

**UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION**

In the Matter of Amazon.com, Inc.,

Respondent.

CPSC Docket No. 21-2

**RESPONDENT AMAZON.COM, INC.’S, MOTION TO STAY
THE CONSUMER PRODUCT SAFETY COMMISSION’S FINAL ORDER**

Respondent Amazon.com, Inc. (“Amazon”) respectfully moves the U.S. Consumer Product Safety Commission (“CPSC” or the “Commission”) to stay its January 16, 2025, Decision and Order Approving Notification and Action Plan (the “Final Order”) pending judicial review.¹ While Amazon appreciates the Commission’s careful consideration of the parties’ arguments in fashioning the Final Order, the Final Order nonetheless raises statutory issues of first impression and significant constitutional issues. A Commission stay is therefore appropriate while Amazon seeks review of the Final Order in court. Amazon will file a complaint in federal district court within 14 days after the Commission resolves this Motion and requests that the stay remain in effect until 14 days after the court issues a final judgment in that action.² The Commission has authority to issue such a stay pursuant to 5 U.S.C. § 705 and 16 C.F.R. § 1025.57(a), as reflected in its previous stay of enforcement in a mandatory recall adjudication. Should the Commission deny this Motion, Amazon respectfully requests that the effective date of the Final Order be set to

¹ This stay request also extends to any portion of the July 29, 2024, Decision and Order that was incorporated by reference in the Final Order.

² If Amazon files a complaint in federal district court, Amazon would be willing to stipulate to an expedited briefing schedule for motions for summary judgment in order to facilitate a swift resolution of the litigation.

14 days after the Commission’s order denying this Motion to grant Amazon sufficient time to comply with the Commission’s Order and to seek a stay in federal district court.³

A stay is warranted for at least four reasons. First, Amazon has raised significant questions about the statutory validity of the Commission’s determination that Amazon is a “distributor” of the children’s sleepwear, hair dryers, and carbon monoxide detectors at issue⁴ (the “Subject Products”), the constitutionality of the agency’s structure, and the statutory, regulatory, and constitutional validity of the notice and remedial requirements imposed by the Final Order.

Second, Amazon will face irreparable harm absent a stay. Classifying Amazon as a distributor requires it to spend significant resources to comply with the distributor requirements of the Consumer Product Safety Act (“CPSA”) and, in the event of non-compliance, face the threat of civil penalties. *See* Dkt. 154 at 31 (discussing the risk of civil penalties that Amazon would face if it cannot “demonstrate compliance” with the Final Order). Furthermore, Amazon contends that the Final Order infringes its First Amendment rights, a harm the Supreme Court has explained “unquestionably constitutes irreparable injury.” *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)). In addition, Amazon will have to pay up to \$21 million in duplicative refunds that it will not be able to recover from the Commission in litigation because the government has not waived sovereign immunity for such claims.

³ The Final Order provides that if Amazon files a motion to stay, “this Order shall be effective on the date the Commission resolves Amazon’s motion, unless the Commission orders otherwise.” Dkt. 154 at 50. Absent an extension from the Commission, Amazon would essentially be required to comply with the Order instantaneously if this stay motion is denied. Such immediate compliance with all aspects of the Final Order is not feasible. For this reason, Amazon requests that, should the Commission decline to issue a stay, the effective date of the Final Order be set to 14 days after issuance of the Commission’s decision.

⁴ *See* Dkt. 1 ¶¶ 21, 30, 39 (Complaint); Dkt. 35 (joint stipulation regarding Subject Products); Dkt. 154 at 5.

Third, a stay would serve the public interest by preserving the status quo until judicial review of the significant legal issues raised by the Final Order is complete. The status quo—in which the Subject Products are no longer being sold⁵ and purchasers have already been notified and fully refunded—does not pose a substantial risk of harm to the public.

Fourth, staying the Final Order would allow Amazon and the Commission to conserve resources that they would otherwise spend litigating a stay motion in court.

I. The Commission Is Authorized to Stay the Final Order

The Commission has the power to stay the Final Order. The Commission’s regulations provide that “[a]n order of the Commission in proceedings arising under the Consumer Product Safety Act becomes effective upon receipt, *unless otherwise ordered by the Commission.*” 16 C.F.R. § 1025.57(a) (emphasis added). The Administrative Procedure Act (“APA”) provides additional authority for an agency to stay its action pending judicial review. *See* 5 U.S.C. § 705 (“When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review.”).

