and Nutrition
The Children's Hospital at Montefiore
The Pediatric Hospital for Albert Einstein College of Medicine
3411 Wayne Ave, 7th Floor
Bronx, NY 10467
Phone 718-741-2332
Fax 718-515-5426

From: Tanzer, Theodore
To: Bellet, Cecilia
Subject: FW: This week's agenda
Date: Tuesday, December 17, 2019 9:54:27 AM
Attachments: FOUO_BP_Status 12.17.19.pdf

From: Klein, Sarah
Sent: Tuesday, December 17, 2019 9:53 AM
To: Agenda Planning <listAgendaPlanning@cpsc.gov>
Cc: Kentoff, Maureen <MKentoff@cpsc.gov>
Subject: This week's agenda

Please see attached for this week's agenda. Thanks!

Page 017

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information Act

From:	Tanzer, Theodore
To:	Feldman, Peter
Subject:	Fwd: Seeking Responsive Information Relevant to FOIA Request #20-F-00126 [UPDATED]
Date:	Wednesday, January 8, 2020 8:46:20 AM
Attachments:	12-27-2019 (Ravnitzky) Coded.pdf ATT00001.htm Request for Documents Memo for FOIA Request.docx ATT00002.htm

---

Sent from my iPhone

Begin forwarded message:

From: "kmurchison@cpsc.gov"
Date: January 8, 2020 at 8:39:24 AM EST
To: "Yahr, Dorothy" , "Tanzer, Theodore" , "Fatula, Shannell" , "Crockett, David"
Cc: "Harrington, Thaddeus" , "ahernandez@cpsc.gov"
Subject: Seeking Responsive Information Relevant to FOIA Request #20-F-00126 [UPDATED]

Request for Documents for Request # '20-F-00126'. Your response due date is: 1/15/2020 12:00:00 AM Message from SENDER: We are seeking information that is responsive to FOIA Request #20-F-00126 which has requested The results of electronic searches for a copy of each email containing the word MAGNET or the word MAGNETS in each of the following CPSC email accounts: Individuals in the Office of Communications; Individuals in the Office of Legislative Affairs; Individuals in the Office of Commissioner Baiocco; and Individuals in the Office of Commissioner Feldman. I limit this request to emails during the time period of December 1, 2019 to the present. (Date Range for Record Search: From 12/1/2019 To 12/27/2019). Please provide records regarding this subject matter via FOIA Tracker and to Abioye E. Mosheim.

From: [redacted]
To: [redacted]
Subject: New FOIA request received for Consumer Product Safety Commission
Date: Friday, December 27, 2019 8:06:02 AM
Attachments: [redacted]

Hello,

A new FOIA request was submitted to your agency component.

The following list contains the entire submission submitted December 27, 2019 08:02:02am ET and is formatted for ease of viewing and printing.

Contact information

First name	Michael
Last name	Rawitzky
Mailing Address	1055 August Drive
City	Silver Spring
State/Province	MD
Postal Code	20902
Country	United States
Phone	301-592-8924
Email	[redacted]

Request

Request ID	98716
Confirmation ID	98151
Request description	This results of electronic searches for a copy of each email containing the word MAGNET or the word MAGNETS in each of the following CPSC email accounts: - Individuals in the Office of Communications - Individuals in the Office of Legislative Affairs - Individuals in the Office of Commissioner Baiocco - Individuals in the Office of Commissioner Feldman I limit this request to emails during the time period December 1, 2019 to the present.

Supporting documentation

Fees

Request category ID	other
Fee waiver	no
Willing to pay	100

Expedited processing

Expedited Processing	no

The following table contains the entire submission, and is formatted for ease of copy/pasting into a spreadsheet.

request_id	confirmation_id	address_city	address_country	address_line1	address_state_province	address_zip_postal_code	email	expedited_processing	fee_amount_willing	fee_waiver	name_first	name_last	phone_number	request_category	request_description
98716	98151	Silver Spring	United States	(b)(6)	MD	20902	(b)(6)	no	100	no	Michael	Rawitzky	(b)(6)	other	This results of electronic searches for a copy of each email containing the word MAGNET or the word MAGNETS in each of the following CPSC email accounts: - Individuals in the Office of Communications - Individuals in the Office of Legislative Affairs - Individuals in the Office of Commissioner Baiocco - Individuals in the Office of Commissioner Feldman I limit this request to emails during the time period December 1, 2019 to the present.

Email secured by Check Point

Program Offices: CODB; COPF; OCM; OLA
Requester Type: Individual
Product Codes: 9999
Track: Simple
RFD OK?: Yes
Assigned to: Abi for CODB and COPF; Korinne for OCM and OLA
Request #: Pending

FOIA Request 98716

The following list contains the entire submission submitted December 27, 2019 06:30:02am ET, and is formatted for ease of viewing and printing.

Contact information

First name	Michael
Last name	Ravnitzky
Mailing Address	(b)(6)
City	Silver Spring
State/Province	MD
Postal Code	20902
Country	United States
Phone	(b)(6)
Email	

Request

Request ID	98716
Confirmation ID	98191
Request description	The results of electronic searches for a copy of each email containing the word MAGNET or the word MAGNETS in each of the following CPSC email accounts: - individuals in the Office of Communications - individuals in the Office of Legislative Affairs - individuals in the Office of Commissioner Baiocco - individuals in the Office of Commissioner Feldman I limit this request to emails during the time period December 1, 2019 to the present.

Supporting documentation

Fees

Request category ID	other
Fee waiver	no
Willing to pay	100

Expedited processing

Expedited Processing	no

FOIA Request 98716

The following list contains the entire submission submitted December 27, 2019 06:30:02am ET, and is formatted for ease of viewing and printing.

Contact information

First name	Michael
Last name	Ravnitzky
Mailing Address	(b)(6)
City	Silver Spring
State/Province	MD
Postal Code	20902
Country	United States
Phone	(b)(6)
Email	

Request

Request ID	98716
Confirmation ID	98191
Request description	The results of electronic searches for a copy of each email containing the word MAGNET or the word MAGNETS in each of the following CPSC email accounts: - individuals in the Office of Communications - individuals in the Office of Legislative Affairs - individuals in the Office of Commissioner Baiocco - individuals in the Office of Commissioner Feldman I limit this request to emails during the time period December 1, 2019 to the present.

Supporting documentation

Fees

Request category ID	other
Fee waiver	no
Willing to pay	100

Expedited processing

Expedited Processing	no

U.S. CONSUMER PRODUCT SAFETY COMMISSION
THE SECRETARIAT - OFFICE OF THE SECRETARY
FREEDOM OF INFORMATION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

REQUEST FOR DOCUMENTS

DATE: **January 08, 2020**

TO:

FROM: **Keisha Murchison – GCOS/FOIA Office**

REQUEST #: **20-F-00126**

REQUEST INFO.: **The results of electronic searches for a copy of each email containing the word MAGNET or the word MAGNETS in each of the following CPSC email accounts: Individuals in the Office of Communications; Individuals in the Office of Legislative Affairs; Individuals in the Office of Commissioner Baiocco; and Individuals in the Office of Commissioner Feldman. I limit this request to emails during the time period of December 1, 2019 to the present. (Date Range for Record Search: From 12/1/2019 To 12/27/2019)**

REQUESTER: **Michael Ravnitzky**
(b)(6)
Silver Spring, MD 20902
HOME: WORK:
FAX: E-MAIL: (b)(6)

Office	Sent Date	Due Date	Received Date	Delivery Method
CODB; COPF; OCM; OLA	January 08, 2020	January 15, 2020	December 27, 2019	Mail

This is a request for records (documents) responsive to the attached request for records under the Freedom of Information or Privacy Act. Please complete the following tasks within 5 business days of receipt of the request:

(1) Search and RETURN TO the GCOS FOIA Office any and all records located that may be responsive to the attached request. Please send responsive records in electronic format via FOIA Tracker.
(2) Identify and explain any potential sensitive portions, but **DO NOT** redact those portions. The FOIA Office needs to see any sensitive portions to apply any applicable FOIA exemptions.
(3) State below who performed the search, how long it took them to search, and, where applicable, any time spent reviewing the records to for sensitive information, or on duplication (*e.g.*, copying or scanning the records).
(4) If you have any legal questions related to this request, please consult with the Chief FOIA Officer, Abioye Mosheim, at amosheim@cpsc.gov.

RESULTS OF SEARCH: (TO BE COMPLETED BY THE OFFICE PERFORMING THE SEARCH)

NO RECORDS located responsive to the request : _____

Records forwarded to GCOS FOIA as requested : _____
Search Performed by : _____
Search Date : _____
Search Time : _____ Hour(s) _____ Minute(s)
Review Time : _____Hour(s) _____ Minute(s)
Duplication : _____ Pages

From: Feldman, Peter
To: Tanzer, Theodore
Subject: Fwd: Zen"s Cross-Appeal/Response Brief - Zen Magnets, LLC v. CPSC (10th Circuit)
Date: Friday, December 6, 2019 10:08:25 AM
Attachments: 12-05-2019 10th Cir Zen"s Cross Appeal and Response Appendix.pdf
ATT00001.htm

Sent from my iPhone

Begin forwarded message:

From: "House, Mary" <mhouse@cpsc.gov>
Date: December 6, 2019 at 10:05:54 AM EST
To: "Feldman, Peter" <PFeldman@cpsc.gov>
Subject: RE: Zen's Cross-Appeal/Response Brief - Zen Magnets, LLC v. CPSC (10th Circuit)

Sure. It's attached.

From: Feldman, Peter
Sent: Friday, December 06, 2019 10:05 AM
To: House, Mary <mhouse@cpsc.gov>
Subject: Re: Zen's Cross-Appeal/Response Brief - Zen Magnets, LLC v. CPSC (10th Circuit)
Can we see the appendix?

Sent from my iPhone

On Dec 6, 2019, at 8:35 AM, House, Mary <mhouse@cpsc.gov> wrote:

Good Morning,
Attached please find Zen's Cross-Appeal/Response brief in the above-referenced matter.
Zen also filed an Appendix, which I can provide if requested.
Mary A. House
Attorney, Regulatory Affairs Division
U.S. Consumer Product Safety Commission
4330 East West Highway, Suite 702
Bethesda, MD 20814
301-504-6810
mhouse@cpsc.gov

<12-05-2019 10th Cir Zen's Cross Appeal and Response.pdf>

[ORAL ARGUMENT REQUESTED]

Case Nos. 19-1168; 19-1186

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ZEN MAGNETS, LLC,

Plaintiff-Appellee/Cross-Appellant,

v.

U.S. CONSUMER PRODUCT SAFETY COMMISSION,

Defendant-Appellant/Cross-Appellee.

On Appeal from the United States District Court
for the District of Colorado
[District Court Case No. 1:17-cv-2645 (Judge R. Brooke Jackson)]

APPENDIX FOR APPELLEE/CROSS-APPELLANT

DAVID C. JAPHA
Levin Jacobson Japha, P.C.
950 South Cherry Street, Suite 912
Denver, Colorado 80246
(303) 504-4242

Evan House, on Brief

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Volume I

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ZEN MAGNETS, LLC Petitioner, v. CONSUMER PRODUCT SAFETY COMMISSION, Respondent.	CASE NO. 14-9610 (CPSC 2012 0050)

PETITION FOR REVIEW OF FINAL ACTION OF THE CONSUMER PRODUCT SAFETY COMMISSION

PETITIONER ZEN MAGNETS LLC'S OPENING BRIEF

ORAL ARGUMENT REQUESTED

DAVID C. JAPHA, ESQ.
The Law Offices of David C. Japha, P.C.
950 S. Cherry St., Ste. 912
Denver, CO 80246
(303) 964-9500
1-866-260-7454 *facsimile*
davidjapha@japhalaw.com
djapha4064@aol.com

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GLOSSARY

APA	Administrative Procedure Act 5 U.S.C. § 551, *et. seq.*
CPSA	Consumer Product Safety Act 15 U.S.C. §2051, *et.seq.*
CPSC	Consumer Product Safety Commission
NEISS	National Electronic Injury Surveillance System
NPR	Notice of Proposed Rule
SREM(s)	Small Rare Earth Magnet(s)

STATEMENT OF RELATED CASES

There are no related cases.

STATEMENT OF JURISDICTION

On October 3, 2014, the Consumer Product Safety Commission ("CPSC" or the "Commission") promulgated Final Rule for Magnet Set Safety Standards, 79 Fed. Reg. 59,962 (Oct. 3, 2014), pursuant to 15 U.S.C. § 2056(a). This rule is a final agency action. The Tenth Circuit has subject matter jurisdiction to hear this case pursuant to 15 U.S.C. § 2060(a), (c) (granting jurisdiction to review a consumer product safety rule), and 28 U.S.C. § 2112(a), (c) (granting jurisdiction to a United States court of appeal for the circuit in which a person adversely affected by a Commission rule resides to enjoin, set aside, suspend, modify, or otherwise review or enforce a rule promulgated by the Commission). Zen Magnets, LLC, ("Zen") is a party who is adversely affected by the Final Rule.

STATEMENT OF THE ISSUES

I. Whether the Commission has shown by substantial evidence that the final rule is reasonably necessary to address an unreasonable risk of injury.

II. Whether the Commission adequately considered the utility of the subject products and how they function.

III. Whether the Commission impermissibly banned the subject magnets under

the guise of a safety standard.

IV. Whether the Commission failed to undertake a proper cost-benefit analysis of the Rule.

V. Whether the Commission impermissibly expanded the definition of the subject products.

VI. Whether the Commission has shown that promulgating the Rule in in the public interest.

STATEMENT OF THE CASE

Zen Magnets, LLC, manufactures and distributes Zen Magnets. These are small rare earth magnets designed to make sculptures and other works of art as well as provide educational tools to students of the physical sciences. On October 3, 2014, the Consumer Product Safety Commission (hereafter "the Commission" or "CPSC") promulgated the Final Rule for Magnet Sets 79 Fed. Reg. 59,962 (Oct. 3, 2014), (16 C.F.R. Part 1240), hereafter "The Rule" or "The Final Rule".

The Rule is a final agency action challengeable pursuant to 15 U.S.C. § 2060(a) by a party who is adversely affected by such final rule. The Final Rule applies to "aggregations of separable magnetic objects that are marketed or commonly used as a manipulative or construction item for entertainment, such as puzzle working, sculpture building, mental stimulation, or stress relief." 79 Fed. Reg. 59,962. The

subject magnets are commonly known as Small Rare Earth Magnets, or "SREMs." In the case at bar, Zen Magnets is the sole remaining distributor of SREMs in the United States and has been aggrieved by the Rule.

Zen Magnets, LLC, ("Zen") is adversely affected by the Final Rule because Zen is the only remaining U.S. distributor of the subject magnets (*see* 79 Fed. Reg. 59,978), and the rule prohibits Zen from manufacturing or importing its products (*see id.* at 59,985).

Prior to promulgating the Rule, the CPSC published a Notice of Proposed Rule (NPR) 77 Fed. Reg. 53,781 (Sept. 4, 2012) which purported to set forth the safety standard for magnet sets, or SREMs. In 2014, the CPSC changed the scope of the final rule with its promulgation. Zen seeks this Court's review based on the CPSC's failure to adhere to proper rule making procedures under the Consumer Product Safety Act (CPSA, 15 U.S.C. § 2051, et. seq.) and applicable provisions of the Administrative Procedure Act, 5 U.S.C. § 551, *et.seq*. For the reasons argued herein, Zen Magnets asks that this Court grant this petition for review and vacate the Rule.

