



April 14, 2014

**VIA FAX AND CERTIFIED MAIL**

Mr. Elliot F. Kaye  
Executive Director  
Consumer Product Safety Commission  
4330 East West Highway  
Room 720  
Bethesda, MD 20814-4408  
(301) 504-0461 (fax)

**RE: Information Quality Act Appeal**

Dear Mr. Kaye:

On November 12, 2013, Cause of Action (COA), on behalf of its client, Craig Zucker (Mr. Zucker), submitted to the U.S. Consumer Product Safety Commission (CPSC) a Petition for Disclosure and Correction pursuant to the Information Quality Act (IQA).<sup>1</sup> The Petition concerns information disseminated by CPSC about Buckyballs® and Buckycubes® in a press release dated July 25, 2012, as well as in an April 12, 2013 press release and recall notice.<sup>2</sup> CPSC's IQA guidelines state CPSC will "respond to [a] request for correction of information within 60 calendar days of receipt of the request."<sup>3</sup> On January 10, 2014, CPSC claimed "resource constraints" prevented it from meeting this 60-day response deadline. CPSC notified Cause of Action that it required more time to resolve the Petition and "estimate[d] that it [would]

<sup>1</sup> Letter from Cause of Action to Office of the Secretary, U.S. Consumer Prod. Safety Comm'n (Nov. 12, 2013) (hereinafter Petition) (attached as Exhibit 1).

<sup>2</sup> Press Release, U.S. Consumer Prod. Safety Comm'n, CPSC Sues Maxfield & Oberton Over Hazardous Buckyballs® and Buckycube™ Desk Toys Action Prompted by ongoing harm to children from ingested magnets (July 25, 2012) (hereinafter 2012 Press Release), *available at* <http://www.cpsc.gov/en/Newsroom/News-Releases/2012/CPSC-Sues-Maxfield--Oberton-Over-Hazardous-Buckyballs-and-Buckycube-Desk-Toys-Action-prompted-by-ongoing-harm-to-children-from-ingested-magnets/> and Press Release, U.S. Consumer Prod. Safety Comm'n, Six Retailers Announce Recall of Buckyballs and Buckycubes High-Powered Magnet Sets Due to Ingestion Hazard (Apr. 12, 2013) (hereinafter 2013 Press Release), *available at* <http://www.cpsc.gov/en/Recalls/2013/Six-Retailers-Announce-Recall-of-Buckyballs-and-Buckycubes-High-Powered-Magnet-Sets/>.

<sup>3</sup> *Information Quality Guidelines*, U.S. CONSUMER PROD. SAFETY COMM'N, <http://www.cpsc.gov/Research--Statistics/Information-Quality-Guidelines> (last visited April 10, 2014) (hereinafter CPSC Guidelines). OMB Guidelines set the minimum information quality standards that CPSC must meet in this case. Pursuant to 44 U.S.C. § 3516 Note, Congress allowed agencies to create review and correction mechanisms for OMB approval, but mandated agency compliance with quality standards contained in the OMB guidelines. *See* OMB Guidelines 67 Fed. Reg. 8452, 8458 (Feb. 22, 2002) (instructing agencies to establish an administrative appeal process).

resolve . . . [the] request on or before March 13, 2014.” On March 13, 2014, CPSC denied the Petition.<sup>4</sup> For the reasons set forth below, Mr. Zucker hereby appeals CPSC’s denial.<sup>5</sup>

## ARGUMENT

### I. THE PRESS RELEASES ARE NOT EXEMPT FROM IQA REQUIREMENTS.

CPSC’s central contention is that the information at issue pertains to an ongoing “adjudicative proceeding” and therefore is exempt from IQA requirements. That argument fails.

