

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of)	
ZEN MAGNETS, LLC)	CPSC Docket No: 12-2
Respondent.)	

**Statement of Acting Chairman Ann Marie Buerkle
on the Public Notification and Action Plan**

For the reasons explained in my concurring and dissenting opinion of October 26, 2017, I do not agree with the scope of the recall being ordered by the Commission majority. I remain of the opinion that the recall should be limited to those magnet sets sold without warnings or appropriate age recommendations. I write separately to address a few points raised by the majority’s Opinion and Order Approving Public Notifications and Action Plan [hereinafter cited as “Majority Opinion”].

First, I concur with the majority that there is no need to identify any foreign manufacturer of the magnets in the press release or other materials available to the public. Majority Opinion at 3. No such name appears on the product or packaging of Zen Magnets or Neoballs. Therefore, the information would not help consumers to determine whether their magnets sets are covered by the recall. It is not unusual for an importer to try to protect the identity of its foreign suppliers, as Zen Magnets LLC seeks to do here. Under 18 U.S.C. § 1905, it is a crime for a federal employee to release trade secrets or other confidential business information. In this case, there is no need to risk putting any CPSC employee in legal jeopardy on that score.

Second, I disagree with the majority’s decision as to the amount of refunds for magnet sets in the possession of consumers for more than one year at the time of notice. The pertinent statute requires that if we decide to order a refund for such products, we must grant a “reasonable allowance for use.” 15 U.S.C. § 2064(d)(1)(C).

The Commission’s October 26, 2017 Final Decision and Order directed Respondent to provide information on “the generally accepted useful life of magnets.” On this point, Respondent provided information on the durability of the magnet coatings. Complaint Counsel took issue with this input on two grounds. First, “based on a recent assessment by CPSC technical staff,” Complaint Counsel “dispute[d] the factual predicate underpinning the calculation of the useful life of the Subject Products.” Joint Statement at 8. Specifically, Complaint Counsel claimed that “[t]he useful life of the magnets is not conditioned upon the integrity of the coatings but rather the strength of the magnets.” *Id.* at 8-9. Second, Complaint Counsel argued that no allowance should be granted anyway because the magnet sets “will

continue to pose a hazard to children even if their magnetism is reduced or their coatings are less shiny or if the color coating shows wear.” *Id.* at 9.

The Commission majority does not explicitly adopt Complaint Counsel’s legal interpretation, but it reaches much the same result by a different route. The majority concludes that “the most appropriate method of providing a reasonable allowance for use under the circumstances is to look to the useful life of the product” and further concludes that “the useful life of the Subject Products is best based on their relative magnetism over time.” Majority Opinion at 11. According to the Commission majority, the magnetic properties of the Subject Products wane very slowly and thus no reduction of the full refund is warranted in these particular circumstances. *Id.* at 12.

I disagree with the majority on this matter. I believe that the “reasonable allowance for use” should reflect the amount of “use” the owners of a product have gotten over time. A person who has enjoyed the use of a product for many years should not be entitled to the same refund amount as someone who has used it for a much shorter period. In addition, I question the majority’s reliance on magnetic properties alone as the basis for useful life. I am not aware of the “recent assessment by CPSC technical staff” on this point. If such an analysis exists, I believe it should have been provided to Respondent and included in the record.


Ann Marie Buerkle, Acting Chairman