STANDARD OF REVIEW

Courts review the Consumer Product Safety Commission's findings of fact and regulatory analysis in support of a consumer product safety rule under 15 U.S.C. 2060(a), (c), for substantial evidence based on the record as a whole. The

Administrative Procedure Act requires courts to hold unlawful and set aside agency action that is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, or "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." 5 U.S.C. § 706(2)(A), (F). Review of the Commission's determinations is more searching than the usual standard in administrative reviews, arbitrary and capricious. *See Aqua Slide 'N Dive*, 569 F.2d 831, 837 (5th Cir. 1978) ("Congress put the substantial evidence test in the statute because it wanted the courts to scrutinize the Commission's actions more closely than an 'arbitrary and capricious' standard would allow"); *Forester v. Consumer Prod. Safety Comm'n*, 559 F.2d 774, 789 (5th Cir. 1978); *contra. Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). The Commission's action must do more than exhibit a rational connection between the facts found and choices made (*State Farm*, 463 U.S. at 43); it must have examined relevant data and articulated a satisfactory explanation for promulgating the rule, such that a reasonable mind might accept it as adequate. *See Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *see also Wang v. INS*, 352 F.3d1250, 1258 (9th Cir. 2003).

SUMMARY OF THE ARGUMENT

Petitioner Zen Magnets, LLC asks this Court to grant this petitioner for review and vacate the Final Rule for Magnet Sets promulgated by the CPSC on October 3,

2014 because the Rule is procedurally unsound and the overriding factors relied upon by the CPSC are fundamentally flawed and statistically unreliable. Specifically, the CPSC relied upon data proved by the National Electronic Injury Surveillance System (NEISS) to determine that there is an unreasonable risk of harm to people who use SREMs -small rare earth magnets – despite the fact that no harm can come anyone who use the magnets properly. Further, the CPSC failed to adequately consider the beneficial uses of magnets in promulgating the Final Rule.

ARGUMENT

I. THE COMMISSION'S FINDINGS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

A. The Commission has not shown by substantial evidence that the final rule is reasonably necessary to address an unreasonable risk of injury

The CPSA mandates that, "[a]fter taking procedure into account and weighing the evidence, the Court must determine whether the established facts reasonably satisfy the criteria necessary to support the ultimate statutory finding.;" *Aqua Slide*, 569 F.2d at 838. The relevant inquiry is whether there is substantial evidence to support a rule reasonably necessary to address an unreasonable risk of injury. 15 U.S.C. §§ 2056(a), 2060(c). The Commission has failed to meet its burden here. Specifically, the evidence relied upon by the Commission regarding the actual risks associated with the subject products woefully lacks the indicia of reliability on which

substantial evidence must be based. *See Southland Mower v. Consumer Prod. Safety Comm'n*, 619 F.2d 499, 510 (5th Cir. 1980) ("Without *reliable* evidence of the likely number of injuries that would be addressed by application of [the rule], we are unable to agree that this provision is reasonably necessary to reduce or prevent an unreasonable risk of injury") (emphasis added).

B. The Commission has not shown by substantial evidence that the risk of injury is unreasonable

The Commission's analysis fails for two reasons. First, the Commission has not shown by substantial evidence that the risk posed by the subject magnets is an unreasonable one under 15 U.S.C. § 2056(a). And Second, as discussed below, *see,* pp.12-13, the Commission has not shown that the Rule is reasonably necessary.

"An important predicate to Commission action is that consumers be unaware of either the severity, frequency, or ways of avoiding the risk. If consumers have accurate information, and still choose to incur the risk, then their judgment may well be reasonable." The comments in CPSC-2012-0050 are replete with the acknowledgment that the subject magnets can be hazardous if ingested, but that a ban is unnecessary, even in light of the risk. Commenters also noted that the risk of injury is quite remote. *See* Comment from Max Wie, CPSC-2012-0050-0076 (noting the small number of incidents per magnet sets sold) and Comment from Mike Isbill, CPSC-2012-0050-0268, ("According to NEISS data for 2009-2011, 10,000 injuries

and 18 deaths involve balloons, much greater than magnets.").

The Commission's own data also fail to support the theory the risk is unreasonable. The error here is not that the Commission has not looked at the matter, but that the Commission greatly exaggerates the estimated number of injuries caused by the subject magnets by using flawed and unreliable data. *See* Oral Presentation Comment from Shihan Qu, CPSC-2012-0050-2594.

The Final Rule is based on a statistically- and scientifically-flawed analysis of injury data, and the CPSC has failed to address an obvious lack of statistical support for its assertions in the Magnet Rule. National injury data is a foundational requirement for safety standards, and the Commission's injury analysis is both arbitrary and unsupported by substantial evidence. *See* 15 U.S.C. § 2056(a). The Final Rule states that, from "January 1, 2009 to December 31, 2013, [there were] an average of about 580 ingestion incidents [of SREMs] per year." 79 Fed. Reg. 59,987. In the three years prior to 2009, based on the observed methodology of the Commission's Epidemiology Staff, the Commission's data show that there was an average of 650 emergency room visits annually from the ingestion of products matching the description of SREMs. Many descriptions of ingested magnets are nearly identical among years before and after 2009. *See* CPSC National Electronic Injury Surveillance System ("NEISS") Database, available at http://www.cpsc.gov/en/Research--

Statistics/NEISS-Injury-Data/ (hereinafter "NEISS database"). Despite the prevalence of magnets that were either round or small (or both) prior to 2009, the Commission simply assumed that small and round magnets did not exist prior to 2009, and since January 2009, that all "round magnet" ingestions are from ingestions of spherical rare earth magnet sets.[1] Of critical importance is that the injuries blamed on the SREMs include ingestions of magnets that are "strong" *or* "round," despite the magnets, as defined in 16 C.F.R. § 1240.2, being both strong *and* round. Therefore, the Commission's finding that an estimated 2,900 ingestions of magnets were treated in emergency departments between January 1, 2009 and December 31, 2013 (16 C.F.R. § 1240.5; 79 Fed. Reg. 59,987) cannot be relied upon to provide an estimated risk of injury from magnets subject to the Final Rule.

The Commission's injury estimate is further controverted because the same data and search methodology,[2] show a substantially equal number of ingestions during 2006-2009 and 2009-2014. *See* NEISS Database; *see also* Oral Presentation

[1] For example, ingestions of magnets described as "magnet marbles" are counted as SREM ingestions, despite the fact that the SREMs subject to the Final Rule are commonly known to be a small fraction of the size of marbles, and magnetic marbles have been on the market before 2009.

[2] Zen's observed method was to count (or bin as "yes/possible") all NEISS ingestions and aspirations with a description that mentioned magnets in the narrative, as well as any of the following: power, rare, marb*, ball, bb, bearing, bead, spher*, or round. The narrative would then be manually examined for language that would otherwise include or exclude it as a magnet sphere ingestion. For further explanation of the CPSC's methodology, *see generally*, CPSC Briefing Package, Tab A, AR 08071 for CPSC NEISS search methodology, listed at #16 of Respondent's Certified Index of Administrative Record.

Comment from Shihan Qu (CPSC-2012-0050-2594). Logic dictates that if the Commission's injury findings were valid, the number of ingestions from magnets matching the description of the subject magnets would be fewer from 2006-2009 (when the subject magnets did not exist), rather than larger or substantially equal to the number of ingestions from 2009-2014.

The CPSC's misplaced reliance on NEISS estimates in promulgating the final rule cannot be overstated. The Commission continues to assert that up to 4,400 ingestions of subject magnets have occurred (Resp. To Mot. For Stay, p. 4) as the basis for the need for the Final Rule and, effectively, a ban on all small, strong magnets that could be used for anything outside of industrial uses. The injury estimates are indeed integral to the final rule and the Commission's determinations under 15 U.S.C. § 2058(f)(1), (3).

The Commission is entitled to a certain amount of discretion in fact finding expertise. Yet, the Commission is required to have articulated a reason for its decision that "a reasonable mind might accept as adequate to support [its] conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. at 229. The NEISS data, in conjunction with the Commission's admission that the estimates are based on subjective interpretations of incomplete data sets, lead to the inescapable conclusion that the Commission's analysis using the figure of 2,900 injuries is not reliable and cannot

provide the basis for its findings by substantial evidence.

Moreover, the Commission has admitted that there is great uncertainty concerning the NEISS estimates vis a vis the subject products. "About 90 percent of the cases upon which the table was based were described as only possibly involving the magnets of interest because NEISS narratives are not required to list manufacture or brand name." 79 Fed. Reg. 59,980. The CPSC's "facts" are nothing more than speculation and conjecture. And, as is well supported, "speculation and conjecture may not substitute for substantial evidence." *Wang v. INS*, 352 F.3d 1250, 1258 (9th Cir. 2003). *Southland Mower*, 619 F.2d at 510 ("It must be remembered that a real, and not a speculative, risk be found to exist and that the Commission bear the burden of demonstrating the existence of such a risk before proceeding to regulate ") (citing *D.D. Bean & Sons Co. v. CPSC,* 574 F.2d 643, 651 (1st Cir. 1978)).

Such a large level of doubt and the lack of a control study (*see* Comment from Shihan Qu CPSC-2012-0050-2594) render the NEISS data inadequate to support a finding of unreasonable risk by substantial evidence. *See e.g.*, *Gulf South Insul.v. Consumer Product Safety Comm'n*, 701 F.2d 1137, 1146-1147 (5th Cir. 1983). The data is not merely capable of being interpreted differently; the Commission's "data" was subjectively chosen to reflect the Commission's predetermined conclusion, and statistically cannot be the basis for the determinations necessary to promulgate the

Final Rule.

Zen does not maintain that the Commission need develop a "precise body count," but the Commission must make a determination that its decision weighs in favor of the standard. *See Aqua Slide*, 569 F.2d at 840. Part of that determination would necessarily include an explanation that a reasonable mind might accept as adequate, which would also apply to the required finding that an unreasonable risk exists and the ensuing balancing test. It is this finding that Zen maintains cannot survive substantial evidence review. The Commission's position seems to be that *some* magnets, which *may or may not* be the subject magnet sets, might cause *some* injuries to *some* people is sufficient to support the rule. Further, the Commission can be expected to argue that any data collection methodology employed by the Commission and conclusions drawn therefrom rest within the sole discretion of the agency. *See, for example,* CPSC Resp. To Motion for Stay, p. 13. Such an argument would do away with the substantial evidence requirement and the findings under 15 U.S.C. §§ 2060(c) and 2058(f); *see also Aqua Slide*, 569 F.2d at 843 ("The Commission concluded the chain's presence 'should, on balance, create a safer product.' . . . This is not the stuff of which substantial evidence is made.").

The Commission's findings must be supported by substantial evidence, including a finding of unreasonable risk, and that requirement is not met when it is

based almost entirely on unreliable evidence, as is the case here. *See id.* at 842.

C. The Commission has not shown by substantial evidence that the rule is reasonably necessary

In addition to the Commission's failure to show that the risk is unreasonable, it has also failed to show by substantial evidence that the rule is reasonably necessary relative to that risk. "Only after the existence of a hazard and the likelihood of its reduction at a reasonable cost have been established by the Commission may it be said that the requirements are 'reasonably necessary.'" *D.D. Bean & Sons,* 574 F.2d at 649. Where the risk is as remote as it is here, the impact the rule has on the price, utility, and availability of the products become all the more important. *See Aqua Slide*, 569 F.2d at 840.

"In evaluating the 'reasonable necessity' for a standard, the Commission has a duty to take a hard look, not only at the nature and severity of the risk, but also at the potential the standard has for reducing the severity or frequency of the injury, and the effect the standard would have on the utility, cost or availability of the product." *Aqua Slide*, 569 F.2d at 844. As discussed above, the Rule has the practical effect of banning the subject magnets. Such an extreme rule does not satisfy the requirements of the CPSA because it unduly hampers the availability and utility of the products vis-à-vis the remote risk of injury. *See Aqua Slide*, 569 F.2d at 840 ("it seems likely that a standard which actually promised to reduce the risk *without* unduly hampering the

availability of the slides or decreasing their utility could render this risk 'unreasonable'") (emphasis added). Therefore, the Commission has not shown that the benefits of the Rule bear a reasonable relationship to its significant disadvantages. As such, the Commission cannot show by substantial evidence that the risk of injury is unreasonable, or that the Rule is reasonably necessary in relation to that risk.

II. THE COMMISSION DID NOT ADEQUATELY CONSIDER THE UTILITY OF THE SUBJECT PRODUCTS AND HOW THEY FUNCTION

Chief among the factors that the CPSC failed to adequately consider in promulgating the Final Rule is the magnets' utility to consumers. The Final Rule conspicuously glosses over beneficial uses of the magnets because the CPSC accepted without meaningful consideration an assumption that alternative products can substitute satisfactorily for SREMs. *See* 79 Fed. Reg. 59,967. This is a mistake. The Rule seeks to ban all magnets used for any beneficial purposes because the physical properties of the magnets that make them potentially hazardous if ingested are precisely those that make the magnets beneficial.

The Commission explains that, although there is a form of art that has been developed using the subject magnets, non-subject magnets could still be used for such art. However, conforming magnets would have to be made with a flux index of 50 kG^2mm^2 or less, making them useless for nearly any type of manipulation, including

art forms. *See* Comment from Michael Kobb (CPSC-2012-0050-2011). The Commission's apparent ignorance about how the magnets function and are used is strong evidence that it did not seriously consider these factors in promulgating the Final Rule. This is borne out in the CPSC's misguided view that the rule "has a limited scope" and will not affect the use of the magnets in education and biology. *See* CPSC, Final Rule for Magnet Sets Briefing Memorandum, p. 12 (Sept. 3, 2014).

The rule would indeed ban the magnets in uses for which they are currently employed in high schools and universities to teach concepts such as physics, chemistry, mathematics, biology, metallurgy, and geometry. *See* comment from Anthony Pelletier, CPSC-2012-0050-1092. Moreover, the lack of cogent explanations about product use and availability do not pass the substantial evidence test. *See AquaSlide*, 569 F.2d at 840. The Commission also trivialized other positive social benefits associated with the magnets, including their educational utility. Numerous commenters made it clear that the magnets are important and irreplaceable educational tools. *See* Stephen Niezgoda, a physicist at Los Alamos National Laboratory; ("magnet sets are of tremendous educational values, and [has] used them in the classroom as well as at scientific community outreach events")(CPSC-2012-0050-0515); Michele LaForge (magnets have "been a remarkable teaching and learning tool in [her] home and in the classroom")(CPSC-2012-0050-2138); and Dr. Anthony

Pelletier, a high school biology teacher; (considers the magnets to be "an invaluable teaching tool," and uses them to teach protein structure and formation) (CPSC-2012-0050-1092).

Further, the Commission's position that the Magnet Rule is limited in scope and will not harm academic and scientific research (CPSC, Final Rule for Magnet Sets Briefing Memorandum, p. 12 (Sept. 3, 2014)) is belied by the record. For instance, David Nicholaeff commented on how he conducted research into geometric lattice theory with the magnets and considers them a "powerful tool." CPSC-2012-0050-1137. Similarly, Lee Walsh explained that, "[a]s a practicing physicist, [he has] used these magnets for experimental and demonstrative purposes," and considers them to be "very effective tools." CPSC-2012-0050-0938. Magnet sets that meet the new standard could not be used to create the necessary structures that would be of educational, scientific, and artistic utility. The Commission admits as much. For example, the Commission notes that "magnet sets that comply with the Rule could serve some of the purposes of magnet sets that are currently available." 79 Fed. Reg. 59,967. But, the Commission further acknowledges that complying magnets would be "unsuitable and impractical for use in most sculpturing and other construction activities for which the subject magnet sets are used." 79 Fed. Reg. 59,982.

