New Civil Liberties Alliance

February 6, 2025

VIA EMAIL

Alberta E. Mills
Secretary of the Commission
U.S. Consumer Product Safety Commission
4330 East West Highway
Washington, DC 20207
AMills@cpsc.gov

Re: **Request to Postpone the Effective Date of *Safety Standard for Infant Support Cushions*, 89 Fed. Reg. 87,467 (Nov. 4, 2024)**

Dear Secretary Mills,

Heroes Technology (US) LLC d/b/a Snuggle Me Organic ("Heroes Technology") has petitioned the D.C. Circuit for judicial review of the U.S. Consumer Product Safety Commission's ("CPSC") *Safety Standard for Infant Support Cushions*, 89 Fed. Reg. 87,467 (Nov. 4, 2024) (the "Rule"). Pursuant to 5 U.S.C. § 705 and Federal Rule of Appellate Procedure 18(a)(1), Heroes Technology requests that the CPSC stay the effective date of the Rule, which establishes an arbitrary and ineffective safety standard, including testing requirements, for infant support cushions, and amends certain registration and notice requirements to apply to such products. *See* 89 Fed. Reg. 87,467.

In the alternative, Heroes Technology requests postponement and reconsideration of the rule pursuant to President Trump's *Regulatory Freeze Pending Review* Executive Memorandum.[1]

Please respond to this request by February 28, 2025, so that Heroes Technology may seek a stay from the D.C. Circuit if necessary.

[1] 90 Fed. Reg. 8,249 (Jan. 28, 2025) (issued on Jan. 20, 2025).

ARGUMENT

Heroes Technology designs, manufactures, and sells the Snuggle Me Infant Lounger. The lounger is unlike any other product on the market.[2] It has an unpadded, suspended center sling, which can gently hold an infant in the supine position.[3] The loungers are made of organic cotton and filled with polyester fiber.[4] They are machine washable.[5] For all intents and purposes Snuggle Me Loungers are textiles, which are not considered durable goods. Yet, despite this fact, the Commission's in-scope product description and examples provided in the Rule likely include products like the Snuggle Me Infant Lounger and similar soft products that have by long agency practice and interpretation been considered nondurable goods.

Under 5 U.S.C. § 705, the Commission is permitted to "postpone the effective date of action taken by it, pending judicial review" if it finds that "justice so requires[.]" In considering a request under section 705, agencies consider the same requirements that apply to motions for stay pending appeal before the courts.[6] Those familiar factors require the agency to consider "(1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."[7]

Heroes Technology easily makes that showing here and the Commission should postpone the effective date of the Rule while the petition for review is pending.

I. HEROES TECHNOLOGY IS LIKELY TO PREVAIL ON THE MERITS

A. The CPSC Exceeded Its Statutory Authority and, in Doing so, Conducted This Rulemaking Without the Procedures Required by Law

The Administrative Procedure Act ("APA") provides for review of "final" agency actions, 5 U.S.C. § 704, and requires courts to "hold unlawful and set aside agency action … found to be ... in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" or "without observance of procedure required by law[.]"[8]

---

[2] Letter from Alessio Bruni to Alberta Mills at 5 (Mar. 18, 2024), https://www.regulations.gov/comment/CPSC-2023-0047-0017.

[3] *Id.*

[4] https://snugglemeorganic.com/collections/snuggle-me-organic-infant/products/infant-lounger-natural.

[5] *Id.*

[6] *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 29–30 (D.D.C. 2012) ("[T]he standard for a stay at the agency level is the same as the standard for a stay of agency action by a court.").

[7] *In re NTE Connecticut, LLC*, 26 F.4th 980, 987–88 (D.C. Cir. 2022) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009) (cleaned up)).

[8] 5 U.S.C. § 706(2)(C), (D).