The Commission has previously stayed enforcement of its final decision and order pending judicial review in a mandatory recall proceeding. In *Zen Magnets, LLC v. CPSC*, the Commission initially stipulated that it would stay enforcement of its stop-sale order for 60 days or until the court resolved Zen Magnets’ motion for a preliminary injunction. No. 17-CV-02645, 2018 WL 2938326, at *2 (D. Colo. June 12, 2018). The Commission subsequently extended the stay by 120 days pending the court’s resolution of motions for

⁵ *See* Dkt. 154 at 5 (acknowledging that “Amazon has already ceased distribution of the Subject Products by removing the items from Amazon.com, prohibiting Fulfilled by Amazon participants or any other entity from listing the Subject Products on Amazon.com, and quarantining and destroying all units in Amazon’s fulfillment centers.”).

summary judgment; later, the Commission again extended the stay for 120 additional days.⁶

II. A Stay Is Warranted Here

The APA grants federal agencies authority to stay their own actions when “justice so requires.” 5 U.S.C. § 705. Agencies may exercise that “equitable authority to maintain the status quo,” “prevent irreparable injury,” and “afford parties an adequate judicial remedy.” *Bauer v. DeVos*, 325 F. Supp. 3d 74, 105–06 (D.D.C. 2018) (citations and quotation marks omitted). In determining whether a stay is warranted, the Commission need not “apply the same four-factor test that courts apply” but must “balanc[e] the [parties’] competing claims” and “consider[] the effect on each party of granting the stay.” *Id.* (quotation marks and punctuation omitted); *see also Casa de Md., Inc. v. Wolf*, 486 F. Supp. 3d 928, 971 (D. Md. 2020) (“Section 705 operates broadly to allow the agency to postpone enactment of a rule for a host of reasons . . .”). Those considerations support granting a stay pending judicial review here.

First, Amazon has raised significant statutory and constitutional questions, including on issues of first impression, regarding the Final Order, which weigh in favor of granting a stay. While the Commission rejected many of these arguments, Amazon has at a minimum raised the type of “serious legal question[s]” that justify a stay pending judicial review. *Cigar Ass’n of Am. v. FDA*, 317 F. Supp. 3d 555, 560 (D.D.C. 2018) (citation omitted); *see also Philipp v. Federal Republic of Germany*, 436 F. Supp. 3d 61, 66 (D.D.C. 2020); *M.M.V. v. Barr*, 459 F. Supp. 3d 1, 6 (D.D.C. 2020).

⁶ *See* Stipulated Briefing & Hr’g Schedule, *Zen Magnets, LLC v. CPSC*, No. 17-CV-02645 (D. Colo. Nov. 16, 2017), ECF No. 17; Stipulated Briefing Schedule & Continued Stay, *Zen Magnets* (D. Colo. Jan. 12, 2018), ECF No. 26; Stipulated Continued Stay, *Zen Magnets* (D. Colo. May 23, 2018), ECF No. 49.

For instance, Amazon maintains that the Commission lacks statutory authority to order Amazon to act because Amazon is a third-party logistics provider, not a distributor, of the Subject Products under the CPSA. *See* 15 U.S.C. § 2052(a)(16), (b) (explaining that “a person who solely receives, holds, or otherwise transports a consumer product in the ordinary course of business but who does not take title to the product” is a third-party logistics provider, not a distributor). The term “solely” in the definition of third-party logistics provider is most naturally read to disqualify entities that engage in *distribution* activities other than receiving, holding, or transporting products from being classified as third-party logistics providers. The activities Amazon performed with respect to the Subject Products were either (1) expressly authorized by the third-party logistics provider exemption or (2) non-distribution activities that do not render that exemption inapplicable. Indeed, when the Complaint against Amazon was first filed, then-Acting Chair Robert Adler openly questioned its legal basis.⁷ He recognized that the CPSA’s proper application to online marketplaces is unclear, and it will be an issue of first impression before a federal district court.