In effect, the Rule bans SREMs that have any utility outside of the industrial

sector, especially considering the expansive scope of the Commission's definition of the magnets based on their "common use." 16 C.F.R. § 1240.2; 79 Fed. Reg. 59,973. The Final Rule is indeed a functional ban on an entire product category. The lack of availability of the products is a factor that must be given more weight by the Commission for its rule to withstand review for substantial evidence. *See* H.R. Rep. No. 1153, 92d Cong., 2d Sess. 33 (1972).

The Commission's biased analysis and lack of consideration for educational and artistic utility, and other societal benefits, underscore the lack of substantial evidence to support its promulgation of the Final Rule. This is exemplified by the fact that the Commission asserts that it "fully considered" the utility of the magnets (Commission Resp. to Mot. for Stay, 15), yet acknowledges conforming alternatives are not tenable for purposes of construction or manipulation. *See* 79 Fed. Reg. 59,982. The effect is that magnets that do not meet the requirements of the Rule are banned.

The unique characteristics of the subject magnets that make them ideally suited for artistic and educational uses are their size and flux, which are the same qualities that render the magnets potentially hazardous if ingested. The Rule all but disregards any laudable use for the magnets based on the assumption that alternative products would meet any beneficial use that the SREMs might have. *See* 79 Fed. Reg. at

59,967. Such is simply not the case. For example, the Commission states that "the rule will cover only any aggregation of separable magnetic objects that is a consumer product intended, marketed or commonly used as a manipulative or construction item for entertainment, such as puzzle working, sculpture building, mental stimulation, or stress relief." *Id.* What the Commission does not disclose is that this rule would effectively ban all magnets used for these purposes because the physical properties of the magnets that make them potentially hazardous if ingested are precisely those that enable them to function as manipulatives.

The Commission's regulatory analysis concluded that producers of the subject magnets "opted to exit the market altogether" rather than develop conforming products. Briefing Memorandum, Tab B, p. 32. This is because it is *impossible* to develop a product that conforms to the Rule and maintains the desired utility.

III. THE COMMISSION IMPERMISSIBLY BANNED THE SUBJECT MAGNETS UNDER THE GUISE OF A SAFETY STANDARD

The promulgation of the Rule at issue here is an impermissible ban on the import and manufacture of all small and powerful magnets that might be used for purposes of manipulation. Despite the Commission's argument that the Rule merely makes impermissible the importation and manufacture of the Subject Products, there is a distinction between a traditional safety standard and what the Commission has

done in this case. Functionally, the promulgated Rule is a ban.

The Commission has the authority to ban products in certain limited circumstances and must make findings to support a ban under 15 U.S.C. § 2058(f)(3)(C). Because it did not do so here, the Commission impermissibly instituted a ban on the magnet sets without making the required findings.

The Commission has to show that no rule is sufficient under 15 U.S.C. § 2057, or adopt a rule that is "reasonably necessary," striking a balance between the benefits and adverse impacts of a rule that does not unduly affect the product's price, utility, and availability. *See Aqua Slide*, 569 F.2d at 839. The Commission has done neither here. Rather, the Commission ignored less restrictive alternatives, opting to enact a "safety rule" that effectively bans an entire product category. The Commission cannot show by substantial evidence that its decision to promulgate the Final Rule is reasonably necessary under 15 U.S.C. § 2056, and cannot show it undertook a proper procedural course of action and fair consideration of the required, relevant issues. Using the guise of a safety standard to enact a product ban lacks the indicia of procedural and substantive fairness required under the CPSA. *See Aqua Slide*, 569 F.2d at 838 ("the duty of the Court to discern 'substantial evidence on the record as a whole' requires a look at both substance and procedure").

While the Magnet Rule is not a per se ban on small rare earth magnets, it is in

effect a ban on small rare earth magnets that have any utility outside of the industrial sector, especially considering the expansive scope of the Commission's capacious and amorphous definition of the magnets based not on physical attributes but on their "common use." 16 C.F.R. § 1240.2; 79 Fed. Reg. 59,973. This is not a safety standard alone because, as the Commission has noted, no alternative product exists that can function similarly to subject magnets and comply with the new magnet rule. Because the Commission all but entirely disregarded consideration of alternatives that did not involve such a restrictive physical standard, while assuming that magnets would still be available for "laudable uses" (*see generally* Final Rule Section E, 79 Fed. Reg. 59,966-59,972), the Commission cannot have found that the rule is reasonable by substantial evidence: the Rule prohibits the importation and manufacture of small, strong magnets that have any utility for educational, scientific, and artistic purposes. *See* Comment from Michael Kobb, CPSC-2012-0050-2011 ("While the rule does not specifically ban magnet sets, it does impose a limit on the magnetic flux, and that limit would alter the fundamental characteristic of the product. The practical effect is a ban"). This issue was disregarded by the Commission by assuming, without offering a cogent explanation, that the rule would not eliminate from the marketplace high-powered magnets intended for uses such as education, research in sciences, such as biology, chemistry, and physics, and for therapy for

individuals with autism or attention-deficit disorder. *See* 79 Fed. Reg. at 59,5967. As such, the Commission cannot show that the benefit of the rule has a reasonable relationship to the disadvantages the requirements impose. *See Aqua Slide*, 569 F.2d at 842.

That the Rule is considered a ban is supported by numerous comments. Almost all commenters considered the Rule to be a ban. *See generally* CPSC-2012-0050; Public Hearing on Safety Standard for Magnet Sets (Oct. 22, 2013), CPSC-2012-0050-2597. The Consumers Union considers this to be a ban: "This proposed rule would effectively ban very small, highly powerful rare earth magnets. . . ." (*Id.* at p. 28, lines 9-10.). Commissioner Nord considered it a ban, as well: ". . . and it really is a ban except its [sic] being cast in terms of a rule." (*Id.* at p. 44, lines 18-19.). The Consumer Federation of America also considers the rule a ban: "The safety standard proposal would prohibit current magnet sets." (*Id.* at p. 13, lines 5-6.). *See also* Comments from Rachel Weintraub/Consumer Fed. of Amer., CPSC-2012-0050-0494 ("While a ban under section 8 may have the same immediate effect as a standard promulgated under section 7 and 9. . . .").[3]

Instead of seriously considering less restrictive alternatives (*see e.g.*, Comment

[3]Almost all comments refer to the proposed agency action as a ban. It would be prohibitive to list all of the comments here. However, a representative sample of those comments can be found at CPSC-2012-0050-1973, 1847, 2304, 1548, 0841, 1022, 0757, 0950, 0680, 0700, 2326, 0454, 0531, 0173, 0415, 1175, 2278, 2175 and 0323.

from Doug Braden, CPSC-2012-0050-0808), the Commission made assumptions that rules involving warnings, sale restrictions, and education would be insufficient without conducting any actual test of whether these options would strike a balance between risk reduction and impact to product price, availability, and utility (79 Fed. Reg. at 59,970-59,971). For example, the Commission "acknowledge[s] that developing understandable warnings aimed at parents and other caregivers may be possible; and . . . acknowledge[s] that caregivers who receive such warnings may attempt to keep these products out of the hands of young children." *Id.* at 59,970. Nonetheless, the Commission assumes that "compliance with warning labels related to magnet sets is likely to be low, even if consumers understand the hazard and its consequences," without any empirical evidence to support that conclusion. *Id.* This type of assumption is not satisfactory under the substantial evidence test. *See Aqua Slide*, 569 F.2d at 841-842 ("Unarticulated reliance on Commission 'experience' may satisfy an 'arbitrary, capricious' standard of review . . . but it does not add one jot to the record evidence") (citation omitted); *id.* at 838 (the "Court will defer to Commission fact-finding expertise, but it can do so only when the record shows the Commission has made an actual judgment concerning the significance of the evidence"). In the case at bar, the Commission failed to adequately and meaningfully consider less restrictive alternatives to the Rule.

IV. THE COMMISSION FAILED TO UNDERTAKE A PROPER COST-BENEFIT ANALYSIS OF THE RULE

While the Commission does not have to undertake an elaborate cost-benefit analysis, "[i]t does, however, have to shoulder the burden of examining the relevant factors and producing substantial evidence to support its conclusion that they weigh in favor of the standard." *Aqua Slide*, 569 F.2d at 840. Here, the Commission intentionally ignored a host of material factors in assessing the costs and benefits of the rule, and in doing so, failed to undertake a cost-benefit analysis that was remotely meaningful. Specifically, the Commission made projections based on obsolete data, severely misrepresenting current market conditions. While the Commission may base rules on the data available at the time, the Commission may not distort its regulatory analysis by using injury estimates from 2009-2014 and pre-2012 cost-benefit analysis data to arrive at a predetermined conclusion about the need for the Rule. Ostensibly, if the Commission had time to update its injury analysis through September 2014 (*see* Briefing Memorandum), it could have as easily updated the sales data pertaining to the subject products.

Baselines are meant to reflect the best assessment of the world absent the proposed regulation. A proper baseline should reflect exogenous factors, including changes in consumer preferences, industry compliance rates, other promulgated

regulations, and behavioral responses to the proposed rule by firms and the public. *See e.g.*, Environmental Protection Agency Baseline Analysis, *available at* http://yosemite.epa.gov/ee/epa/eerm.nsf/vwAN/EE-0568-05.pdf/$file/EE-0568-05.pdf.

Here, the Commission chose a baseline that did not reflect any of these factors. Instead, the Commission's baseline was 2009-2012, despite the Commission's acknowledgment that the market had changed dramatically after the CPSC began to intervene. Final Briefing Package, Tab B, AR 08082, p. 34. Instead of choosing an accurate baseline, the Commission artificially inflated the benefits of the rule vis-à-vis the costs by assessing what the world would look like if the Commission did not exist at all; such is not the proper basis for a cost-benefit analysis for a proposed rule. Had the Commission opted for a realistic baseline, the cost-benefit analysis would have reflected the significant drop in sales of the magnets, as well as a drop in the estimated ingestions and lessened societal injury impact. Notwithstanding the Commission's admission that most firms have shut down due to CPSC compliance actions, the regulatory analysis nevertheless still assumes that 800,000 sets of magnets will be sold every year, and that the annual industry revenues will be approximately $20 million. *See* 79 Fed. Reg. at 59,988. Even if societal costs and benefits per set were accurately estimated, the cost-benefit analysis conducted by the CPSC is still not

based on reality because the number of sets currently being sold by Zen is about 30,000, which is less than four percent of the 800,000-set-per-year estimate used by the CPSC. Therefore, the Commission's required cost-benefit analysis and need determination for the Final Rule cannot be supported by substantial evidence.

Even if, *arguendo*, the SREM industry were to return to its pre-enforcement-action size and the Magnet Rule were not in effect, it is unreasonable to assume that the magnet set market would return to retail sales methods and levels of 2012: The stop sale requests made to internet sellers, to brick-and-mortar stores, and to SREM manufacturers would still be in effect and would foreclose the widespread sale of SREMs.

Ultimately, the cost-benefit analysis is impermissibly based on a marketplace that no longer exists, one tailored to suit the Commission's goals without regard to market realities. As such, there is not substantial evidence in support of the Commission's findings in support of the Final Rule.

V. THE COMMISSION IMPERMISSIBLY EXPANDED THE DEFINITION OF THE SUBJECT PRODUCTS

Contrary to the Commission's assertion that the definition of subject magnets in the Final Rule "varied slightly from that of the proposed rule" (Resp. To Motion for Stay, p. 9), the definition of the subject products was greatly expanded beyond the

scope of the proposed rule. Critically, the ban on SREMs in the Rule applies to magnets not only based on how they are produced and distributed, but also on how they are "commonly used." *See* 79 Fed. Reg. at 59,962. This distinction significantly expands the number of products that fall under the scope of the ban without precise, delineating factors, and intelligible standards; that would allow for an objective understanding of which products are "commonly used" for certain purposes (*i.e.*, for manipulation or construction for entertainment), and in turn which products would violate the Final Rule. *See AFL-CIO v. Donovan*, 757 F.2d 330, 338 (D.C. Cir. 1985) (citations omitted).

The rulemaking process must also "aler[t] the reader to the stakes" of the proposed rule, *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317 (D.C. Cir. 1988), and, critically, must provide notice of important changes between the proposed and Final Rule. *See AFL-CIO v. Donovan*, 757 F.2d at 339 (holding rule invalid where no notice given of an important change between proposed and Final Rule).—

Because Zen could not have foreseen the Commission expanding the definition of the products beyond the usual scheme of consumer product regulation, Zen could not have commented on the expanded scope of the rule prior to its final promulgation. "Notice requirements are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3)

to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review. *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) (citing *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983)); *see also Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1107 (D.C. Cir. 2014); *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1080 (D.C. Cir. 2009).

The Commission expanded its definition without giving an opportunity for comment specifically regarding the definition originally presented. The Final Rule defined the product beyond what was in the proposed rule. Here, the expanded definition could not have apprised makers of small and powerful magnets, of *any* shape, according to the Commission (Resp. To Motion for Stay, p. 14, n. 4), that *might* be used for building structures or making art forms, that their products would be illegal to manufacture and import.

Therefore, approval of Final Rule without § 553 notice and comment was an abuse of discretion; was in excess of statutory jurisdiction under APA § 553 and 15 U.S.C. § 2058(a); circumvented the required procedure for banning a product; and, ultimately, resulted in the Final Rule not being promulgated in accordance with the law.

VI. THE COMMISSION HAS NOT SHOWN THAT PROMULGATING THE RULE IS IN THE PUBLIC INTEREST

The Commission must find that issuing the rule is in the public interest. 15 U.S.C. § 2058(f)(3). And like other of the Commission's findings, these findings must be supported by substantial evidence on the record taken as a whole. *Id.* at § 2060(c). The § 2058 factors determine whether an unreasonable risk exists. The D.C. Circuit has explained that this requires a balancing test similar to that in tort law: "The regulation may issue if the severity of the injury that may result from the product, factored by the likelihood of the injury, offsets the harm the regulation itself imposes upon manufacturers and consumers." *Forester v. Consumer Product Safety Commission*, 559 F.2d 774, 789 (D.C. Cir. 1977) (footnote omitted). The Commission failed to give proper weight to certain relevant factors in finding the Final Rule is in the public interest based on the four factors listed above and the required balancing test.

The SREMs sold by Zen represent a unique medium of art, which, by their very nature, teach principles of physical science and mathematics through their use. The utility of art is inherently subjective, and the utility of Zen's products as an art form can best be shown through appraisals of utility. Public consensus provides evidence of the value that consumers place on the utility of the product. *See* Oral Presentation

Comment of Shihan Qu, CPSC-2012-0050-2595, REF_15 PPP NationalSurveyResults (posted Feb. 12, 2014).

Zen Magnets represent a unique medium of art, which, by their very nature, teach principles of physical science and mathematics through their use. Public consensus provides evidence of the value that consumers place on the utility of the product. *See* Oral Presentation Comment of Shihan Qu, CPSC-2012-0050-2595, REF_15 PPP NationalSurveyResults (posted Feb. 12, 2014).

CONCLUSION

WHEREFORE, Petitioner requests an Order Granting its Petition for Review and vacating the Safety Standard Rule for Magnet Sets Promulgated on October 3, 2014.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner believes Oral Argument would assist the Court in reviewing this matter and requests that Oral Argument be set.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Motion has been served via the Court's electronic system to counsel for the Respondent on this 22d day of April, 2015, by sending it to:

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FURTHER CERTIFICATIONS

1. This brief complies with the type-volume limitation of F.R.A.P. 37(a)(7)(B) because this brief contains 6,767 words, excluding the parts of the brief exempted by F.R.A.P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of F.R.A.P. 32(a)(5) and the type style requirements of F.R.A.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect versionX6 in Times New Roman, 14 point type.

All required privacy redactions, if any, have been made and, with the exception of those redactions, and the actual signature on the filed document, every document submitted in Digital Form or scanned PDF format is an exact copy of the written documents to be filed with the Clerk.