CPSC, like all administrative agencies, is a "creature[] of statute."[9] CPSC "accordingly possess[es] only the authority that Congress has provided."[10] The Commission's "powers can be decided only by considering the powers Congress specifically granted it in the light of the statutory language and background."[11] CPSC "literally has no power to act … unless and until Congress confers power upon it."[12] Thus, "[t]he question to be answered is 'not what the [Commission] thinks it should do but what Congress has said it can do.'"[13]

1. Infant Support Cushions Are Not Durable Infant or Toddler Products

The contours of the CPSC's powers are determined by statute, for infant and toddler products usually 15 U.S.C. §§ 2056 and 2058, or § 2056a.[14] As to certain infant or toddler products, Congress has said that CPSC may regulate under § 2056a if the products are "durable product[s] intended for use, or that may be reasonably expected to be used, by children under the age of 5 years[.]"[15] "Durable product" is not defined in the statute. The critical question then is: what is a "durable product" for purposes of § 2056a?

To determine the scope of the CPSC's authority, courts "must begin with the words of the statute creating the Commission and delineating its powers."[16] And they "must interpret statutory language, unless otherwise defined, 'in accord with the ordinary public meaning of its terms at the time of its enactment.'"[17] An agency's interpretation that "was issued roughly contemporaneously with enactment of the statute and remained consistent over time" may serve as an "interpretative aid[.]"[18] But "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires."[19]And "courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous."[20]

A "durable product," often referred to as a "durable good," "durables," or "hard goods," are **"**[c]onsumer goods that are designed to be used repeatedly over a long period; esp., large things

---

[9] *NFIB v. OSHA*, 595 U.S. 109, 117 (2022).

[10] *Id.*

[11] *Nat'l Petroleum Refiners Ass'n v. FTC.*, 482 F.2d 672, 674 (D.C. Cir. 1973).

[12] *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

[13] *Nat'l Petroleum Refiners Ass'n.*, 482 F.2d at 674 (quoting *CAB v. Delta Air Lines*, 367 U.S. 316, 322 (1961)).

[14] While there are specific provisions governing how certain products are regulated, *e.g.*, toys, Snuggle Me believes that its products that fall within the scope of the Rule are not subject to those other provisions.

[15] 15 U.S.C. § 2056a(f).

[16] *Nat'l Petroleum Refiners Ass'n.*, 482 F.2d at 674; *see also Tanzin v. Tanvir*, 592 U.S. 43, 46 (2020) ("[Courts] start with the statutory text.").

[17] *Secular Student Alliance v. U.S. Dep't of Education*, No. CV 21-0169 (ABJ), 2025 WL 105843, at *5 (D.D.C. Jan. 15, 2025) (quoting *Bostock v. Clayton Cnty.*, 590 U.S. 644, 654 (2020))

[18] *Loper Bright Enters. v. Raimondo* and *Relentless v. Dep't of Com.*, 603 U.S. 369, 386 (2024).

[19] *Id.* at 412.

[20] *Id.* at 413.

(such as cars, televisions, and furniture) that most people do not buy often."[21] The definition of "durable goods," and its variations, has remained consistent over the course of several decades. A review of various dictionaries also shows that there is a consistent substantive understanding of the term. The Oxford English Dictionary defines "consumer durables" as "[c]onsumer goods which are expected to have a relatively long useful life after purchase[.]"[22] Merriam-Webster defines "durables" as "consumer goods (such as vehicles and household appliances) that are typically used repeatedly over a period of years[.]"[23] And the American Heritage Dictionary defines "durable" as "[a] good or product made to withstand repeated use over a relatively long period, usually several years or more[.]"[24]

Sometimes the difference between durable goods and "nondurable goods," "soft goods," or "semidurable goods" is expressed in terms of the product's perceived lifespan, typically longer than three years.[25] A product's reusability has no bearing on whether it is a "durable product."[26]

---

[21] *Durable Goods*, Black's Law Dictionary (12th ed. 2024); *see also Durable Goods*, Black's Law Dictionary (8th ed. 2004) ("[c]onsumer goods that are designed to be used repeatedly over a long period, such as automobiles and personal computers"); *Durable Goods*, Black's Law Dictionary (6th ed. 1990) ("Goods which have a reasonably long life and which are generally not consumed in use; *e.g.* refrigerator."); *Durable Goods*, Black's Law Dictionary (5th ed. 1979) (same).