First, the IQA exemptions contained within OMB and CPSC guidelines are *ultra vires*. OMB’s guidelines implement section 3504(d)(1) of the Paperwork Reduction Act (PRA).<sup>6</sup> This section requires that “with respect to information dissemination, the [OMB] director shall develop and oversee the implementation of policies, principles, standards and guidelines to apply to federal agency dissemination of public information, regardless of the form or format in which such information is disseminated. . . .”<sup>7</sup> All federal agencies subject to the PRA must comply with these guidelines.<sup>8</sup> The PRA’s legislative history states that “the legislation’s policies and required practices apply to the dissemination of all Government information *regardless of form or format* . . .”<sup>9</sup>

Other parts of the statutory text and legislative history make clear that *any* information disseminated to the public is covered. For example, the House Report states as follows:

The concept of ‘public information’ is fundamental to the information dissemination provisions of H.R. 830. The objective of the definition is to minimize disputes over what government information is subject to dissemination. The definition turns on an easily made factual determination rather than a complex one. ‘Public information’ is information that an agency has in fact made public.<sup>10</sup>

Furthermore, the PRA’s Information Dissemination Requirements contain no statutory exemptions.<sup>11</sup> By contrast, several exemptions exist from the PRA’s separate Collection of Information Requirements.<sup>12</sup> Surely if Congress had intended to create exemptions from the information dissemination requirements, it would have done so expressly, as it did elsewhere in

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<sup>4</sup> Letter from George A. Borlase, Office of Hazard Identification and Reduction, U.S. Consumer Prod. Safety Comm’n, to Cause of Action (March 13, 2014) [hereinafter CPSC Denial] (attached as Exhibit 2).

<sup>5</sup> This appeal is timely, as it has been made within thirty days of CPSC’s response.

<sup>6</sup> 44 U.S.C. § 3516 Note.

<sup>7</sup> *Id.* § 3504(d)(1).

<sup>8</sup> *Id.* § 3506(a)(1)(B), 3516 note.

<sup>9</sup> H. Rep. No. 104-37, at 27 (Feb. 15, 1995) (“House Report”) (statement made in section entitled “Information Dissemination”) (emphasis added).

<sup>10</sup> *Id.* at 107, 109.

<sup>11</sup> 44 U.S.C. §§ 3502(12), 3504(d)(1), 3516 note.

<sup>12</sup> *Id.* §§ 3502(3)(B), 3518(c)(1).

the statute. All of this taken together indicates that OMB exceeded its authority in establishing exemptions from its IQA guidelines, including the exemption for “adjudicative processes.”

Second, even if OMB has discretion to create exemptions from IQA requirements, those exemptions do not apply here. OMB Guidelines do exempt “adjudicative processes.”<sup>13</sup> The information at issue, however, does not fall within that rubric. The preamble to the OMB Guidelines provides that “[t]he exemption . . . for ‘adjudicative processes’ is intended to exclude . . . the findings and determinations that an agency makes in the course of adjudications involving specific parties.”<sup>14</sup> Neither press release consists of findings and determinations made “in the course of adjudications involving specific parties.” For example, the 2012 Press Release announced CPSC’s filing of an administrative complaint against Maxfield & Oberton (M&O). By definition, the information contained therein could not have been developed “in the course of adjudications involving specific parties.” Similarly, the 2013 Press Release addresses CPSC action that was incidental to, but not a part of, an adjudicative proceeding and makes factual assertions that were anything but “findings and determinations that [CPSC made] in the course of adjudications” with M&O or any other party. The mere fact that the press release mentions the M&O complaint and includes a web site link to it does not transform its contents into “findings and determinations made in the course of an adjudication” or shield CPSC from its information quality obligations.<sup>15</sup>

Third, OMB Guidelines set the irreducible minimum standards for CPSC’s information quality. The IQA says OMB’s Guidelines “shall apply” to federal agencies. The Guidelines themselves, promulgated through notice and comment, explicitly bind all such agencies.<sup>16</sup> Therefore, CPSC may not use its own Guidelines as a trap door to escape information quality requirements. Pushing back against bureaucratic discretion grabs OMB said:

We note...that a number of agencies emphasize that their guidelines are not intended to provide any right to judicial review. A few agencies even stress... that the agency may be free to differ from the guidelines where the agency considers such action appropriate.

Regardless...agency guidelines should not suggest that agencies are free to disregard their own guidelines. Therefore...we ask that you not include extraneous assertions that appear to suggest that the OMB and agency guidelines are not statements

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<sup>13</sup> OMB Guidelines § V.8, 67 Fed. Reg. 8452, 8460 (defining “Dissemination”).

<sup>14</sup> *Id.* at 8452.