Further, although the Commission properly rejected several burdensome notice requirements that had been advocated by Complaint Counsel, the Final Order nevertheless infringes Amazon’s First Amendment rights in several ways. The Final Order compels Amazon to communicate a variety of Commission-dictated messages and mandates where and how Amazon must communicate those messages. But Amazon intends to challenge whether the Commission has shown that commandeering Amazon’s speech would “directly advance” a substantial government interest in a manner “not more

⁷ *See* Statement of Acting Chairman Robert S. Adler on the Vote to Approve Filing of an Administrative Complaint Against Amazon.com, CPSC (July 14, 2021), https://www.cpsc.gov/s3fs-public/Statement%20on%20Amazon%20RSA%207.14_0.pdf.

extensive than necessary.” *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564 (1980).⁸ The Order also prohibits Amazon from including a true factual statement (regarding third-party sellers’ failure to cooperate with the Commission regarding the Subject Products) in its communications with consumers, *see* Dkt. 154 at 21, thereby triggering heightened First Amendment scrutiny, *see, e.g., Thompson v. Western States Medical Center*, 535 U.S. 357, 374–75 (2002); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 502–04 (1996) (scrutinizing prohibitions on “truthful, nonmisleading commercial speech”). Similarly, Amazon has argued that the Final Order’s notice requirements exceed the Commission’s statutory authority because the company has already provided direct notice to every purchaser of the Subject Products through two different channels, such that additional notice is not “required in order to adequately protect the public.” 15 U.S.C. § 2064(c)(1).

Similarly, Amazon contends that the Final Order implicates broader questions regarding the constitutional separation of powers and due process. The Commission’s structure infringes upon the President’s removal authority under Article II of the Constitution by shielding Commissioners from removal absent “neglect of duty or malfeasance in office.” 15 U.S.C. § 2053(a). And the Supreme Court’s recent decision in *Chrysaifis v. Marks* supports Amazon’s argument that Commission’s adjudication process violates the Due Process Clause of the Fifth Amendment by vesting the agency with a combination of investigative, prosecutorial, and judicial functions, in contravention of the Supreme Court’s “longstanding teaching that ordinarily ‘no man can be a judge in his own

⁸ The Commission’s conclusion that *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985), not *Central Hudson*, governs Amazon’s First Amendment argument is also erroneous. As the D.C. Circuit has recognized, “*Zauderer* is confined to advertising,” *Nat’l Ass’n of Mfrs. v. SEC*, 800 F.3d 518, 522 (D.C. Cir. 2015), and therefore does not apply to the Commission’s notice order. Rather, as Complaint Counsel correctly conceded, *Central Hudson* provides the applicable framework. *See* Dkt. 129 at 72.

case’ consistent with the Due Process Clause.” 141 S. Ct. 2482, 2482 (2021) (citation omitted).

Amazon also intends to continue challenging the Commission’s authority to order duplicative refunds. While the CPSA permits the Commission to order companies to issue refunds up to “the purchase price of such product,” and provides for a downward adjustment of refunds for used products, the statute makes no mention of an upward adjustment above the purchase price. 15 U.S.C. § 2064(d)(1)(c) (allowing a refund “less a reasonable allowance for use”). Interpreting the statute to authorize duplicative refunds—beyond those already provided by Amazon—would also raise serious questions under the Fifth Amendment’s Takings Clause, which prohibits the “transfer [of] property from one private party to another” when the transfer is not for “public use” and would only “benefit a particular class of identifiable individuals,” here, purchasers of the Subject Products. *Kelo v. City of New London*, 545 U.S. 469, 478 (2005).

Second, Amazon would be irreparably harmed absent a stay. By classifying Amazon as a distributor, the Final Order would require it to spend considerable time and resources to comply with the CPSA’s distributor obligations. For example, Amazon would need to spend significant resources developing new technology and processes across its substantial business operations to comply with the initial and potentially full reporting obligations imposed on distributors by the CPSA. *See* 15 U.S.C. § 2064(b); 16 C.F.R. § 1115.13(b)–(d).⁹ If Amazon fails to comply, it risks the imposition of significant civil penalties by the Commission. *See, e.g.*, 15 U.S.C. § 2068 (prohibiting various acts); *id.* § 2069 (authorizing civil penalties); Civil Penalties; Notice of Adjusted Maximum

⁹ The reporting obligations of entities classified as a “distributor” by the Commission are not the subject of this adjudication, and Amazon reserves all of its rights, including all defenses and objections, with respect to these issues.