[22] *Consumer Durables*, Oxford English Dictionary (Sept. 2024), https://doi.org/10.1093/OED/6922242419 (definition was "[o]riginally published as part of the entry for *consumer, n.*" and "was revised in September 2009").

[23] *Durables*, Merriam-Webster.com (last accessed Feb. 6, 2025), https://www.merriam-webster.com/dictionary/durable%20goods; *see also Durable*, Merriam-Webster.com (last accessed Feb. 6, 2025), https://www.merriam-webster.com/dictionary/durable ("able to exist for a long time without significant deterioration in quality or value"); *see also Durable Goods*, Merriam-Webster's Advanced Lerner's English Dictionary (2008) ("products (such as cars or stoves) that usually last a very long time").

[24] *Durable*, American Heritage Dictionary of the English Language (5th Ed. 2022), https://ahdictionary.com/word/search.html?q=durable.

[25] *See* 76 Fed. Reg. 70,228, 70,287 (Nov. 10, 2011) (collecting sources) (internal citations omitted) ("The United States Department of Commerce uses a durability standard of 3 years for consumer durable goods for National Income and Accounts estimates. Furthermore, economics dictionaries, various encyclopedias, and economics textbooks define durable goods as goods that are expected to last longer than 3 years."); *see also* Environmental Protection Agency, *Frequent Questions regarding EPA's Facts and Figures about Materials, Waste and Recycling* (last accessed Feb. 4, 2025), https://www.epa.gov/facts-and-figures-about-materials-waste-and-recycling/frequent-questions-regarding-epas-facts-and#Difference ("Durable goods last three years or more" and "[n]ondurable goods generally last less than three years[.]"); *Durable goods*, Bureau of Economic Analysis, *Glossary* (last accessed Feb. 4, 2025), https://www.bea.gov/help/glossary?title_1=All&title=durable ("Tangible products that can be stored or inventoried and that have an average life of at least three years.").

[26] *See* In the Matter of Christina C., CBCA 7750-RELO, 23-1 BCA ¶ 38,397 (finding that a manufacturer's description of a product as "reusable" does not overcome the definition of "durable goods").

Consequently, certain products, like textiles and fabric items are not considered durable goods, even if they may be kept for longer than three years.[27]

Indeed, contemporaneous with § 2056a's adoption, the Commission's prior understanding of "durable" looked at both dictionary definitions of "durable goods" as well as how the term was understood "[i]n the economic or financial context[.]"[28] It recognized that "clothing, blankets, and such textile products would not be considered durable infant or toddler products" under the definitions they considered.[29] The Commission also suggested that "[a]dditional guidance" on the term's meaning could be drawn from the twelve statutory categories.[30] As the Commission noted, "[t]he statutory definition leaves uncertainty about which products would be considered durable infant or toddler products."[31] The Commission also recognized that while "[m]any products may last three or more years … does not necessarily mean that Congress intended them to be considered durable infant or toddler products under this section."[32] As recently as 2021, at least some members of the Commission, or its staff, still held the view that "textile products" were not considered durable goods.[33] For example, now-Acting Chair Peter A. Feldman questioned the viability of

[27] *See* Robert Smith & Zoe Chace, *What Are Durable Goods, Anyway?*, Planet Money, NPR (Mar. 28, 2012 9:57 AM ET), https://www.npr.org/sections/money/2012/03/28/149523535/what-are-durable-goods-anyway (noting that carpets are not durable goods even though consumers keep them for more than three years); *see also Nondurables*, Merriam-Webster.com (last accessed Feb. 4, 2025), https://www.merriam-webster.com/dictionary/nondurables ("consumer goods (such as textiles, food, clothing, petroleum, and chemical products) that are only able to be used for a relatively short time before deteriorating or that are consumed in a single usage").