The digital submission of this document has been scanned for viruses with the most recent version of a commercial virus scanning program ESOT NOD 32 , version 8.0.312.0 updated to April 22, 2015 and, according to the program, is free of viruses. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/David C. Japha

[ORAL ARGUMENT REQUESTED]

No. 14-9610

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ZEN MAGNETS, LLC

Petitioner,

v.

CONSUMER PRODUCT SAFETY COMMISSION,

Respondent.

On Petition for Review from the Consumer Product Safety Commission

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BRIEF FOR RESPONDENT

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STATEMENT OF RELATED CASES

We are not aware of any related appeals. In this case, petitioner moved for a stay of the regulation at issue. This Court denied the stay on April 20, 2015. Petitioner is currently the subject of a pending administrative action. Petitioner is also the defendant in a district court action alleging that petitioner illegally sold recalled consumer products (magnets) after a publicly announced recall. *United States* v. *Zen Magnets, LLC*, No. 15-cv-955 (D. Col.).

/s/ *Adam C. Jed*
Adam C. Jed

GLOSSARY

CPSC	Consumer Product Safety Commission
NEISS	National Electronic Injury Surveillance System
NPRM	Notice of proposed rulemaking

INTRODUCTION

This case concerns a safety rule for sets of high-powered magnets, frequently used by consumers for general entertainment, such as desk toys. These magnets are extremely dangerous if swallowed because they are powerful enough to clamp together through intestinal tissue. Following numerous incidents in which children were hospitalized and seriously injured, the Consumer Product Safety Commission proposed a rule that would require that these magnets either be large enough to prevent swallowing or have a low enough "magnetic flux" (the strength of the magnets) to mitigate the danger. After reviewing extensive data, considering thousands of public comments, and holding a public hearing, the Commission promulgated the rule.

Petitioner, Zen Magnets, imports magnet sets affected by the rule and asks this Court to set it aside. Yet virtually all of Zen's arguments are simply disagreements with how the agency extrapolated from the available data or weighed competing policy considerations. Those matters are firmly vested with the agency. The question for this Court's review is simply whether the agency could rationally make the factual determinations that it did, and whether the agency considered the relevant issues and offered a rational explanation for its decision. On any view of the record, the agency did so, and Zen has failed to show otherwise.

STATEMENT OF JURISDICTION

Petitioner invoked this Court's jurisdiction pursuant to 15 U.S.C. § 2060(a).

STATEMENT OF THE ISSUE

Whether the Consumer Product Safety Commission's safety standard for magnet sets is arbitrary and capricious or not supported by substantial evidence.

STATEMENT OF THE CASE

A. Statutory Background

In 1972, Congress enacted the Consumer Product Safety Act (Act), Pub. L. No. 92-573, 86 Stat. 1207 (codified as amended at 15 U. S. C. § 2051 *et seq.*), in order, *inter alia*, "to protect the public against unreasonable risks of injury associated with consumer products." 15 U.S.C. § 2051(b)(1). The Act established an independent agency, the Consumer Product Safety Commission, to administer the statute and give effect to its provisions. *Id.* § 2053. The Commission is charged with collecting and disseminating product safety information, *id.* § 2054(a)(1), conducting research and tests concerning consumer product safety, *id.* § 2054(b)(1), (2), promulgating safety standards, *id.* § 2056, and banning hazardous consumer products, *id.* § 2057.

As directly relevant here, Congress entrusted the Commission with the authority to "promulgate consumer product safety standards" that are "reasonably necessary to prevent or reduce an unreasonable risk of injury associated with such product." 15 U.S.C. § 2056(a). The Commission creates such standards through notice and comment rulemaking in which it must consider and make appropriate findings about "potential benefits and potential costs" including the "risk of injury," "the approximate number" of affected products, "the need of the public for the

consumer products," and the "probable effect" on "utility, cost, or availability" of those products; alternative means of "achieving the objective of the order while minimizing adverse effects"; whether the rule "is reasonably necessary to eliminate or reduce the unreasonable risk of injury"; "the public interest," and whether "the rule imposes the least burdensome requirement which prevents or adequately reduces the risk of injury." *Id.* § 2058.

B. Factual Background

1. This case concerns sets of small, high-powered magnets, typically comprising dozens or hundreds of tiny magnetic spheres or cubes, that are often used as desk toys. 79 Fed. Reg. 59,962, 59,963 (Oct. 3, 2014). In 2010, the Consumer Product Safety Commission began receiving reports of serious medical incidents caused by these magnet sets, particularly in children. *Id.* at 59,962; see *id.* at 59,964. When a person ingests more than one magnet, the magnets "interact rapidly and forcefully," damaging intestinal tissue "trapped" between them. 77 Fed. Reg. 53,781, 53,784, 53,786 (Sept. 4, 2012). These injuries are difficult to diagnose because symptoms "often appear similar to those of less serious conditions." 79 Fed. Reg. at 59,964. This can result in serious injury or death. *Ibid.*

The Commission began gathering information about these products and working with companies to address the safety hazards. During 2011, the agency evaluated marketing and labeling of magnet sets and encouraged companies to ensure that these sets were not marketed to children. 77 Fed. Reg. at 53,782. In cooperation

with several manufacturers, the agency also published a public service announcement concerning the hazards of this product. *Ibid.*

Nonetheless, reports of serious incidents continued to increase. 77 Fed. Reg. at 53,782. Based on an extrapolation of data from the National Electronic Injury Surveillance System, it was estimated that from 2009-2011, approximately 1,700—and possibly as many as 6,100—ingestions of magnets from magnet sets were treated in emergency departments. See *id.* at 53,784 & n.3. A high percentage of cases resulted in surgeries or other invasive procedures. See, *e.g., id.* at 53,782, 53,784-53,785.

"[D]espite the warnings or labeling," moreover, caregivers purchased sets for children. 77 Fed. Reg. at 53,783. And even when caregivers "intended to keep the sets away" from them, children got their hands on the magnets anyway. *Ibid.* Experts believed that these products—which are often shiny and smooth and "move in unexpected ways" thanks to their "strong magnetic properties"—appeal to and even "seem magical" to younger children. *Ibid.* And older children are attracted to various ways that the magnets could be used. For example, in "incidents reported among the 8- through 12-year-old age group, one child described wanting to feel the force of the magnets through his tongue; one was trying to see if the magnets would stick to her braces; and another wanted to see if the magnets would stick together through her teeth." *Id.* at 53,785; "[A]mong 8 to 15 year olds[,] [c]hildren used at least two and as many as seven magnets to simulate piercings of their tongue, lips, or cheeks." *Ibid.* These incidents resulted in long hospital stays, numerous CT scans, endoscopies,

surgeries, "damaged bowel tissue," and "life-threatening intestinal injuries that will have lasting adverse health effects." *Ibid.*

2. In 2012, the Commission proposed a product safety standard for consumer magnet sets. 77 Fed. Reg. at 53,781. The proposed standard would apply to "any aggregation of separable, permanent magnetic objects that is a consumer product intended or marketed by the manufacturer primarily as a manipulative or construction desk toy for general entertainment, such as puzzle working, sculpture, mental stimulation, or stress relief." *Id.* at 53,787. It would essentially require either that magnets be large enough to mitigate the risk of swallowing, or that the magnetic flux be low enough (*i.e.*, the magnets be weak enough) to minimize the danger of tissue strangulation. *Ibid.*

The agency received more than 5,000 written comments and heard testimony at a public hearing. 79 Fed. Reg. at 59,966. "Virtually all comments received from medical professionals" supported the rule. *Id.* at 59,969. They observed that "magnet ingestions often result in rapid and severe injuries with devastating and costly long-term consequences," explained that injuries caused by high-powered magnets are "difficult to diagnose," and expressed concern with "the rapidly growing number of cases." *Ibid.* Some commenters noted that magnet sets have many good uses, such as "fun stress-relievers" and "as an artistic medium." *Id.* at 59,967. Other commenters "cite[d] the high severity of the injuries associated with magnet sets." *Id.* at 59,968.

3. On September 26, 2014, the agency issued a final rule, which was published in the Federal Register on October 3, 2014, establishing a safety standard. 79 Fed. Reg. at 59,962 (codified at 16 C.F.R. pt. 1240). The rule applies to "magnet sets" and individual magnets "marketed or intended for use with or as magnet sets." 16 C.F.R. § 1240.1. It defines magnet sets as "[a]ny aggregation of separable magnetic objects that is a consumer product intended, marketed or commonly used as a manipulative or construction item for entertainment, such as puzzle working, sculpture building, mental stimulation, or stress relief." *Id.* § 1240.2. The rule establishes a safety standard based on size and strength: "Each magnet in a magnet set, and any individual magnet" that "fits completely within" a standard toy testing cylinder used to estimate whether children can swallow an item, cannot exceed a certain maximum magnetic strength or "flux." *Id.* § 1240.3; see also *id.* § 1501.4 (establishing dimensions of cylinder); *id.* § 1240.4 (establishing method of testing magnetic flux).

The Commission described and addressed the thousands of comments that it received, 79 Fed. Reg. at 59,966-59,972, described and explained changes between the proposed rule and final rule, *id.* at 59,972-59,974, discussed alternatives that were considered but rejected, *id.* at 59,974-59,976, and explained its final regulatory analysis, *id.* at 59,976-59,989.

The Commission evaluated benefits of the rule in light of data from the National Electronic Injury Surveillance System and other sources. 79 Fed. Reg. at 59,978-59,980. Using the available data, the agency estimated that from 2009 to 2012,

there were approximately 2,138 injuries treated in emergency departments that were directly attributable to magnet sets, eleven percent of which required hospitalization. *Id.* at 59,978. The agency used an injury-cost model to estimate medical costs, work losses, and intangible costs associated with such incidents. *Id.* at 59,978-59,980. The Commission recognized that, given the limits of the available data, "there is uncertainty concerning these estimates," and explained that the estimates may both (1) incidentally take into account incidents that did not involve the types of magnet sets at issue, and (2) incidentally exclude incidents involving the relevant magnet sets but in which, for example, medical narratives "mentioned that a magnet was involved but presented insufficient information to classify the magnet type." *Id.* at 59,980.

The Commission also carefully considered the potential costs of the rule. It sought to model "[t]he lost use value experienced by consumers who would no longer be able to purchase magnets that do not meet the standard" and "the lost income and profits to firms that could not produce and sell non-complying products." 79 Fed. Reg. at 59,980; see *id.* at 59,980-59,982. The agency also considered various alternative approaches, such as requiring warnings or different packaging or limiting sales to certain locations. *Id.* at 59,974-59,976, 59,983-59,984, 59,988-59,989. But the Commission concluded, on balance, that these alternatives would not adequately protect consumers and that the safety risks to the public from high-powered consumer magnet sets warranted adoption of the safety standard. *Ibid.*

4. Petitioner, Zen Magnets, LLC, imports consumer magnet sets. On December 2, 2014, Zen Magnets filed a petition for review. On April 1, after the rule had come into effect, Zen asked this Court to enjoin the rule pending review. After initially issuing an interim stay, the Court denied a stay on April 20.[1]

SUMMARY OF ARGUMENT

Congress enacted the Consumer Product Safety Act to "protect the public against unreasonable risks of injury associated with consumer products." 15 U.S.C. § 2051(b)(1). Congress accordingly charged the Commission with "promulgat[ing] consumer product safety standards" that are "reasonably necessary to prevent or reduce an unreasonable risk of injury associated with such product." 15 U.S.C. § 2056(a). After reviewing extensive data, considering thousands of public comments, and considering statements made at a public hearing as well as accompanying written testimony, the Commission promulgated a rule establishing a safety standard for magnet sets.

By any measure, the standard that the Commission established falls well within the statutory command. The Commission analyzed reports of children's emergency room visits to develop estimates of how many safety incidents were being caused by

[1] Zen is also the subject of separate litigation concerning recalled magnet sets. Just before a batch of magnets was voluntarily recalled, Zen purchased the magnets, mixed them in with other magnets, and sold the magnets after the recall took effect. A district court has entered a preliminary injunction barring Zen from selling those recalled products, and that litigation remains ongoing. See *United States* v. *Zen Magnets, LLC*, No. 15-cv-955 (D. Col.).

high-powered magnet sets. The Commission studied the uses of such sets and the likely effects of the proposed safety standard on producers and consumers. And the Commission considered potential alternatives. The Commission issued a rule requiring either that these magnets be large enough to prevent swallowing or be weak enough to mitigate the danger posed if the magnets are swallowed. Support for the rule among medical experts was virtually unanimous.

Zen claims that the Commission's analysis was deficient in various respects. But the vast majority of Zen's arguments are simply disagreements with how the agency extrapolated from the available data or weighed competing policy considerations. For example, Zen repeatedly alleges that the Commission's extrapolation from medical records of the number of injuries to children caused by consumer magnet sets is inaccurate. Zen, however, does not identify a better source of data or explain why the Commission's method of analyzing these records and extrapolating was improper, let alone irrational. Zen similarly argues that the Commission did not adequately take into account the effect of this safety standard on consumers who use magnet sets. But the Commission fully considered these effects, explaining that in many instances safer magnet sets would still be useful and that other products could often serve the same purposes. The Commission acknowledged, moreover, that there may be purposes for which sets of large, connected, or lower-flux magnet sets may not be as useful, but concluded that the safety benefits of the

rule nonetheless warranted its adoption. The fact that the Commission did not treat Zen's concerns as dispositive is not a basis for invalidating the rule.

Zen's few legal arguments similarly misapprehend the nature of administrative rulemaking. Zen urges that the challenged rule is not a safety standard but is instead a "ban," and that the Commission therefore first had to determine that no safety standard could effectively mitigate the risk. But the rule is plainly written as a safety standard. It is a set of criteria that certain magnet sets must meet to mitigate an acknowledged hazard—exactly the sort of requirement that Congress anticipated would be issued as a safety standard. See 15 U.S.C. § 2056(a)(1) (authorizing the Commission to promulgate "safety standards" that are "expressed in terms of performance requirements"). And were there any ambiguity, the Commission, to which Congress delegated the power to promulgate both safety standards and product bans, would be entitled to substantial deference in the characterization of its own rule.

Similarly, Zen contends that it lacked an adequate opportunity to comment on the rule because the Commission's proposed rule defined consumer magnet sets by reference to how they are "intended or marketed by the manufacturer," while the final rule referred to how the sets are "intended, marketed or commonly used." But in seeking public comment, the agency expressly requested comment on the scope of products covered by the rule. Zen therefore had notice that the final scope of the rule was not yet fixed. And in any event, this kind of small, definitional clarification is

common—indeed, endemic—to the concept of rulemaking, particularly where, as here, the clarification conforms the rule to its stated purpose.

At bottom, Zen's disagreement with the Commission is one of policy: Zen does not dispute that children have been grievously injured by high-powered consumer magnet sets, but asserts that the risks do not warrant promulgation of a consumer product safety standard. But Congress has tasked the Commission with making these kinds of policy determinations. The question for this Court's review is simply whether, based on the administrative record, the agency could rationally make the factual findings that it did, and whether the agency considered the relevant issues and offered a rational explanation for its decision. On any view of the record, the agency did so, and Zen has failed to show otherwise.

STANDARD OF REVIEW

Safety rules issued by the Consumer Product Safety Commission are reviewed pursuant to the Administrative Procedure Act, with certain findings reviewed for "substantial evidence on the record taken as a whole." 15 U.S.C. § 2060(c). A reviewing court "is not to substitute its judgment for that of the agency," but instead reviews the agency record to determine whether it "may reasonably be discerned" that the agency "examine[d] the relevant" information and identified "a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of the United States, Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted); see, *e.g.*, *WildEarth Guardians* v. *EPA*, 770 F.3d 919, 927

(10th Cir. 2014). Under this deferential standard of review, the agency's factual determinations are conclusive so long as there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Wilson* v. *Astrue*, 602 F.3d 1136, 1140 (10th Cir. 2010), *i.e.*, "unless the record demonstrates that any reasonable adjudicator would be compelled to conclude to the contrary." *Sidabutar* v. *Gonzales*, 503 F.3d 1116, 1122 (10th Cir. 2007) (internal quotation marks omitted).