<sup>15</sup> If CPSC stands by its claim that the press release statements challenged here are in fact “findings and determinations that an agency makes in the course of adjudications involving specific parties,” then it necessarily concedes that the ongoing administrative case is a predetermined sham. The challenged statements, after all, include claims that Buckyballs® and Buckycubes® “contain defects in the design, warnings and instructions, which pose a substantial risk of injury and death to children and teenagers” and that these products were proven to be hazardous and cause “ongoing harm to children.” The challenged statements include claims of risk and defect that, in theory, are still being litigated and so, unless CPSC has already made up its mind, and prejudged the outcome of the administrative proceeding, there cannot be any IQA-exempt “findings and determinations” in these documents.

<sup>16</sup> See 67 Fed. Reg. at 8452-53.

of government-wide policy, i.e., government-wide quality statements which an agency is free to ignore based on unspecified circumstances. In addition, agencies should be aware that their statements regarding judicial enforceability might not be controlling...,<sup>17</sup>

Simply, CPSC has no choice in the matter: It must comply with the OMB Guidelines and its failure to do so is judicially reviewable.

## II. THE PRESS RELEASES FAIL IQA REQUIREMENTS.

CPSC contends that the press releases meet IQA requirements because they “state accurately staff’s position that Buckyballs® and Buckycubes® are defective and hazardous.”<sup>18</sup> But the releases do not merely state staff positions. The 2013 Press Release states that Buckyballs® and Buckycubes® “contain defects in the design, warnings and instructions, which pose a substantial risk of injury and death to children and teenagers.”<sup>19</sup> This statement might very well reflect CPSC’s opinion about those products, but the language employed does not explicitly or implicitly convey that the statements made are simply staff opinions, nor does CPSC provide the requisite context, transparency and support needed by the public to evaluate those claims. To the contrary, CPSC presents its claims of “defects” and “substantial risk” as facts. OMB guidelines mandate that “disseminated information is . . . presented in an accurate, clear, complete, and unbiased manner.”<sup>20</sup> Therefore, the 2013 Press Release fails to meet this standard.

The 2012 Press Release is also woefully deficient. The headline states “CPSC Sues Maxfield & Oberton Over Hazardous Buckyballs® and Buckycubes® Desk Toys Action (sic) prompted by ongoing harm to children from ingested magnets.” It is an uncontested fact that CPSC sued M&O with respect to Buckyballs® and Buckycubes®. But the clear implication of this statement is that the products were proven to be hazardous and that “ongoing harm to children” was a fact. However, these “facts” were mere unproven allegations.

Further, the information contained in the 2012 Press Release was not presented “within a proper context” as CPSC asserts.<sup>21</sup> CPSC failed to define what a “hazard” is or to provide any metrics by which the public may judge the “quality, objectivity, utility, [or] integrity” of that assertion, as the IQA demands.<sup>22</sup> Accordingly, COA requested the disclosure of information from CPSC about the data and methods used to make its “hazardous” determination so that Mr. Zucker could engage a qualified third party to reproduce CPSC’s findings -- a request that CPSC

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<sup>17</sup>Memorandum, “OIRA Review of Information Quality Guidelines Drafted by Agencies” at 14-15 (June 10, 2002)(emphasis added), available at [http://www.whitehouse.gov/sites/default/files/omb/inforeg/iqg\\_comments.pdf](http://www.whitehouse.gov/sites/default/files/omb/inforeg/iqg_comments.pdf) (accessed Feb. 7, 2014).

<sup>18</sup> CPSC Denial at 2.

<sup>19</sup> 2013 Press Release, *supra* note 2.

<sup>20</sup> OMB Guidelines § V.3(a), 67 Fed. Reg. 8452, 8459.

<sup>21</sup> CPSC Denial at 2.

<sup>22</sup> 44 U.S.C. § 3516 Note.

has improperly denied. Not only did CPSC fail to address COA's request for disclosure, it entirely ignored it in its denial letter.

As for CPSC's claim that Buckyballs® and Buckycubes® presented an "ongoing harm to children," the agency has not presented any evidence of harm to children except for a statistically insignificant number of accidental ingestion incidents. Further, CPSC has failed to provide any context for the relative risk ratios about this ingestion risk. Absent such context, CPSC's claim that Buckyballs® and Buckycubes® present an "ongoing harm to children" fails the utility, objectivity, and reproducibility requirements.