Amounts, 86 Fed. Reg. 68,244 (Dec. 1, 2021) (setting inflation adjusted penalties of up to \$120,000 per violation and up to \$17,150,000 for any related series of violations). The “severe economic losses” Amazon would incur in complying with the obligations imposed on distributors by the CPSA constitute irreparable harm “[b]ecause the government is protected by sovereign immunity and no monetary damages are available.” *Ass’n of Cmty. Cancer Ctrs. v. Azar*, 509 F. Supp. 3d 482, 500 (D. Md. 2020); *see also Nat’l Lifeline Ass’n v. FCC*, No. 18-1026, 2018 WL 4154794, at *1 (D.C. Cir. Aug. 10, 2018) (per curiam) (reasoning that “allegations of *unrecoverable* monetary losses” are subject to “a less stringent standard” when considering a stay); 5 U.S.C. § 702 (waiving sovereign immunity for actions “seeking relief other than money damages”).

In addition, an order requiring Amazon to issue duplicative refunds, including to purchasers of the Subject Products to whom Amazon has already issued full refunds, would require Amazon to pay up to an additional \$21 million. Although the Commission concluded that this would not be a “severe” penalty, it is nonetheless a significant loss that Amazon would not be able to recover. Even if a court later holds that the Commission lacked authority to order such refunds, Amazon will not be able to recover those funds.

Further, the notice requirements ordered by the Commission will cause irreparable harm to Amazon’s First Amendment rights by compelling and controlling Amazon’s speech. “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Roman Cath. Diocese*, 141 S. Ct. at 67 (quoting *Elrod*, 427 U.S. at 373).

Third, the public interest and the balance of equities support a stay, which would preserve the status quo. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) (“[A]ssessing the harm to the opposing party and weighing the public interest . . . merge when the

Government is the opposing party.”). When determining whether a stay is appropriate, agencies “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief,” *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987), as well as the public interest. The immediate and irreparable harm that Amazon faces outweighs any hardship the Commission might face. A stay would not pose a substantial risk of harm to the public because the Subject Products were removed from Amazon’s online store years ago and are no longer sold through Amazon’s Fulfillment by Amazon service. Moreover, all Subject Product purchasers have already been instructed to destroy the products, and full purchase price refunds have already been issued. Further, throughout the course of this adjudication, Amazon has continued to interact in good faith with the Commission across various programs regarding the safety of products sold on Amazon.com. The status quo has prevailed for more than three years during the pendency of this proceeding, making it particularly reasonable to continue the status quo for the comparatively short duration requested by this motion.

Finally, a stay of the Commission’s Final Order would promote efficiency. Staying the Final Order would avoid the need for both the Commission and Amazon to expend resources on judicial stay proceedings. A stay would also accelerate the disposition of litigation regarding the merits of the Final Order by allowing the parties to proceed directly to cross-motions for summary judgment.¹⁰

For the foregoing reasons, Amazon respectfully moves the Commission to stay the Final Order pending judicial review. If the Commission were to deny this Motion,

¹⁰ As noted *supra*, Amazon would be willing to stipulate to an expedited schedule for briefing on such cross-motions for summary judgment in federal district court.

Amazon respectfully requests that the effective date of the Final Order be set to 14 days after the Commission's order denying this Motion to give Amazon sufficient time to comply with the Final Order and to request a stay from a federal district court.

Dated: January 24, 2025

Respectfully submitted,



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[PROPOSED] ORDER

Upon consideration of Respondent Amazon.com, Inc.'s Motion to Stay the Commission's Final Order, and any and all briefing relating thereto, it is hereby:

ORDERED that Amazon, Inc.'s, Motion to Stay the Commission's Order is GRANTED; and, accordingly,

ORDERED that the Commission's Decision and Order Approving Notification and Action Plan ("Final Order"), dated January 16, 2025, is stayed until a federal district court has issued a final judgment with respect to the Final Order.

SO ORDERED this ____ day of _____, 2025.

BY THE COMMISSION,

ALBERTA E. MILLS, Secretary
U.S. Consumer Product Safety Commission

CERTIFICATE OF SERVICE

I hereby certify that, on January 24, 2025, a true and correct copy of the foregoing document was, pursuant to the Order Following Prehearing Conference entered by the Presiding Officer on October 19, 2021:

- filed by email with the Secretary of the U.S. Consumer Product Safety Commission Alberta Mills at amills@cpsc.gov; and
- served to Complaint Counsel by email at jeustice@cpsc.gov, lwolf@cpsc.gov, sanand@cpsc.gov, fmillett@cpsc.gov, and tmendel@cpsc.gov.

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