ARGUMENT

A. The Commission Reasonably Exercised Its Discretion in Promulgating the Magnet Set Safety Standard

Congress entrusted the Consumer Product Safety Commission with "promulgat[ing] consumer product safety standards" that are "reasonably necessary to prevent or reduce an unreasonable risk of injury associated with such product." 15 U.S.C. § 2056(a). The Commission reasonably exercised that discretion in promulgating the consumer magnet set safety standard.

Upon becoming aware of a serious hazard to children caused by consumer magnet sets, the Commission began studying the product, analyzing ways to mitigate the hazard, and reviewing available data. After reviewing extensive information, evaluating thousands of public comments, and considering testimony at a public hearing, the Commission promulgated a rule that seeks to mitigate the unreasonable safety risks posed by these magnet sets.

The Commission's analysis is thorough and well-reasoned. The Commission explained the need for the rule, 79 Fed. Reg. 59,962, 59,976-59,977 (Oct. 3, 2014), described the product and market, *id.* at 59,977-59,978, analyzed the risks and societal benefits, *id.* at 59,978-59,980, evaluated the costs of the rule to producers and consumers, *id.* at 59,980-59,983, and considered various alternatives, *id.* at 59,974-59,976, 59,983-59,984, 59,988-59,989, before determining that the risks to consumers posed by high-powered magnet sets warranted adoption of the safety standard.

Congress expected and intended that the Commission would exercise its discretion in this manner. Even Zen does not contest that magnet sets have caused serious injuries and death. The Commission based its conclusions on the available evidence, considered the relevant factors, and exercised its discretion in a manner expressly authorized by statute. Nothing more was required.

B. Zen's Legal Objections Are Without Merit

Most of Zen's arguments are simply disagreements with how the agency evaluated the available data or weighed competing policy considerations. Zen's only legal objections to the Commission's rule are its claim (Br. 17-21) that the rule is not a safety standard issued pursuant to 15 U.S.C. § 2056, but instead a "ban" covered by 15 U.S.C. § 2057; and its claim (Br. 24-26) that that the Commission failed to provide the required opportunity for notice and comment because the final rule's definition of consumer magnet sets varied slightly from that of the proposed rule. Each of these claims is meritless.

1. The Commission Reasonably Promulgated the Challenged Rule as a Safety Standard Under 15 U.S.C. § 2056

Congress authorized the Commission to "promulgate consumer product safety standards" that are "reasonably necessary to prevent or reduce an unreasonable risk of injury associated with such product." 15 U.S.C. § 2056(a). The Act provides that such standards may either be "expressed in terms of performance requirements," *i.e.*, how a product works, or take the form of rules governing "warnings or instructions." *Id.* § 2056(a)(1), (2). Congress also authorized the Commission to "promulgate a rule declaring [a] product a banned hazardous product" if the product "presents an unreasonable risk of injury" and "no feasible consumer product safety standard under th[e] act would adequately protect the public." *Id.* § 2057.

Zen argues (Br. 17-21; see Br. 15-16) that the rule is not a "safety standard" issued pursuant to 15 U.S.C. § 2056, but instead a "ban" covered by 15 U.S.C. § 2057, and that the Commission was accordingly required to make findings that "no feasible consumer product safety standard under this Act would adequately protect the public" and failed to do so. This argument fails at every turn.

As an initial matter, the rule is plainly framed as a safety standard. The rule applies to consumer "magnet sets" and individual magnets "marketed or intended for use with or as magnet sets." 16 C.F.R. § 1240.1; see *id.* § 1240.2 (definition of magnet sets). As to these consumer magnet sets, it does not outright prohibit all such sets but instead establishes a safety standard for certain smaller magnets, which thus permits

magnets sets that meet the specified requirements: "Each magnet in a magnet set, and any individual magnet, that fits completely within" a standard toy testing cylinder used to estimate whether children can swallow an item "must have a" maximum magnetic strength—a "flux index of 50 kG^2 mm^2 or less." *Id.* § 1240.3 (cross-referencing 16 C.F.R. § 1501.4 (establishing dimensions of cylinder); 16 C.F.R. § 1240.4 (establishing method of testing magnetic flux)).

The rule thus mitigates the serious safety hazard posed by consumer magnet sets by prescribing how such magnets sets must operate: if the magnets are small enough to swallow, then the magnetic flux cannot be greater than a prescribed maximum. That is plainly a safety standard. See, *e.g.*, *Black's Law Dictionary* 1624 (10th ed. 2014) (defining standard as "[a] criterion for measuring acceptability"). Indeed, Congress expressly authorized the Commission to issue "safety standards" that are "expressed in terms of performance requirements." 15 U.S.C. § 2056(a)(1). That is what the Commission did here.

If there were any doubt, the Commission's interpretation of the Act and its characterization of its own rule are entitled to substantial deference. See, *e.g.*, *Southern Utah Wilderness Alliance* v. *Office of Surface Mining Reclamation & Enforcement*, 620 F.3d 1227, 1235-1236 (10th Cir. 2010) (agency's interpretation of statute through regulations must govern unless unreasonable); *Mitchell* v. *Comm'r*, 775 F.3d 1243, 1249 (10th Cir. 2015) (agency's interpretation of its own regulation must govern unless plainly erroneous). The Commission, which is entrusted by Congress with

implementing the Act, understood this rule to constitute a consumer product safety standard, see 16 C.F.R. § 1240.1, and has long understood similar rules to constitute consumer product safety standards, see, *e.g.*, 16 C.F.R. pt. 1213 (bunk beds must comply with certain requirements for guardrails). Zen identifies no plausible basis for setting aside that interpretation as plainly erroneous or unreasonable.

Much of Zen's argument simply reduces to the observation that any safety standard can be rephrased as a "ban" on products that do not meet the standard. Thus, Zen points to public comments (Br. 20) that used the word "ban" and that suggested the proposed rule "would prohibit current magnet sets." But a safety standard does not become a "ban" within the meaning of 15 U.S.C. § 2057 simply because it could be described as prohibiting products that fail to meet that standard or because some existing products do not comply with the standard. If Zen's contrary argument were correct, then nearly *every* safety standard could be recharacterized as a "ban" on products that do not satisfy the relevant requirements.

Zen is on no firmer footing when it urges that the final rule "is *in effect* a ban" because magnet sets that satisfy the rule would not be useful for many consumer applications. See Br. 18-19 (emphasis added). Section 2057 applies to "bans" of hazardous products for which no feasible safety standard would adequately protect the public. It does not apply to safety standards that, like the rule at issue here, permit the sale of conforming products while prohibiting the sale of nonconforming products. That is what consumer product safety standards are supposed to do.

Nothing in the Act supports Zen's contention that a safety standard that sets out "performance requirements," 15 U.S.C. § 2056(a)(1), is somehow transformed into a "ban" under section 2057 whenever the standard has the salutary effect of preventing the sale of unsafe products or making the product less useful for certain purposes. Indeed, Zen's argument would appear to render the Act's various requirements that the Commission consider the effect of any safety standard on producers and users, see 15 U.S.C. § 2058(e) & (f)(1), (3), a near nullity: under Zen's reading of the statute, any time a safety standard has any significant effect on producers and consumers by rendering a product unfit for certain uses, the standard thereby becomes a "ban."

Moreover, as discussed in greater detail below, Zen's factual premises, such as that conforming magnets are "useless for nearly any type of manipulation" (Br. 13) or have no "utility outside of the industrial sector" (Br. 19) is belied by the record. See *infra* pp. 28-30. Even Zen's hand-picked comments refer only to certain uses. And as to those uses, in response to comments about "education and research," and "value as an artistic medium," the agency explained that the rule does not cover "high-powered magnets that serve industrial and commercial needs," and that "less powerful" magnets, larger magnets, and interconnected small magnets all meet the consumer standard and will often be useful for the same purposes. 79 Fed. Reg. at 59,967; see *id.* at 59,977. Indeed, other companies already make and sell such products. See *id.* at 59,967, 59,977. Even on Zen's mistaken understanding of the term, therefore, the

challenged rule does not comprise a "ban" and the Commission was not unreasonable in concluding otherwise.[2]

2. The Commission Provided Ample Opportunity for Comment

Zen's only other legal argument is its claim (Br. 24-26) that the agency failed to provide the required notice for public comment because the final rule's definition of consumer magnet sets varied slightly from that of the proposed rule. To give meaning to the notice and comment requirement, courts generally require that the final rule be a "logical outgrowth" of the proposed rule. *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 174 (2007). "The object, in short, is one of fair notice." *Ibid.* "A final rule is a logical outgrowth if affected parties should have anticipated that the relevant modification was possible." *Allina Health Servs.* v. *Sebelius*, 746 F.3d 1102, 1107 (D.C. Cir. 2014). By contrast, a final rule is not a logical outgrowth of a proposed rule where "interested parties would have had to divine [the agency's] unspoken thoughts, because the final rule was surprisingly distant from the proposed

[2] In any event, if Zen's interpretation of what constitute "bans" and "safety standards" were correct, then the challenged rule would (under Zen's argument) constitute a *valid* "ban." As Zen urges (see Br. 18), to promulgate a "ban," the agency must determine that "no feasible consumer product safety standard under th[e] act would adequately protect the public." 15 U.S.C. §§ 2057, 2058(f)(3)(C). But because, under Zen's view of the statute, virtually any rule governing magnet flux and/or size is a "ban" on noncompliant magnets, then the Commission's determination that less restrictive standards would be inadequate to protect the public would (under Zen's interpretation) refer to any feasible safety standards. See 79 Fed. Reg. at 59,974-59,976, 59,983-59,984, 59,988-59,989.

rule." *CSX Transp., Inc.* v. *Surface Transp. Bd.*, 584 F.3d 1076, 1080 (D.C. Cir. 2009) (internal quotation marks omitted) (brackets in original).

Here, not only was the final rule a logical outgrowth of the proposed rule, but the rules are virtually identical. The proposed and final rules establish safety standards for consumer magnet sets—indeed, the *same* standards. The only difference that Zen points to (Br. 25) is a clarification of the definition of a consumer magnet set: The proposed definition was "any aggregation of separable, permanent magnetic objects that is a consumer product *intended or marketed* by the manufacturer primarily as a manipulative or construction desk toy for general entertainment, such as puzzle working, sculpture building, mental stimulation, or stress relief." 77 Fed. Reg. 53,781, 53,783, 53,787, 53,800 (Sept. 4, 2012) (emphasis added). The final definition is "[a]ny aggregation of separable magnetic objects that is a consumer product *intended, marketed or commonly used* as a manipulative or construction item for entertainment, such as puzzle working, sculpture building, mental stimulation, or stress relief." 16 C.F.R. § 1240.2(b) (emphasis added).

Zen cannot plausibly maintain that this kind of modification could not have been anticipated and thus vitiated the notice and comment process. Indeed, the notice of proposed rulemaking (NPRM) expressly sought "comment on the scope of the products proposed to be covered by this proposed rule." 77 Fed. Reg. at 53,787. Zen thus had every reason to expect that the definition of covered magnet sets might change during the rulemaking. See *CSX*, 584 F.3d at 1081 (logical outgrowth where

"NPRM expressly asked for" comments on the issue). Moreover, the NPRM itself spoke in terms of consumers' using these magnets sets and the kinds of dangers that arise when such strong magnets are used by consumers. See, *e.g.*, 77 Fed. Reg. at 53,798 (estimating injuries caused by magnets in consumer hands). It was entirely reasonable for the Commission to clarify that the rule's scope covers magnets commonly used by consumers, a clarification consistent with the NPRM itself.

Indeed, the Commission reasonably explained that the change in language from "intended or marketed by the manufacturer" to "intended, marketed or commonly used" was not intended "to change the scope of the rule from the proposal, but rather, to describe more clearly the products subject to the rule." 79 Fed. Reg. at 59,973. The change in language "clarifies that the common usage" of magnets bears on "whether the magnets are intended for use as manipulatives for entertainment, irrespective of the firm's stated intentions." *Ibid.*

In any event, minor definitional modifications of this kind are common in administrative rulemaking and do not, as Zen suggests, automatically deprive the public of the right to notice and comment. That is particularly true where, as here, definitional modifications are meant to match the stated purpose of the rule (here, mitigating hazards of consumer use of magnet sets) with the precise scope of the rule (here, making clear that the rule covers magnet sets that are commonly used by consumers). Moreover, definitional changes intended to avoid possible confusion about a rule's outer bounds and/or to prevent evasion of the rule's scope are also

intrinsic to rulemaking. Thus, the Commission explained that "[t]his change clarifies that the common usage of a firm's magnet products could be a consideration in determining whether the magnets are intended for use as manipulatives for entertainment, irrespective of the firm's stated intentions." 79 Fed. Reg. at 59,973. And this clarification also addressed the possibility of companies' "avoiding the rule by simply stating in marketing and other materials that the magnets are intended for uses other than those specified in the definition." *Ibid.* That refinement was well within the Commission's discretion to adopt in moving from a proposed rule to a final one.

C. The Commission Had Ample Basis in the Administrative Record To Promulgate the Challenged Rule

Unable to identify any legal error by the Commission, Zen devotes most of its brief to urging that the agency should have differently interpreted the available data or differently weighed competing policy considerations. These arguments fail to apprehend the applicable principles of administrative law and disregard the deference owed to the Commission's determinations.

1. Zen first alleges (Br. 5-13) that the Commission erred in estimating how many people have been injured by magnet sets. In promulgating the rule, the Commission was required, among other things, to consider "the risk of injury which the standard is designed to eliminate or reduce," to "make appropriate findings" regarding "the degree and nature of the risk of injury," to conclude that the risk is

"unreasonable," and to give "[a] description of the potential benefits" of the rule. 15 U.S.C. § 2058(e), (f). The Commission did so here and had ample basis for that analysis.

In reviewing the risk of injury and benefits of the rule, the Commission reviewed reports of magnet-related ingestions in the National Electronic Injury Surveillance System (NEISS) database. It also relied on incidents reported through the Commission's own databases, which include the Injury or Potential Injury Incident database and the In-depth Investigation database, as well as comments from medical and public health experts. See, *e.g.*, AR103-115 (2012 memorandum); AR8072-8081 (2014 memorandum); see also, *e.g.*, AR8191-8635 (in-depth investigation reports).

To estimate the number of annual injuries attributable to consumer magnet sets, the Commission extrapolated from NEISS reports. Because these reports do not necessarily identify consumer magnet sets as the cause, the agency utilized a multi-step sorting process: Experts identified reports referencing ingested magnets; counted injuries clearly attributable to the magnet sets at issue (such as by reference to a brand name); and discarded incidents connected to other identifiable magnet-types, such as "kitchen magnets." See 77 Fed. Reg. at 53,784, 53,791; 79 Fed. Reg. at 59,964-59,965, 59,969, 59,978-59,980; AR 103-115; AR8072-8081. Because the reports available to the Commission "include[] incidents involving all types of magnets, not just magnet sets," the agency had to rely on narratives, such as notes in emergency room reports,

to estimate which ones "involve" or "possibly involve" the magnet sets at issue here. 77 Fed. Reg. at 53,784; see also, *e.g.,* 79 Fed. Reg. at 59,964. The Commission did not count reports where the magnet type was unknown. 77 Fed. Reg. at 53,784, 53,6792; 79 Fed. Reg. at 59,968, 59,980.