[28] *Requirements for Consumer Registration of Durable Infant or Toddler Products*, 74 Fed. Reg. 30,983, 30,984 (June 29, 2009).

[29] *Id.*

[30] *Id.*; 15 U.S.C. § 2056a(f)(2) (durable infant or toddler goods includes "(A) full-size cribs and nonfull-size cribs; (B) toddler beds; (C) high chairs, booster chairs, and hook-on chairs; (D) bath seats; (E) gates and other enclosures for confining a child; (F) play yards; (G) stationary activity centers; (H) infant carriers; (I) strollers; (J) walkers; (K) swings; and (L) bassinets and cradles."); *see also Requirements for Consumer Registration of Durable Infant or Toddler Products; Final Rule*, 74 Fed. Reg. 68,668 (Dec. 29, 2009).

[31] 74 Fed. Reg. at 30,985.

[32] *Id.*

[33] Letter from Comm'r Peter A. Feldman to Sen. Maria Cantwell and Roger Wicker (Apr. 28, 2021) (attached as Exhibit 1 to Letter from Samuel S. Sykes, II to the CPSC (Mar. 18, 2024)), https://www.regulations.gov/comment/CPSC-2023-0047-0014; *see also* Mem. from Gregory B. Rodgrs Assoc. Exec. Dir., Directorate for Economic Analysis, to Timothy Smith, Project Manager, Crib Bumper Project, Directorate for Engineering Sciences, at 26–30 (Sept. 9, 2016), https://www.cpsc.gov/s3fs-public/StaffResponsetotheRecordofCommissionActiononCribBumper.pdf.

regulating crib bumpers under § 2056a because they are "textiles."[34] As Commission Staff articulated in 2016:

> [C]rib bumpers probably would not be considered "durable products" by existing economic and commercial definitions. Bumpers, along with apparel and other textile consumer goods, generally are classified in government statistics as non-durable goods with a useful life of less than 3 years. Although bumpers might be passed down among infants and could last more than 3 years with light use or repair, the expected life of bumpers in regular use is likely to be less than 3 years. If crib bumpers are not "durable infant or toddler products," rulemaking under section 104 of the CPSIA is not a viable option.[35]

While the Commission has previously indicated that the term "durable goods" is "blurry at its edges"[36] this is not an "edge" case. In any event, "blurriness" does not permit the Commission to interpret the statute in such a way that it rewrites the English language, particularly when that interpretation bears on whether the Commission has acted within its statutory authority.

The Commission's classification of infant support cushions as durable infant or toddler products cannot overcome the plain meaning of "durable goods" or its prior contemporaneous understanding of § 2056a(f). The Rule describes in-scope products as "products that support an infant for lounging, meaning reclining in a supine, prone, or recumbent position."[37] It also recognized that "[m]ost infant support cushions currently on the market are filled with cushy foam or soft fibrous batting, covered by flexible fabric."[38] In other words, most infant support cushions on the market and the subject of the Rule are textiles. But textiles are not durable goods. Snuggle Me Loungers are undoubtedly textiles.

The Commission attempts to support its determination by noting several of its reasons for deciding that infant support cushions are durable infant or toddler products, including that they are (1) "not disposable; (2) "have a useful life of up to several years and are often used by multiple children in succession;" (3) "are similar to other soft durable infant and children's products such as crib mattresses and sling carriers[;]" (4) "are resold and widely available on secondary marketplaces[.]"[39] The Commission is wrong on each of these points and offers no explanation for why it now considers infant support cushions, which are textiles, to be durable infant or toddler products.

---

[34] Mem. from Gregory B. Rodgers Assoc. Exec. Dir., Directorate for Economic Analysis, to Timothy Smith, Project Manager, Crib Bumper Project, Directorate for Engineering Sciences, at 27.