### **III. CPSC'S LEGAL THEORIES ARE IRRELEVANT.**

CPSC claims that Mr. Zucker's Petition seeks correction of legal theories or responses to legal questions.<sup>23</sup> This is simply not the case. Mr. Zucker has requested disclosure of data underlying CPSC's conclusions, not CPSC's legal analysis of that data. Furthermore, CPSC claims that to the extent metrics or data exist, "they are found in the CPSA and Commission regulations."<sup>24</sup> But those regulations do not contain any metrics or data relevant to Buckyballs® or Buckycubes®. No metrics or data for the legal definition of defect or hazard exist in the statute or CPSC regulations, nor is that what Mr. Zucker has requested. Instead, he has sought the data underlying CPSC's press releases in order to be able to evaluate and test the accuracy and integrity of those statements.

### **IV. MR. ZUCKER IS AN IQA AFFECTED PERSON.**

Without citing any authority, CPSC suggests that Mr. Zucker might not qualify as an IQA "affected person."<sup>25</sup> In fact, Mr. Zucker has unquestionably been adversely affected by the influential information disseminated by CPSC. For example, the 2012 Press Release contributed to driving M&O out of business, as noted in the Petition,<sup>26</sup> and CPSC continues to pursue Mr. Zucker personally for its claims against M&O through the use of a novel and disputed legal theory. Additionally, the 2013 Press Release contains biased and inaccurate statements that have affected both Mr. Zucker's reputation and his financial status.

### **V. THE INFORMATION AT ISSUE HERE IS INFLUENTIAL.**

CPSC suggests that only technical reports related to engineering, health science, or hazard analysis can qualify as influential information. However, OMB guidelines state that influential information "means that the agency can reasonably determine that dissemination of the information will have or does have a clear and substantial impact on important public policies or important private sector decisions. Each agency is authorized to define 'influential'

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<sup>23</sup> CPSC Denial at 2.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 3.

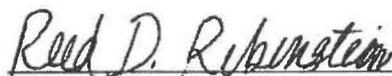
<sup>26</sup> Petition at 2.

in ways appropriate for it given the nature and multiplicity of issues for which the agency is responsible.”<sup>27</sup> CPSC’s guidelines, in turn, affirm the OMB’s definition and further note that “technical reports related to engineering, health science or hazard analysis issues potentially have impacts on important public policies and private sector decisions...Therefore, CPSC’s information in these reports should be highly transparent and capable of being reproduced by qualified persons.”<sup>28</sup> In CPSC’s view, this language means that *only* such information can possibly be considered influential. But the CPSC guidelines merely point out that these types of technical reports are *likely* influential. This does not preclude any other information from also qualifying as influential.

The information at issue here is certainly “influential” for IQA purposes. For example, the 2013 Press Release’s claim that “defects in the design, warnings and instructions . . . pose a substantial risk of injury and death to children and teenagers” is influential because it concerns health and safety risks and was designed to influence important private sector decisions regarding the purchase and/or use of the subject products.<sup>29</sup> CPSC’s claim that Buckyballs® and Buckycubes® pose a “very serious hazard” is influential because it concerns health and safety risks and was designed to influence important private sector decisions regarding the purchase and/or use of the subject products. CPSC’s assertion that it “has received 54 reports of children and teens ingesting this product, with 53 of these requiring medical interventions” is influential because it concerns health and safety risks and was designed to influence important private sector decisions regarding the purchase and/or use of the subject products. Finally, CPSC’s claim in the 2012 Press Release that Buckyballs® and Buckycubes® were “hazardous” and cause “ongoing harm to children” is influential because it concerns health and safety risks and was designed to influence important private sector decisions regarding the purchase and/or use of the subject products. Even under CPSC’s erroneous reading of its guidelines the information here remains influential because the data and metrics that underlie the statements being challenged are presumably contained in technical reports relating to hazard analysis issues -- the very type of information specifically referenced in the guidelines.

For all of these reasons, and as set forth in the original Petition, CPSC ought to make the requested disclosures and corrections. Please direct all communications regarding this appeal to me by email at reed.rubinstein@causeofaction.org or by phone at 202-499-4232. Thank you for your attention to this matter.

Sincerely,



REED D. RUBINSTEIN  
SENIOR VICE PRESIDENT, LITIGATION

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<sup>27</sup> OMB Guidelines § V.8, 67 Fed. Reg. 8452, 8460.

<sup>28</sup> CPSC Guidelines, *supra* note 3.

<sup>29</sup> 2013 Press Release, *supra* note 2.