The bulk of Zen's argument is its observation that the available data are limited and that many reports, such as emergency room reports, do not always clearly state the type of object involved. Thus, Zen asserts that the Commission's estimates were not "reliable" (*e.g.,* Br. 9), were "subjective" (*e.g.,* Br. 9) and were "speculation" (*e.g.,* Br. 10). The Commission, however, specifically acknowledged the sorts of methodological concerns that Zen now raises and explained that it had no choice but to work with necessarily imperfect data, such as emergency room reports, and extrapolate from that information. Thus, the agency made clear that its injury counts were "estimates," and, in response to comments pointing out difficulties with the data, the agency explained that its analyses "acknowledge that there is some uncertainty concerning the estimated annual average of medically attended injuries." 79 Fed. Reg. at 59,968; accord *id.* at 59,980. Zen does not suggest that the Commission had available to it a better, more complete data set on which the agency should have—let alone, must have—relied. Faced with reports of serious injuries to children from consumer magnet sets, the Commission relied upon the best information it could reasonably gather. It was well within the Commission's discretion to proceed on this basis.

The Commission candidly recognized that, as Zen argues, it may have incidentally included incidents involving magnets that would not be covered by the rule. 79 Fed. Reg. at 59,968, 59,980. On the other hand, the agency also noted that by excluding magnets "classified as 'unknown or other,'" it may also have *excluded* incidents attributable to covered magnet sets. *Id.* at 59,968. There were "an estimated 7,700 emergency department-treated ingestions involving magnets type unknown or other type of magnets" which were not counted towards the estimated thousands of incidents that the Commission conservatively attributed to consumer magnet sets. See AR8072-8074. The true number could well have been much higher.

Indeed, "medical experts reported that the available research most likely reflects an *undercount* of the true incidence of injuries associated with magnet sets." 79 Fed. Reg. at 59,966 (emphasis added); see, *e.g.*, AR7618-7619 (testimony of Dr. Mark Gilger, Chief at Children's Hospital of San Antonio) (describing the NEISS estimate as "a serious under estimation"); AR7649 (testimony of Dr. Maria Oliva-Hemker, Chief of Pediatric Gastroenterology and Nutrition at Johns Hopkins, on behalf of North American Society for Pediatric Gastroenterology, Hepatology and Nutrition) (explaining that "it is highly possible" that some of the thousands of magnet-related emergency department visits "not classified as high powered magnets could be attributable to those high powered magnet sets . . . it is just that many of the NEISS reports did not include sufficient detail to place them in that category"); see also AR7722 (Dr. Hemker's written testimony).

Nothing in the statute requires the Commission to offer precise injury counts. And the Commission necessarily must work from available data. A contrary requirement would render it almost impossible to promulgate consumer product safety standards. As the Supreme Court has explained, "[i]t is not infrequent that the available data does not settle a regulatory issue." *State Farm*, 463 U.S. at 52. An agency merely must "explain the evidence which is available" and "offer a rational connection between the facts found and the choice made." *Ibid.*; see *Forester* v. *Consumer Prod. Safety Comm'n*, 559 F.2d 774, 788-789 (D.C. Cir. 1977) (agency need not "develop a precise 'body count' of actual injuries that will be reduced by each regulatory provision" and "no precise statistical showing is required"). The Commission has done so here.

Zen nonetheless urges that there is no rational basis for the Commission's estimates by asserting (Br. 7-9) that the NEISS database, from which the Commission drew injury reports and then extrapolated, shows a similar number of incidents in the years before the relevant consumer magnet sets were widely sold. This argument fails at every turn. First, the only factual basis that Zen identifies is its own CEO's comment submitted during the rulemaking. That comment, like Zen's brief, simply asserted its conclusion, stating in two sentences that: "The same search applied to the 3 years (2006-2008) before magnet sets were on the market reveals 94% as many recorded injuries" and that "[u]sing the same method on the same database, 'magnet sets' caused nearly as many injuries when 'magnet sets' existed on the market as when

they didn't . . . ." AR7737 (Comment from Shihan Qu). Zen's comment, however, did not include data, search terms, or other analysis to substantiate this assertion. Thus, the record does not support Zen's claim that its CEO's review of 2006-2008 NEISS data mirrors what Zen itself acknowledges was the case-specific analysis of narratives, such as emergency room reports, that Commission experts undertook using NEISS data from later years.

Second, and in any event, the administrative record shows both that the number of incidents of magnet ingestion surged as high powered magnet sets came to market and that, contrary to Zen's unexplained assertion, the NEISS data itself demonstrates this trend. For example, prior to 2010, the Commission received *no* consumer incident reports involving magnet sets; and from 2011 through 2012 these reports steadily climbed. 79 Fed. Reg. at 59,962. A survey of doctors conducted by the North American Society for Pediatric Gastroenterology, Hepatology, and Nutrition likewise showed that, from 2008 to 2012, the number of medical incidents involving magnet sets sharply increased. AR7719-7720; see AR7642-7643. Similarly, medical experts reported on the strong "correlation between the emergence of high powered magnet sets in the commercial market and the rise in the incidents of high powered magnet ingestions." AR7639; see AR7639-7647.

The record also belies Zen's unsupported assertion about the NEISS data, *i.e.*, that NEISS reports show the same number of incidents before 2009 as after. The record included expert discussion of an article published in the Journal of Pediatric

Gastroenterology and Nutrition that reviewed NEISS data during the 2002 to 2011 period. *E.g.*, AR7644-7648. The article's analysis of NEISS data showed a sharp increase in 2009, when the subject magnet sets became popular. See AR7647-7648. For example, in 5 to 13-year-olds, "those suspected to have multiple small and/or round magnet ingestions. . . increased from .02 per 100,000 in 2007 to 1.22 per 100,000 in 2011." AR7647. "This represents a *61 fold increase*." *Ibid.* (emphasis added). Similarly, children ages 14-17 "had almost no documented magnet ingestion related emergency department visits . . .until 2009, after which a statistically significant rise is noted from a rate of 0.1 per 100,000 to 1.15 per 100,000." *Ibid.*; see also AR1018-1022 (further details of the independent NEISS data analysis); AR7720-7722 (same). This independent review of NEISS data is consistent with the agency's estimates. The Commission had ample basis in the record to rely on its own estimates, which were supported by this published, peer-reviewed study, rather than on two unexplained sentences in Zen Magnet's submission to the agency.

Zen's remaining criticisms of the Commission's risk estimates merely second-guess the judgment calls that agency experts had to make when interpreting this imperfect data. For example, Zen faults the agency (Br. 8) for counting injuries caused by magnets described as "small" or described as "round," rather than only counting reports with *both* terms. But that kind of judgment call is for the agency to make. Given the imperfect data and the need to balance over- and underestimates, the agency's methodology was hardly irrational. And Zen is in any event mistaken

that the final rule covers only magnets that are "both strong *and* round." Br. 8. The rule does not require that magnets be round at all. See 16 C.F.R. § 1240.2. The covered magnets may, for example, be "cube-shaped." 79 Fed. Reg. at 59,963. And, in any event, not every incident involving a small magnet or round magnet was counted. As the agency explained, more specific terms were used to include or to exclude individual cases. See AR8072-8074.[3]

2. Zen next argues (Br. 13-17) that the agency did not strike the right balance between the dangers of small, high-flux magnet sets, and the utility of such sets. Zen asserts that magnet sets may be useful for art, education, and research, and that the safety rule would impede such uses. *Ibid.* But the agency acknowledged these uses in considering the costs and benefits of the rule, and Zen cannot seek to invalidate the rule merely because the agency could have struck a different balance.

As an initial matter, several of Zen's assertions about the effects of the new rule on consumer utility are not supported by the comments that Zen cites. For example, Zen posits (Br. 13-14) that lower-flux magnets are "useless for nearly any type of manipulation." But even ignoring the fact that larger or interconnected high-flux

[3] Zen additionally asserts (Br. 12-13) that there was no evidence that the rule was "reasonably necessary" to mitigate the known risk of magnet sets. But Zen's argument is mostly a list of unrelated assertions, such as that the risk is "remote," "the Rule has the practical effect of banning the subject magnets," and it "unduly hampers the availability and utility" of magnet sets. *Ibid.* To the extent that Zen suggests, without explanation, that the agency failed to weigh the risk against the costs, that is also belied by the record. See, *e.g.*, 79 Fed. Reg. at 69,988.

magnets (rather than just lower-flux magnets) satisfy the safety standard, Zen's only support for that assertion is a single comment which observed that "the proposed rule impose[s] a limit on the magnetic flux" and posited that the "limit would alter the fundamental characteristic of the product." AR3574 (Comment of Michael Kobb). That is a far cry from rendering magnets "useless" (Br. 13). Similarly, the comments that Zen cites (Br. 14-15) for its observations that some people use magnet sets in classrooms or to build models in laboratories do not state that larger, lower flux, or interconnected magnets could not be used in such settings, and certainly do not support Zen's claim that lower-flux magnets are "useless for nearly any type of manipulations." See AR1601 (comment of Anthony Pelletier) (teacher stating that his students use such sets and it would be a hardship if magnet sets were no longer available); AR911 (comment of Stephen Niezgoda) (physicist saying that he uses these sets and "oppose[s] the ban"); AR3704 (comment of Michele LaForge) (math teacher stating that one brand is a good "teaching tool" and asking that the Commission "not ban it").

In any event, the agency explained why the standard would often not affect these uses, but also acknowledged that costs of the safety standard would include "lost use value experienced by consumers who would no longer be able to purchase magnets that do not meet the standard," and the agency even sought to model that loss. See 79 Fed. Reg. at 59,980-59,882. In response to comments that "high-powered magnets have many laudable uses, including for education and research,"

and "value as an artistic medium," the agency explained that the rule does not cover "high-powered magnets that serve industrial and commercial needs"; that "less powerful" or larger magnets could be used; and that in addition to compliant magnet sets, entirely different products may also be useful for the same purposes. *Id.* at 59,967, 59,977. The agency also acknowledged, however, that not all alternatives are good substitutes for all purposes. *Ibid.* The agency fully acknowledged, for example, that lower-flux magnets "may be too weak for building sculptures or . . . other construction activities" *id.* at 59,977, and that larger magnets may be "more limited" in their uses, *id.* at 59,967.

Aware of these costs, the Commission nonetheless concluded that the safety rule was warranted to prevent an unreasonable risk of injury to the public. Congress expected and intended the Commission to make discretionary judgments of that kind. The fact that the agency considered Zen's objection but did not treat it as dispositive is not a basis for invalidating the rule.

3. In places, Zen suggests (see Br. 18, 20-21) that the agency failed to consider alternatives to the rule and lacked a rational basis for concluding that the magnet safety rule is "reasonably necessary to prevent or reduce an unreasonable risk of injury." 15 U.S.C. § 2056(a). The Commission, however, carefully explained that it considered various alternatives and why it believed those alternatives were insufficient. 79 Fed. Reg. at 59,974-59,976, 59,983-59,984, 59,988-59,989. The Commission's explanation is well supported in the record.

For example, the record before the Commission included studies demonstrating that, despite "warnings or labeling," caregivers still purchased sets for children, and that even when caregivers "intended to keep the sets away," children nonetheless got hold of them, resulting in injuries. 77 Fed. Reg. at 53,783; see 79 Fed. Reg. at 59,983-59,984, 59,989; see also, *e.g.*, AR1023-1024 (North American Society for Pediatric Gastroenterology, Hepatology and Nutrition explaining that "[p]arents and other caregivers may purchase these magnets sets for older children because they do not anticipate the magnets being used for the unintended purpose[s]"); AR406, 409, 410, 413, 419, 430, 445, 450, 456, 459, 492, 496, 501, 508, 511, 513, 519, 529, 539, 545, 552, 628, 631, 662, 667, 669, 671, 673, 681, 724-725, 746, 815-816, 861, 870-871, 893, 897, 899, 904, 946-948, 1303, 1505-1506, 1692-1694 (comments from doctors urging that warning labels are ineffective). The fact that the agency did not run additional "test[s]" (Br. 21) does not render its conclusions irrational. Indeed, the Commission had already experimented with a number of other methods of mitigating the danger of magnet sets before it proposed the size and flux standard. See, *e.g.*, 77 Fed. Reg. at 53,782 (describing voluntary practices concerning marketing, sales, labeling, as well as Commission public service announcements).

4. Zen next urges (Br. 22-24) that, because a number of manufacturers voluntarily stopped selling dangerous magnet sets after the agency proposed its rule in 2012, the agency's use of pre-2012 data rendered the cost-benefit analysis unsupportable. Neither Zen nor anyone else submitted comments on this issue, and

Zen therefore cannot now challenge the final rule on that basis. See, *e.g.*, *Universal Health Servs., Inc.* v. *Thompson*, 363 F.3d 1013, 1019-20 (9th Cir. 2004) (collecting cases); see generally *Woodford* v. *Ngo,* 548 U.S. 81, 90 (2006) ("'[A]s a general rule . . . courts should not topple over administrative decisions unless the administrative body not only has erred, *but has erred against objection made at the time appropriate under its practice.*'") (emphasis, omission, and alteration in original) (quoting *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)).

There are, moreover, persuasive reasons that no one made such a suggestion. As the Commission explained, it used a pre-2012 baseline because "[t]he expected benefits of a product safety regulation must be measured against a baseline representing the best assessment of how the market would operate and how products would be used in the absence of the intervention." 79 Fed. Reg. at 59,978. Since the Commission proposed this rule, certain companies stopped importing and/or manufacturing magnet sets or shifted to compliant sets. But that does not explain what the market would look like if the Commission declined to adopt a rule. Moreover, Zen's argument to the contrary would render it almost impossible for the Commission to adopt any safety standard for products in a changing market. The agency must propose rules based on the data available at the time and cannot indefinitely delay rules as the market changes and as new data is then collected about the prior year's market changes. And in any event, decreasing sales will decrease the costs of the final rule as well: if fewer dangerous magnet sets are sold, then a safety

rule may not prevent as many injuries, but it also will not affect as many manufacturers, importers, or consumers. The agency accordingly was well within its discretion to look to pre-2012 sales data.

5. Finally, Zen argues (Br. 27-28) that the Commission lacked a rational basis for its conclusion that the rule is in the public interest. This argument underscores that, at bottom, Zen is simply asking that this Court reweigh competing policies, a task entrusted by law to the Commission. The Commission clearly explained its judgment that the requirements of the final rule are "in the public interest because they would reduce deaths and injuries associated with magnet sets in the future." 79 Fed. Reg. at 59,988. Although Zen quibbles about the *number* of children who have been injured by these products, even Zen does not dispute the expert medical consensus that consumer magnet sets are dangerous and have been responsible for serious injuries and death. And, as discussed, the agency acknowledged the competing interests and even sought to model consumer and producer utility, but concluded that the expected costs did not outweigh the expected benefits of the safety standard. That judgment is firmly vested with the Commission.

Relying on the comment of Zen's own CEO, Zen asserts (Br. 27-28) that noncompliant magnet sets "represent a unique medium of art" and that "[t]he utility of art is inherently subjective." And Zen declares (Br. 27-28) that a "[p]ublic consensus" supports this point, by citing a poll which asked people, without any detailed explanation or elaboration, whether magnet sets should be "[c]ompletely

banned." See AR7936-7941. Even ignoring the methodological problems with such a poll, nothing in the statute requires the Commission to defer entirely to claims of artistic utility or to accept poll results in lieu of medical consensus and injury reports when determining whether a consumer product poses an unreasonable risk of injury and whether a safety standard is in the public interest. As the Supreme Court has stressed, a "'public interest' standard calls for an inherently policy-based decision best left in the hands of an agency." *United States* v. *Bean*, 537 U.S. 71, 77 (2002).