[35] *Id.*

[36] Mem. from Gregory B. Rodgers Assoc. Exec. Dir., Directorate for Economic Analysis, to Timothy Smith, Project Manager, Crib Bumper Project, Directorate for Engineering Sciences, Tab B at II (June 1, 2016).

[37] 89 Fed. Reg. at 87,469.

[38] *Id.*

[39] 89 Fed. Reg. at 87,480.

First, disposable products are not durable goods, but, as noted above, the fact that a product can be reused, or used by multiple children in succession, does not make a product a "durable good." Carpets and other textiles, like children's clothing, cloth diapers, and blankets, are reused, and sometimes used by multiple children in succession, but are not classified as "durable goods." *Second*, the useful life of a product is only one consideration in determining whether it is a durable good. Products that are used repeatedly over long periods of time without degrading are durable goods. Thus, it is the combination of useful life of the product and its ability to withstand significant deterioration that guides whether a product is durable. *Third*, that CPSC has determined that crib mattresses and sling carriers are "soft" durable infant or toddler products does that mean that infant support cushions are. The Commission's *ipse dixit* cannot overcome the plain and ordinary meaning of the statute. Moreover, that the Commission's classifications of those products were not challenged does not mean that the CPSC's interpretation was correct then, or applicable here. *Fourth*, the ability of a product to be resold or made available in a secondary marketplace has no bearing on whether it is a durable product. Again, if that were the case, children's clothing, cloth diapers, and blankets would all be "durable goods," but they are not because they are textiles.

Critically, the Commission did not reference § 2056a(f)(2)'s statutory product list for guidance, as it had previously done. The products in that list—adopted by Congress—tend to be made from hard and rigid materials like plastic, wood, and metal and/or fit into traditional categories of durable goods like furniture, *e.g.*, cribs, toddler beds, and high chairs.[40] In comparison, the Rule's in-scope products, like Snuggle Me Loungers, are textiles and have no analogous statutory product category. Nor does the Commission suggest that such exists. Instead, CPSC relies on its determinations that infant sling carriers and crib mattresses are "soft" durable infant and children's products—a category that is not prescribed by statute.[41] As to "infant slings[,]" the Commission determined that they are durable infant or toddler products because the products "are similar to infant or child carriers which are explicitly covered" by § 2056a(f)(2).[42] In 2022, nearly twelve years after § 2056a(f) was adopted, CPSC issued its Safety Standard for Crib Mattresses final rule.[43] In that rule, the Commission noted how crib mattresses are "similar to" and used "in conjunction with" with the products listed in § 2056a(f)(2).[44] But CPSC provides no such analysis here and provides no reason for disregarding its long-held interpretive methods.[45]

[40] *Cf.* Mem. from Gregory B. Rodgers Assoc. Exec. Dir., Directorate for Economic Analysis, to Timothy Smith, Project Manager, Crib Bumper Project, Directorate for Engineering Sciences, Tab B at II. ("CPSC staff has considered consumer product durability based, in part, on a product's metal, wood, or plastic content.").

[41] 89 Fed. Reg. at 87,480.

[42] 74 Fed. Reg. at 68,673.

[43] 87 Fed. Reg. 8,640 (Feb. 15, 2022).

[44] *Id.* at 8,641.

[45] Such interpretative methods, if contemporaneous with § 2056a's adoption and remaining consistent over time, would at best provide an interpretative aid. *See Loper Bright* and *Relentless*, 603 U.S. at 386. But the Commission appears to have abandoned such interpretive rationales.

2. By Proceeding under § 2056a the Commission Failed to Observe the Procedures Required by §§ 2056 and 2058

The Rule falters at the start. By CPSC's own description and examples of in-scope products, it is obvious that the products described are likely, if not exclusively, nondurable products more akin to textiles and soft goods than to cribs or other products provided for by statute. Certainly, that is the case for Snuggle Me Loungers.

