

MINUTES OF COMMISSION MEETING
March 1, 2017

Acting Chairman Ann Marie Buerkle convened the March 1, 2017, 10:00 a.m., meeting of the U.S. Consumer Product Safety Commission in open session. Commissioner Robert S. Adler, Commissioner Marietta S. Robinson, Commissioner Elliot F. Kaye and Commissioner Joseph P. Mohorovic were also in attendance. Acting Chairman Buerkle made welcoming remarks and thanked Commissioner Kaye for his service to the Commission as Chairman and Executive Director.

Decisional Matter: Federal Register Notice Removing Safety Standard for Magnet Sets from the Code of Federal Regulations
(Briefing package dated February 1, 2017)

After introducing the matter and making an opening statement, Acting Chairman Buerkle asked questions of the staff. DeWane Ray, Deputy Executive Director for Safety Operations, George Borlase, Assistant Executive Director for Hazard Identification and Reduction, and Patricia Pollitzer, Assistant General Counsel for Regulatory Affairs, responded to the questions. Acting Chairman Buerkle called for any opening statements or questions. The Commissioners made opening statements and asked questions of the staff.

Acting Chairman Buerkle called for any motions. Commissioner Kaye moved that the Commission direct the staff to prepare and send to the Commission as soon as possible a draft Notice of Proposed Rulemaking for Commission consideration addressing the holding in the 10th Circuit opinion issued on November 22, 2016 in *Zen Magnets, LLC v. CPSC*. Commissioner Adler seconded the motion. Commissioner Kaye explained the purpose of the motion and the Commission discussed the motion. After the discussion, Acting Chairman Buerkle called for a vote on the matter. The Commission voted (3-2) to adopt the motion. Commissioner Adler, Commissioner Robinson and Commissioner Kaye voted to adopt the motion. Acting Chairman Buerkle and Commissioner Mohorovic voted to not adopt the motion.

Acting Chairman Buerkle called for any other motions or comments. Hearing none, Acting Chairman Buerkle called for consideration of a motion of approval of the staff draft notice of that would remove the magnet set rule from the Code of Federal Regulations and publication of the same in the *Federal Register (FR)*. Acting Chairman Buerkle called for a vote on the matter. The Commission voted unanimously (5-0) to approve the notice and publish it in the *FR*.

Acting Chairman Buerkle called for any closing statements. The Commissioners each made closing statements.

Acting Chairman Buerkle and Commissioner Kaye submitted the attached statements regarding the issue.

There being no other business, Acting Chairman Buerkle adjourned the meeting at 11:10 a.m.

For the Commission:



Todd A. Stevenson
Secretariat

Attachments: Statement of Acting Chairman Buerkle
Statement of Commissioner Kaye

Statement of Acting Chairman Ann Marie Buerkle on the Commission's March 1, 2017 Actions Concerning the Standard for Magnet Sets

I agree that it was appropriate for us to remove the magnet standard from the Code of Federal Regulations, in response to the order of the U.S. Court of Appeals. I appreciate the staff's initiative in putting that package together for us.

Although I was a member of the Commission when the vote on the standard for magnet sets took place, I did not participate in the decision that was vacated by the Court of Appeals. At the time, I believed it would be inappropriate for the Commission to promulgate a standard on magnet sets while an adjudication involving the same magnet sets was pending. My views on that issue have not changed; however, I see no reason why withdrawing the magnet standard as directed by the Court would be prejudicial to anyone. Therefore, I joined in the unanimous vote on removal.

I did not support Commissioner Kaye's motion directing staff to prepare a notice of proposed rulemaking to replace the standard we just removed. This is not the right time to move ahead with any replacement.

First, circumstances have changed since the standard for magnet sets was originally promulgated in 2014. In fact, a major reason for the Tenth Circuit Court's decision to vacate the magnet standard was the concern that circumstances had changed even *before* the original standard was promulgated. It seems to me that before we charge ahead again, we should be asking the staff to pull together the updated information that would help inform the decision whether it still makes sense to propose a standard.

Second, the decision to re-propose a standard should not be made in a vacuum. Instead, it should be considered in light of all the other projects

and possibilities we have to consider. Rather than make a peremptory decision, we should be asking how the magnet risk now and in the future is likely to compare with other risks we consider. Work on this issue will take people away from other projects. It seems to me that the appropriate way to address those tradeoffs and priorities would be through an operating plan or midyear adjustment. That is the vehicle the Commission generally uses to prioritize the staff's work. I have seen nothing to suggest that this matter deserves extraordinary treatment.

Third, in the adjudication I mentioned earlier, the Administrative Law Judge rejected the staff's request to order a recall of Zen Magnets. As I anticipated, that decision was appealed to the Commission and is currently before us. Under these circumstances, I believe that re-proposing the magnet standard may create another round of problems for the Commissioners in the adjudicative matter.

Fourth, the direction to the staff was imprecise not to say confusing. The motion asks the staff to prepare a draft Notice of Proposed Rulemaking "addressing the holding in the 10th Circuit opinion" I asked Commissioner Kaye to describe what he believed the holding to be, but he declined. Commissioner Adler even urged the staff to consult the dissenting opinion—a portion of the case that is rarely deemed a part of the holding.

Finally, I believe this Court decision is a timely reminder as to why it is important to be thoughtful and data driven in our rulemaking. As we look ahead, we know already that the budget environment is likely to be challenging for our agency as well as others. We need to approach regulation and utilize our resources more efficiently than ever. We should not be in a hurry to decide that replacing the magnet rule, or rushing into any new work, is the best use of our staff's resources.



**U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814**

**STATEMENT OF COMMISSIONER ELLIOT F. KAYE
ON THE SAFETY STANDARD FOR MAGNET SETS¹**

March 1, 2017

The Commission met today because the United States Court of Appeals for the 10th Circuit vacated our magnet set safety standard,² and we were obligated to remove it from the Code of Federal Regulations. The Commission, of course, must respect the court's decision. An independent judiciary is necessary for a healthy democracy.

However, I note the circuit court's ruling was narrow. The court simply determined that it did not have enough information to ascertain whether two of the Commission's findings were supported and remanded the matter back to the Commission "for further proceedings consistent with [its] opinion."³ Doctors who treat children have recently publicly noted their concerns with the results from the 10th Circuit decision.⁴ It is incumbent upon us as public safety officials to at least attempt to address the court's concerns without delay.

The motion that I introduced today, which the Commission adopted by a 3-2 vote, provides direction to staff to prepare and send to the Commission as soon as possible a draft Notice of Proposed Rulemaking (NPR) for Commission consideration addressing the narrow holding in the 10th Circuit decision. I am pleased that Commissioners Adler and Robinson supported my motion and that we were able to give staff that direction. I thank Commissioners Adler and Robinson for their support and the CPSC staff for their continued safety efforts, and look forward to receiving a draft NPR for Commission consideration.

¹ This statement and my comments today during the Commission's meeting were with respect to the Commission's rulemaking efforts only and not with respect to any specific product, matter or other proceeding.

² *Zen Magnets, LLC v. CPSC*, No. 14-9610 (10th Cir. filed Nov. 22, 2016).

³ *Id.* at 24.

⁴ See, e.g., <http://www.naspghan.org/files/documents/pdfs/advocacy/2016/Magnet%20Letter%20to%20DOJ%20final%2012%2021%2016.pdf>.