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

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JUNE 2015

REQUEST FOR ORAL ARGUMENT

This appeal concerns the validity of consumer product safety regulations. Given the importance of the issue, the government respectfully requests oral argument.

CERTIFICATIONS OF COMPLIANCE

I hereby certify this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font, and that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,526 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

I further certify that (1) all required privacy redactions have been made; (2) the required paper copies are exact versions of the document filed electronically; and (3) that the electronic submission was scanned for viruses and found to be virus-free.

/s/ Adam C. Jed
Adam C. Jed

CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2015, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system and caused seven paper copies to be delivered within two business days. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Adam C. Jed
Adam C. Jed

From: Feldman, Peter
To: Tanzer, Theodore
Subject: Magnet emails
Date: Tuesday, January 14, 2020 3:30:00 PM
Attachments:
This week"s agenda.msg Withheld as duplicate
Bryan Rudolph MD MPH FAAP Tweeted Last week I gave a interview o....msg Not responsive
Newslog 20-044 Anchor It! Magnets SHARE Information Act and More.msg Not responsive
PRO TECHNOLOGY REPORT Friday Jan. 10 2020.msg Not responsive
Magnets meeting.msg Duplicate
Patent Politics Trump administration rewrites policy for standard-essential patents.msg Not responsive
Agenda for this week.msg Duplicate
Fwd Seeking Responsive Information Relevant to FOIA Request #20-F-00126 UPDATED.msg
Fwd Seeking Responsive Information Relevant to FOIA Request #20-F-00126.msg Duplicate
ParentsAgainstTipovers Tweeted Ellis who lost her son Camden when ....msg Not responsive
Nancy Nord re Magnet Sets.msg Duplicate
Commissioner Feldman and Staff Meeting Nancy Nord.msg Duplicate
RE request for meeting.msg Duplicate
RE request for meeting.msg Duplicate
RE request for meeting.msg Duplicate
request for meeting.msg Duplicate
OLA Letter Database - 1062020.msg Duplicate
Donald J. Trump Tweeted IRAN WILL NEVER HAVE A NUCLEAR WEAPON!.msg Not responsive
Product Safety Letter - January 06 2020.msg Not responsive
Newslog 20-041 Magnets Winter Safety and Fireworks.msg Not responsive
Federal Court Litigation Report - OGC - Div. of Enforcement and Information - December 31 2019 (FOR OFFICIAL Duplicate
USE ONLY) OS# 0003.msg Duplicate
Newslog 20-040 Magnets Infant Sleepers New Years Fire Safety.msg Not responsive
Newslog 20-039 Magnets Infant Sleepers and E-Bikes.msg Not responsive
ParentsAgainstTipovers Tweeted Problems with voluntary safety stan....msg Not responsive
Newslog 20-038 CPSC Carbon Monoxide Magnet Ingestions and More.msg Not responsive
WASH POST Magnet Ingestion - .msg Duplicate
OLA Letter Database - 12232019.msg Duplicate
New Web Posting.msg Duplicate
Compliance Status Report November 2019 -- Official Use Only.msg Not responsive
PRO TECHNOLOGY REPORT Friday Dec. 20 2019.msg Not responsive
EXHR Activities Report 12 20 2019.msg
Patent Politics Lawmakers challenge China on WIPO.msg Not responsive
ATM Wearables Staff Letter.msg Not responsive
This weeks agenda.msg Duplicate
RE Wearables letter.msg Not responsive
This weeks Agenda.msg Duplicate
Outgoing Communication Do Not Distribute.msg B5 Deliberative: 5 pages withheld
RE Zen"s Cross-AppealResponse Brief - Zen Magnets LLC v. CPSC (10th Circuit).msg Duplicate
Zen"s Cross-AppealResponse Brief - Zen Magnets LLC v. CPSC (10th Circuit).msg Duplicate
This weeks agenda.msg Duplicate
EXHR Activities Report 12 03 2019.msg Duplicate
Product Safety Letter - December 02 2019.msg Not responsive

From: Nancy A. Nord
To: Feldman, Peter
Cc: Tanzer, Theodore; Bellet, Cecilia
Subject: Magnets meeting
Date: Friday, January 10, 2020 12:29:18 PM
Attachments: CPSC Ballot Response.pdf

Peter, thank you for taking time to meeting with me to discuss the ASTM activity to develop a standard addressing the marketing, labeling, packaging and warnings of adult magnet sets. As I mentioned in the meeting, the balloting at the subcommittee level closes on January 13. Late yesterday afternoon, we received the first negative vote on the proposed standard—from the CPSC. I have attached the letter they sent to me discussing the reasons for the negative vote.

I will be responding to the CPSC letter for the benefit of the subcommittee and will send you a copy of that response when it is prepared. However, the letter from the CPSC raises issues that were fully discussed and decided by consensus in the Subcommittee. With respect to the overarching concern that only changing the product will eliminate the risk, because warnings will not work, this was considered and the group decided to put the current draft out for ballot with the view that, regardless of where one comes down on this issue, having a strong standard on marketing, label, etc. was a better solution than nothing (which is what will result if the proposed rule does not move forward). The group agreed to keep the option of reconsidering changes to the product open for reconsideration in the future. With respect to specifics raised in the letter, they are a "rehash" of issues raised and disposed of during the subcommittee deliberations. For example, the suggestion concerning reference to the Poison Control Center was fully discussed several times. It was noted that while some Poison Control Centers are well-versed in the risk presented by the product, others merely counsel consumers to contact local medical professionals. The consensus of the group was that referencing Poison Control in the instructions but not on the warning (which directs people to seek immediate medical attention) was appropriate. With respect to the warning size, the minimum size requirement in the standard is the direct suggestion of the CPSC staff and was vetted with them. I am surprised to now see it on the list of problems with the standard. All of the issues raised by the CPSC staff were discussed fully and decided during the subcommittee meetings.

I realize I am now way down in the weeds here but it is disappointing so see the staff again want to revisit issues that were thoroughly discussed during the subcommittee deliberations. It almost appears that the staff does not want to give strong warnings a try but rather prefer to defer to the courts (and perhaps a new administration). If that is true then injuries will increase because of the inaction of the CPSC—a very strange outcome.

[to amend our discussion on enforcement, I am aware of one action by CPSC against a seller on Amazon whose product was labeled as "13 months and up." It is my understanding that the seller immediately contacted Amazon and got the listing changed. The company has agreed to do a recall of any product that was incorrectly listed but the CPSC is insisting that his entire inventory be recalled, including inventory that is being held at customs and which he needs to sell in order to finance the more limited recall he has agreed to do. I do not have any information about whether other advertising on the Amazon site suggested that this was a toy. I am not aware of any other enforcement actions being brought in this space.]

U.S. CONSUMER PRODUCT SAFETY COMMISSION
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Engineering Psychologist
Division of Human Factors

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sharsanyi@cpsc.gov

January 9, 2020

TRANSMITTED VIA EMAIL

Ms. Nancy Nord
Subcommittee Chairman for ASTM F15.77,
c/o ASTM International
100 Barr Harbor Drive, P.O. Box C700
West Conshohocken, PA 19428-2959

Dear Ms. Nord:

This letter responds to ASTM ballot F15.77 (19-01), item #1, *Specification for Marketing and Labeling Adult Magnet Sets Containing Small Loose, Powerful Magnets with a Flux Index 50 kG2mm2 WK68963*. Staff of the U.S. Consumer Product Safety Commission (CPSC) is voting negative on the ballot item.[1]

Based on CPSC staff's technical expertise and its examination of magnet sets, incident reports, consumer reviews, and the available literature, staff concludes that relying only on the draft standard's proposed requirements for warnings, instructions, marketing, and packaging ("proposed requirements"), is unlikely to mitigate effectively the hazard associated with the ingestion of small, powerful magnets from magnet sets. The proposed requirements are inadequate because they depend on warnings to override the perception of the product as a suitable plaything for children. In addition, the proposed requirements depend on persuading consumers to consistently perform actions they otherwise might not perform to avoid the hazard. We expand on these points below. As an alternative to the proposed requirements, staff urges the subcommittee to continue efforts to expand the scope of the draft standard to include performance requirements that effectively mitigate the magnet ingestion hazard.

As discussed in staff's letter to the subcommittee on October 18, 2019, explaining staff's participation in the development of this standard, there are numerous factors that render the proposed requirements insufficient.

1. *Consumer Common Recognition:* Studies show that consumers are unlikely to consult and heed warning information for products and features they perceive as simple, familiar, and non-threatening, such as the subject magnet sets. Incident data and consumer reviews of magnet sets

[1] 16 C.F.R. part 1031, as amended in 2016, permits CPSC staff to vote and hold leadership positions on an optional basis, provided that such activities have the prior approval of CPSC's Office of the Executive Director. CPSC staff sought and received approval to vote in October 2019 on matters pertaining to ASTM subcommittee F15.77.

demonstrate that consumers commonly recognize magnet sets as suitable for children; warning information that suggests the contrary is unlikely to be perceived as credible. In addition, studies demonstrate that the more familiar consumers are with a product, the less likely they are to look for and read a warning; in contrast, consumers are more likely to discredit or ignore the warning. If caregivers have observed their child, or their child's peers, using the product, or a similar product, without incident, caregivers may conclude that their child can use the product safely, regardless of what the warnings state. Similarly, recommendations from other consumers and caregivers, including online reviews of magnet sets by others who have purchased these sets, can lead consumers to disregard the hazard.

2. *Required Repackaging:* Consumers are unlikely to repackage the sets in their entirety after each use, which is likely to be required to limit children's access to the sets and individual magnets. Magnet sets are designed and marketed to make complex sculptures, and for other purposes that discourage consumers from dismantling and repackaging the entire set. Magnet sets can have upwards of 1,000 tiny magnets, making the task of finding and collecting every individual magnet, after every use, difficult and time-consuming. Even small increases in time, effort, and other "costs," can have a substantial effect on compliance with a warning, and can quickly drive compliance rates to zero.
3. *Accessibility:* As evidenced in incident reports, magnets from magnet sets are often acquired by children without the packaging and instructions, such as from children sharing sets and children finding loose magnets in their environment. In such cases, any warning information limited to these sources, as well as packaging characteristics, are ineffective. Additionally, the proposed requirement for added complexity for opening the packaging is unlikely to be effective for older children.
4. *Misunderstood Hazard:* Consumers are unlikely to anticipate and appreciate the vulnerability of teens and children who do not have a history of mouthing inedible objects. Therefore, consumers are unlikely to keep the magnets away from these populations, regardless of warning information, which are likely to be perceived as not pertaining to these children.
5. *Access by Older Children:* Older children are unlikely to comply with the warnings. Although older children presumably would be capable of understanding the danger posed by magnet ingestion, they are likely to give in to peer pressure, test limits, bend rules, and underestimate the risk and consequences. In fact, warnings about keeping magnet sets away from all children could have the unintended effect of making the product more appealing to these older children.
6. *Historical Inadequacy of Similar Efforts:* While some magnet sets are sold absent warnings regarding the ingestion hazard, incidents and consumer reviews indicate that young children are continuing to access magnet sets even when there are prominent warnings, 14+ age labels, instructions, marketing, and packaging that attempt to communicate the appropriate user population and warn about the ingestion hazard.

Additionally, in the appendix below, CPSC staff lists other concerns with the draft standard; however, resolution of these concerns would not, in staff's technical opinion, adequately address the hazard.

Magnet ingestion is a significant concern to CPSC staff, primarily due to the hidden nature of the hazard and the difficult-to-control chain of events that lead to injury and death. In staff's briefing package, *Final Rule on Safety Standard for Magnet Sets*, dated September 3, 2014, a multidisciplinary team of CPSC staff concluded that warnings, even strengthened warnings, as well as other methods of addressing consumer behavior (*e.g.,* bitterants, child resistant packaging, and sales restrictions), will not

adequately reduce the hidden hazard and risk of injury associated with magnet sets.[2] CPSC has an open petition regarding magnet sets, Petition CP 17-1.[3,4] Although staff appreciates the efforts of the ASTM F15.77 subcommittee, staff does not believe that this hazard can adequately be addressed by methods that rely only on encouraging consumers to alter their behavior in some way to avoid the hazard, especially given the unique challenges discussed above. Thus, CPSC staff cannot support the current ballot item. Staff looks forward to working with ASTM to develop requirements that effectively alleviate the hazard associated with the subject magnet sets.

Sincerely,

Stephen Harsanyi
Engineering Psychologist,
Division of Human Factors

CC: Molly Lynyak, Manager, Technical Committee Operations, ASTM International
Susan Bathalon, Magnet Sets Petition Project Manager, CPSC
Patricia L. Edwards, CPSC Voluntary Standards Coordinator
Ben Mordecai. CPSC Toy Program Lead Testing Engineer

[2] https://cpsc.gov/s3fs-public/pdfs/foia_SafetyStandardforMagnetSets-FinalRule.pdf
[3] https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=3041-AD67
[4] https://cpsc.gov/s3fs-public/Petition-CP-17-1-Requesting-Rulemaking-to-Establish-Safety-Standards-for-Magnet-Sets-September-20-2017.pdf?dI7e6H9QZHup2Vdi65og6udi3W2IAPab

Appendix

Additional Concerns with the Proposed ASTM F15.77 Draft Standard

In addition to staff's above comments, staff notes the following concerns:

- The draft standard's title is limited to marketing and labeling; however, there are other requirements in the draft standard.
- Ambiguous language is used, which leaves important requirements open to interpretation. For example, regarding designs and techniques for assuring that all magnets have been collected, staff notes that some structures, such as cubes, can be challenging and time-consuming for consumers to construct.
- "Adults" are defined in the draft standard as including children 14 years of age or older. The legal age of adulthood is not below 18 in any U.S. state. Furthermore, staff notes that there have been incidents of magnet ingestion involving children 14 years of age and older.
- The minimum type size for the warning label is too small (*i.e.,* 0.06 inches for the warning text and 0.15 inches for the signal word) for this product; a product that is non-threatening in appearance and has a hidden hazard.
- The requirements in section 8 do not match the example warning label (Figure 3). The language in Figure 3 was recommended by the Marking and Labelling task group.
- Contacting the Poison Control Center should be considered for the warning label.[5]
- Aside from instructional literature, the draft standard does not address statements that contradict or confuse the meaning of the information required by the standard.
- The product can be marketed as a toy, which can reduce the perception of the product, which is non-threatening in appearance, as potentially hazardous, and support common recognition of the product as a suitable plaything for children.

[5] Several members of the Instructional Literature task group voiced arguments in favor of contacting the Poison Control Center. For example, on October 30, 2019, one subcommittee member of the Instructional Literature task group stated the following points:
"1- We may not need to refer every child in. Ingestion of one high powered magnet may not be a problem. Ingestion of multiple is where we get concerned.
2- Telling the family member to seek immediate care also doesn't mean that the appropriate care (x-ray, serial abd exams, or surgery) will be done in the ED. There's probably a higher chance of appropriately recognizing the severity of the exposure if poison control is involved as compared to an average rural/community ED. Plus, the ED often calls poison control (esp in peds cases/peds EDs), so it doesn't obviate the need for us to have high confidence that poison control will appropriately manage these cases.
3- There is better public health tracking of data through poison centers."

(And I enjoyed meeting Cecelia—congrats on getting some economics expertise!)

