CPSC 12-2 Respondent's Motion to Dismiss
Exhibit 3

Statement on the Final Rule for Magnet Sets

September 26, 2014

I did not vote on the final rule promulgating a mandatory standard for magnet sets because I believe that it would be inappropriate at this time. Currently, the Commission staff is actively pursuing an administrative enforcement case against the only remaining seller of these magnet sets. That case is scheduled for trial before an Administrative Law Judge (ALJ) in early December 2014. After the ALJ issues his initial decision, it may be appealed to the Commission (unless of course the matter is previously settled, as both of the other recent magnet cases have been). As potential future judges in that appeal, the Commissioners are often reminded to keep an open mind on the subject of magnet sets, so that we may decide the enforcement matter impartially. Under these unusual circumstances, I believe it would have been prudent to postpone any decision on whether to adopt a mandatory standard for magnets sets until the adjudication is settled or agency proceedings are concluded.

The preamble accompanying the final rule summarizes the Commission's enforcement efforts involving

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magnet sets. In May 2012, the agency's Office of Compliance contacted 13 independent importers of magnet sets. In short order, the staff convinced 11 of the 13 firms to stop importation, distribution and sales of the magnet sets voluntarily.

Statements

Two firms did not agree to stop selling magnet sets. The Commission therefore approved the initiation of administrative enforcement proceedings against these two in July and August 2012. The first case, involving Buckyballs, was settled earlier this year. That leaves only one case still pending. It involves the firm called Zen Magnets, LLC.[1] Thus, of all the importers initially approached by the Compliance staff, only one – Zen Magnets – continues to sell magnet sets that would be proscribed by the new mandatory standard, and that same firm is the sole respondent in the last remaining enforcement case. Preamble at 5; *see also* preamble at 26-27 (of the seven importers that accounted for the great majority of units sold by July 2012—"perhaps more than 98%"—only one, Zen Magnets LLC, continues to market magnet sets that are subject to the rule).

The enforcement case against Zen Magnets is an administrative adjudication subject to special trial-type procedures such as witness testimony and cross examination, which don't apply in ordinary rulemaking. The Administrative Procedure Act (APA) also establishes "separation of functions" safeguards for adjudications. The Commissioners, as possible future decisionmakers, are not allowed to receive or make contacts with either of the parties individually, including our own CPSC staff attorneys who are prosecuting the case. 5 U.S.C. § 557(d). These safeguards help prevent bias and promote fairness.

While such an adjudication is pending, Commissioners are routinely cautioned to avoid making statements, or even asking questions, that may suggest a prejudgment of the matter. To issue a final rule outlawing the very same product that is the subject of the adjudication would seem to be the ultimate prejudgment.

The situation here is particularly unusual in that the only magnet sets that are practically affected by the new standard are those already involved in the adjudication. There is a close identity between the products affected by the rule and those potentially affected by the adjudication. In the usual case, a standard would sweep more broadly, but the agency's prior enforcement efforts have left Zen Magnets as the only firm still selling magnet sets in the United States.[2]

Some have suggested that finalizing the magnet standard poses no prejudgment problem because the standard will apply only prospectively, *i.e.*, after the effective date, while a decision in the enforcement case —if favorable to the CPSC staff--would operate retroactively (*i.e.*, resulting in a recall of magnet sets already in the market). This view is oversimplified, because if the enforcement case is decided against the respondent, it will also have prospective effect, prohibiting any further distribution of the only magnets sets currently being sold. *See* 15 U.S.C. § 2064(c)(1); Preamble at 4 (in the administrative enforcement case,

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CPSC staff sought "an order that the firm cease distribution and importation of the products.").

Some have suggested that issuing a final rule would not be prejudicial in this instance because the criteria for promulgating a mandatory standard are different from the criteria necessary to justify a recall. In this case, the differences are more apparent than real. To obtain an involuntary recall, the staff must prove that the magnet sets constitute a "substantial product hazard." 15 U.S.C. § 2064(d). That term is defined in the CPSA to mean a product that creates "a substantial risk of injury to the public," either because of a failure to comply with an applicable standard or because of a defect. 15 U.S.C. § 2064(a). To promulgate a mandatory standard, the Commission must make a number of specific findings, of which one is that the rule "is reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with such product." 15 U.S.C. § 2058(f)(3). While it may be possible to imagine an "unreasonable risk of injury" that is not also a "substantial risk of injury," there is at the least a very substantial degree of overlap between the two.[3]

To the best of my knowledge, this Commission has never before promulgated a mandatory standard addressing a hazard that is the subject of a pending adjudication. Indeed, I have not found any judicial decision that addresses *any* agency promulgating a mandatory standard under these circumstances. Even if such a precedent exists, the situation at hand calls for special treatment, at least to avoid the appearance of prejudgment.

Finally, I wish to address the possibility that postponing a decision on the final rule could lead to more injuries as a result of continuing sales of magnets sets that would be subject to the mandatory standard. Although it is possible that some additional injuries may occur from the small number of ongoing sales, it is far from certain. According to the preamble, there were 52 incidents of magnet ingestions by children reported to CPSC in 2012, but the reports dropped to 13 ingestions in 2013 (including a fatality) and 2 ingestions in 2014. Preamble at 4. Perhaps in view of this sharp decline, the Commission did not set the effective date of the standard for magnet sets as soon as possible, but kept it at 180 days after publication in the Federal Register (as proposed).[4] If we had postponed decision on the standard, as I recommended, it is entirely possible that the enforcement case would be over by then, and we could decide on the standard without any concern regarding prejudgment.

CONCLUSION

I express no view on the merits of the standard for magnet sets because I believe that doing so is inappropriate at this time. We may be called upon to serve as judges of the last remaining enforcement case, which is scheduled for trial shortly. Under these unusual circumstances, I believe we should have postponed the vote on the rule until the administrative enforcement case is settled or agency proceedings

are concluded.

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[1] As explained in the preamble, when Star Networks, another of the original 13 firms, reneged on its initial agreement to stop selling magnets sets, the Commission also brought an administrative case against it. That case was settled in July 2014. Preamble at 5.

[2] Some have suggested that there may be firms located *outside* the United States who are still offering magnet sets for sale on the internet. Even if such sellers exist, however, the promulgation of the mandatory standard will not automatically stop them. Such "black market" sales are notoriously difficult to address and will likely persist for years in spite of the final rule. Preamble at 25.

[3] There are various other findings the Commission must make before promulgating a consumer product safety standard under CPSA section 9, which governs here. For example, the Commission must prepare a final regulatory analysis of the rule, including a "description of any alternatives to the final rule . . . and a brief explanation of the reasons why these alternatives were not chosen." 15 U.S.C. § 2058(f)(2)(B). Under the circumstances here, much of the preamble relates to factual issues that may arise in the adjudication.

[4] The CPSA would have allowed a much earlier effective date: "[t]he effective date of a consumer product safety standard under this Act shall be set at a date at least 30 days after the date of promulgation unless the Commission for good cause shown determines that an earlier effective date is in the public interest." 15 U.S.C. § 2058(g)(1).

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