Nancy A. Nord
OFW Law
2000 Pennsylvania Avenue, NW
Suite 3000
Washington, DC 20006
Office: (202) 789-1212
Direct: (b)(6)

From:	Tanzer, Theodore
To:	Feldman, Peter; Bellet, Cecilia
Subject:	Nancy Nord re Magnet Sets
Start:	Thursday, January 09, 2020 2:00:00 PM
End:	Thursday, January 09, 2020 3:00:00 PM
Location:	723

From: Nancy A. Nord [mailto:nnord@ofwlaw.com]
Sent: Monday, January 06, 2020 4:11 PM
To: Tanzer, Theodore <TTanzer@cpsc.gov <mailto:TTanzer@cpsc.gov> >
Subject: RE: request for meeting

2 pm on Thursday works well for me. See you then.

From: Tanzer, Theodore <TTanzer@cpsc.gov <mailto:TTanzer@cpsc.gov> >
Sent: Monday, January 06, 2020 4:10 PM
To: Nancy A. Nord <nnord@ofwlaw.com <mailto:nnord@ofwlaw.com> >; Feldman, Peter <PFeldman@cpsc.gov <mailto:PFeldman@cpsc.gov> >
Subject: [EXTERNAL] RE: request for meeting

No problem. How about 1:30PM or 2:00PM on Thursday afternoon?

From: Nancy A. Nord [mailto:nnord@ofwlaw.com]
Sent: Monday, January 06, 2020 4:08 PM
To: Tanzer, Theodore <TTanzer@cpsc.gov <mailto:TTanzer@cpsc.gov> >; Feldman, Peter <PFeldman@cpsc.gov <mailto:PFeldman@cpsc.gov> >
Subject: RE: request for meeting

I have a longstanding meeting schedule for Thursday am. Friday am would work as would Thursday afternoon.

From: Tanzer, Theodore <TTanzer@cpsc.gov <mailto:TTanzer@cpsc.gov> >
Sent: Monday, January 06, 2020 4:07 PM
To: Nancy A. Nord <nnord@ofwlaw.com <mailto:nnord@ofwlaw.com> >; Feldman, Peter <PFeldman@cpsc.gov <mailto:PFeldman@cpsc.gov> >
Subject: [EXTERNAL] RE: request for meeting

Nancy, any chance you might be free to meet on Thursday at 10AM or 11AM?

Thanks,

-Teddy

Theodore R. Tanzer
Attorney Advisor
Office of Commissioner Peter Feldman
U.S. Consumer Product Safety Commission
Office: (301) 504-7300

From: Nancy A. Nord [mailto:nnord@ofwlaw.com]
Sent: Monday, January 06, 2020 4:02 PM
To: Feldman, Peter <PFeldman@cpsc.gov <mailto:PFeldman@cpsc.gov> >
Cc: Tanzer, Theodore <TTanzer@cpsc.gov <mailto:TTanzer@cpsc.gov> >
Subject: request for meeting

Dear Peter, On December 26, 2019, the Washington Post published a story by Todd Frankel that discussed, in a rather negative manner, ongoing efforts at ASTM to draft a safety standard for adult magnet sets with small loose magnets. I am chairing the ASTM subcommittee that is undertaking this activity. The CPSC staff has been involved, although they have made clear that they do not believe that any standard, short of a ban, will adequately address the risk. And, as no surprise, the story had generated interest in the CPSC's activities with respect to this product from elements on the Hill.

Given both the tenor of the story and the interest it has elicited, I am requesting a meeting with you to discuss the background of the ASTM activities and plans for moving forward. I would appreciate the opportunity to meet with you at your earliest convenience sometime in the next two weeks. Thank you so much.

Nancy

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Email secured by Check Point

From: Legislative Affairs
To: Tanzer, Theodore
Subject: OLA Letter Database - 1/06/2020
Date: Monday, January 6, 2020 1:40:18 PM

Legislative Affairs

1/06/2020 has been added

Modify my alert settings | View 1/06/2020 | View OLA Letter Database

Date Entered:	1/06/2020
Date of Incoming:	12/27/2019
From:	Sen. Klobuchar
Subject:	Magnets
Current Office:	
Status/Comments:	
Open/Closed:	Open
#:	782
Date of Outgoing:	

Last Modified 1/6/2020 1:36 PM by Crockett, David

From: Legislative Affairs
To: Feldman, Peter
Subject: OLA Letter Database - 1/06/2020
Date: Monday, January 6, 2020 1:40:18 PM

Legislative Affairs

1/06/2020 has been added

Modify my alert settings | View 1/06/2020 | View OLA Letter Database

Date Entered:	1/06/2020
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From:	Sen. Klobuchar
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Current Office:	
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Open/Closed:	Open
#:	782
Date of Outgoing:	

Last Modified 1/6/2020 1:36 PM by Crockett, David

From: Legislative Affairs
To: Tanzer, Theodore
Subject: OLA Letter Database - 12/23/2019
Date: Monday, December 23, 2019 1:55:20 PM

Legislative Affairs

12/23/2019 has been added

Modify my alert settings | View 12/23/2019 | View OLA Letter Database

Date Entered:	12/23/2019
Date of Incoming:	12/19/2019
From:	Sens. Brown and Blumenthal
Subject:	Magnets
Current Office:	
Status/Comments:	
Open/Closed:	Open
#:	779
Date of Outgoing:	

Last Modified 12/23/2019 1:51 PM by Crockett, David

From: Legislative Affairs
To: Feldman, Peter
Subject: OLA Letter Database - 12/23/2019
Date: Monday, December 23, 2019 1:55:20 PM

Legislative Affairs

12/23/2019 has been added

Modify my alert settings | View 12/23/2019 | View OLA Letter Database

Date Entered:	12/23/2019
Date of Incoming:	12/19/2019
From:	Sens. Brown and Blumenthal
Subject:	Magnets
Current Office:	
Status/Comments:	
Open/Closed:	Open
#:	779
Date of Outgoing:	

Last Modified 12/23/2019 1:51 PM by Crockett, David

From: Tanzer, Theodore
To: Public Calendar,
Cc: Feldman, Peter; Bellet, Cecilia
Subject: RE: Commissioner Feldman and Staff Meeting Nancy Nord
Date: Wednesday, January 15, 2020 1:30:13 PM
Attachments: COPF Nancy Nord Meeting 1-9-20.pdf
Nancy Nord Email.pdf

Hello, please find attached a meeting log and materials from our Nancy Nord meeting. Thanks!
-Teddy

From: Tanzer, Theodore
Sent: Monday, January 06, 2020 4:18 PM
To: Public Calendar,
Cc: Feldman, Peter ; Bellet, Cecilia
Subject: Commissioner Feldman and Staff Meeting Nancy Nord
Please add the following post to the public calendar.
Thanks!
-Teddy
Thursday, January 9, 2020
2:00pm-3:00pm
Open
Substantial
Commissioner Feldman and Staff Meeting Nancy Nord

Commissioner Feldman and staff will be meeting with Nancy A. Nord regarding adult magnet set safety and ongoing efforts at ASTM to draft a safety standard for adult magnet sets with small loose magnets. Participants will include Nancy A. Nord of OFW Law. The meeting will be held on Thursday, January 9, 2020, from 2:00 pm - 3:00 pm, in room 723 of CPSC Headquarters, Bethesda Towers. The meeting was requested by Nancy A. Nord. For additional information contact Teddy Tanzer at 301-504-7300.

U.S. CONSUMER PRODUCT SAFETY COMMISSION
LOG OF METING

SUBJECT: COPF and staff met with Nancy Nord

DATE OF METING: January 9, 2020

LOG ENTRY SOURCE: COPF Staff

LOCATION: CPSC HQ, Suite 723

CPSC ATTENDEE(S): Commissioner Feldman, Teddy Tanzer, Cecilia Bellet

NON-CPSC ATTENDEE(S): Nancy A. Nord, OFR Law (in her personal capacity)

SUMMARY OF METING: COPF Staff met with Nancy Nord to discuss issues pertaining to enforcement of the toy standard, adult magnet set safety, and ongoing ASTM efforts to draft a safety standard for adult magnet sets with small loose magnets. . The meeting was requested by Nancy Nord.

Tanzer, Theodore

From: Nancy A. Nord <nnord@ofwlaw.com>
Sent: Friday, January 10, 2020 12:29 PM
To: Feldman, Peter
Cc: Tanzer, Theodore; Bellet, Cecilia
Subject: Magnets meeting
Attachments: CPSC Ballot Response.pdf

Peter, thank you for taking time to meeting with me to discuss the ASTM activity to develop a standard addressing the marketing, labeling, packaging and warnings of adult magnet sets. As I mentioned in the meeting, the balloting at the subcommittee level closes on January 13. Late yesterday afternoon, we received the first negative vote on the proposed standard—from the CPSC. I have attached the letter they sent to me discussing the reasons for the negative vote.

I will be responding to the CPSC letter for the benefit of the subcommittee and will send you a copy of that response when it is prepared. However, the letter from the CPSC raises issues that were fully discussed and decided by consensus in the Subcommittee. With respect to the overarching concern that only changing the product will eliminate the risk, because warnings will not work, this was considered and the group decided to put the current draft out for ballot with the view that, regardless of where one comes down on this issue, having a strong standard on marketing, label, etc. was a better solution than nothing (which is what will result if the proposed rule does not move forward). The group agreed to keep the option of reconsidering changes to the product open for reconsideration in the future. With respect to specifics raised in the letter, they are a "rehash" of issues raised and disposed of during the subcommittee deliberations. For example, the suggestion concerning reference to the Poison Control Center was fully discussed several times. It was noted that while some Poison Control Centers are well-versed in the risk presented by the product, others merely counsel consumers to contact local medical professionals. The consensus of the group was that referencing Poison Control in the instructions but not on the warning (which directs people to seek immediate medical attention) was appropriate. With respect to the warning size, the minimum size requirement in the standard is the direct suggestion of the CPSC staff and was vetted with them. I am surprised to now see it on the list of problems with the standard. All of the issues raised by the CPSC staff were discussed fully and decided during the subcommittee meetings.

I realize I am now way down in the weeds here but it is disappointing so see the staff again want to revisit issues that were thoroughly discussed during the subcommittee deliberations. It almost appears that the staff does not want to give strong warnings a try but rather prefer to defer to the courts (and perhaps a new administration). If that is true then injuries will increase because of the inaction of the CPSC—a very strange outcome.

[to amend our discussion on enforcement, I am aware of one action by CPSC against a seller on Amazon whose product was labeled as "13 months and up." It is my understanding that the seller immediately contacted Amazon and got the listing changed. The company has agreed to do a recall of any product that was incorrectly listed but the CPSC is insisting that his entire inventory be recalled, including inventory that is being held at customs and which he needs to sell in order to finance the more limited recall he has agreed to do. I do not have any information about whether other advertising on the Amazon site suggested that this was a toy. I am not aware of any other enforcement actions being brought in this space.]

(And I enjoyed meeting Cecelia—congrats on getting some economics expertise!)

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Suite 3000

Washington, DC 20006
Office: (202) 789-1212
Direct: (b)(6)

From:	Feldman, Peter
To:	"Nancy A. Nord"
Cc:	Tanzer, Theodore; Bellet, Cecilia
Subject:	RE: Magnets meeting
Date:	Friday, January 10, 2020 2:16:58 PM

Got it. Thanks Nancy. Good overview.

From: Nancy A. Nord [mailto:nnord@ofwlaw.com]
Sent: Friday, January 10, 2020 12:29 PM
To: Feldman, Peter <PFeldman@cpsc.gov>
Cc: Tanzer, Theodore <TTanzer@cpsc.gov>; Bellet, Cecilia <CBellet@cpsc.gov>
Subject: Magnets meeting

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Direct: (b)(6)

From: Feldman, Peter
To: Tanzer, Theodore
Subject: RE: request for meeting
Date: Monday, January 6, 2020 4:03:23 PM

Let's set this up.

From: Nancy A. Nord [mailto:nnord@ofwlaw.com]
Sent: Monday, January 06, 2020 4:02 PM
To: Feldman, Peter
Cc: Tanzer, Theodore
Subject: request for meeting

Dear Peter, On December 26, 2019, the Washington Post published a story by Todd Frankel that discussed, in a rather negative manner, ongoing efforts at ASTM to draft a safety standard for adult magnet sets with small loose magnets. I am chairing the ASTM subcommittee that is undertaking this activity. The CPSC staff has been involved, although they have made clear that they do not believe that any standard, short of a ban, will adequately address the risk. And, as no surprise, the story had generated interest in the CPSC's activities with respect to this product from elements on the Hill. Given both the tenor of the story and the interest it has elicited, I am requesting a meeting with you to discuss the background of the ASTM activities and plans for moving forward. I would appreciate the opportunity to meet with you at your earliest convenience sometime in the next two weeks. Thank you so much.

Nancy

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2000 Pennsylvania Avenue, NW
Suite 3000
Washington, DC 20006
Office: (202) 789-1212
Direct: (b)(6)

From: Tanzer, Theodore
To: "Nancy A. Nord"; Feldman, Peter
Subject: RE: request for meeting
Date: Monday, January 6, 2020 4:10:01 PM

No problem. How about 1:30PM or 2:00PM on Thursday afternoon?

From: Nancy A. Nord [mailto:nnord@ofwlaw.com]
Sent: Monday, January 06, 2020 4:08 PM
To: Tanzer, Theodore ; Feldman, Peter
Subject: RE: request for meeting

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From: Tanzer, Theodore <TTanzer@cpsc.gov>
Sent: Monday, January 06, 2020 4:07 PM
To: Nancy A. Nord <nnord@ofwlaw.com>; Feldman, Peter <PFeldman@cpsc.gov>
Subject: [EXTERNAL] RE: request for meeting

Nancy, any chance you might be free to meet on Thursday at 10AM or 11AM?
Thanks,
-Teddy

Theodore R. Tanzer
Attorney Advisor
Office of Commissioner Peter Feldman
U.S. Consumer Product Safety Commission
Office: (301) 504-7300

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Subject: request for meeting

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Email secured by Check Point

*****!!! Unless otherwise stated, any views or opinions expressed in this e-mail (and any attachments) are solely those of the author and do not necessarily represent those of the U.S. Consumer Product Safety Commission. Copies of product recall and product safety information can be sent to you automatically via Internet e-mail, as they are released by CPSC. To subscribe or unsubscribe to this service go to the following web page: http://www.cpsc.gov/en/Newsroom/Subscribe *****!!!

Email secured by Check Point

From: Feldman, Peter
To: House, Mary
Subject: Re: Zen"s Cross-Appeal/Response Brief - Zen Magnets, LLC v. CPSC (10th Circuit)
Date: Friday, December 6, 2019 10:04:16 AM

Thanks Mary.

Sent from my iPhone

On Dec 6, 2019, at 8:35 AM, House, Mary <mhouse@cpsc.gov> wrote:

> Good Morning,
> Attached please find Zen's Cross-Appeal/Response brief in the above-referenced matter.
> Zen also filed an Appendix, which I can provide if requested.
> Mary A. House
> Attorney, Regulatory Affairs Division
> U.S. Consumer Product Safety Commission
> 4330 East West Highway, Suite 702
> Bethesda, MD 20814
> 301-504-6810
> mhouse@cpsc.gov
>
> <12-05-2019 10th Cir Zen's Cross Appeal and Response.pdf>

From: Kentoff, Maureen
To: Agenda Planning
Subject: This week"s agenda
Date: Tuesday, January 14, 2020 9:58:20 AM
Attachments: FOUO_BP_Status 1.14.20.pdf
image001.png

Please see attached for this week's agenda.

Thanks!

Maureen M. Kentoff
Executive/Research Assistant
& Federal Women's Program Manager
mkentoff@cpsc.gov
301.504.7096

Office of Commissioner Robert S. Adler
U.S. Consumer Product Safety Commission
4330 East West Highway
Bethesda, MD 20814
301.504.7731

Page 135

Withheld pursuant to exemption

(b)(5)

of the Freedom of Information Act

UNITED STATES OF AMERICA
CONSUMER PRODUCT
SAFETY COMMISSION