Proceeding under § 2056 versus § 2056a requires an initial determination about the nature of the products to be regulated, *i.e.*, whether they are durable infant or toddler products. From there, the law's various procedural requirements flow. If a product is a durable infant or toddler product, the Commission may promulgate safety standards pursuant to § 2056a and require manufacturers of such products to follow the CPSC's consumer registration requirements. 15 U.S.C. § 2056a(b), (d), (f). If a product is not a durable infant or toddler product, then the Commission must follow the procedures set forth in §§ 2056 and 2058, which vary significantly from § 2056a's procedures.

Among other things, the § 2056 process requires the Commission to "rely upon voluntary consumer product safety standards[,]" rather than promulgating mandatory standards, "whenever compliance with such voluntary standards would eliminate or adequately reduce the risk of injury addressed and it is likely that there will be substantial compliance with such voluntary standards." 15 U.S.C. § 2056(b). Safety standards promulgated under § 2056 are subject to the procedural requirements set out in § 2058. Before the Commission can issue a mandatory safety standard under those sections it must first consider whether there is a voluntary standard, and if that voluntary standard eliminates or adequately reduces the risk of injury associated with the to-be-regulated product.[46] If a proposed rule is published, the Commission must provide a "preliminary regulatory analysis containing" certain information including a cost-benefit analysis, reasons why a voluntary standard would not be developed within a reasonable amount of time, and consideration of reasonable alternatives.[47] And before promulgating a final rule, the Commission must also make certain findings regarding, for example, the "degree and nature of the risk of injury the rule is designed to eliminate or reduce" and quantify how many products are affected.[48] The Commission may not promulgate a consumer product safety rule unless it makes a series of findings, including "the benefits expected from the rule bear a reasonable relationship to its costs" and "that the rule imposes the least burdensome requirement which prevents or adequately reduces the risk of injury for which the rule is being promulgated."[49]

In comparison, rulemaking pursuant to § 2056a requires none of these heightened rulemaking procedures.[50] Thus, when as here, the Commission incorrectly claims a product

[46] 15 U.S.C. § 2058(a), (b)

[47] 15 U.S.C. § 2058(c).

[48] 15 U.S.C. § 2058(f)(1).

[49] 15 U.S.C. § 2058(f)(3); *see also* 15 U.S.C. § 2058(f)(2) (requiring "a final regulatory analysis").

[50] *See* 15 U.S.C. § 2056a(b)(1)(B), 5 U.S.C. § 553; *see also* 89 Fed. Reg. at 87,480 (identifying analyses that "are not required" under § 2056a); 87 Fed. Reg. at 8,665 ("[T]he

category is a durable infant or toddler product, it bypasses the heightened procedural requirements of § 2058. In doing so, the Commission acted both "in excess of [its] statutory jurisdiction, authority, or limitations, or short of statutory right" and "without observance of procedure required by law."[51]

To be clear, it is not Heroes Technology's position that the in-scope products cannot be regulated, rather it is its view that the Commission has relied on the wrong statutory authority and rulemaking procedures to do so.

B. The Rule is Arbitrary, Capricious, and Not in Accordance with Law

Even if the Rule was properly promulgated under § 2056a, the Rule still violates the APA, which requires courts to "hold unlawful and set aside agency action … found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]"[52] Under the APA, an agency's actions must "be reasonable and reasonably explained."[53] "[A]n agency must 'articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made."'"[54] And agency actions may be reversed or vacated "if the agency has 'entirely failed to consider an important aspect of the problem' or has 'offered an explanation for its decision that runs counter to the evidence before the agency.'"[55]

The Commission's 180-day effective date does not reflect "reasoned decisionmaking[.]" Three commentors, including Heroes Technology, raised substantial concerns about manufacturers' ability to adjust to redesign of their products and successfully apply novel and ill-defined testing methods.[56] As the Juvenile Products Manufacturers Association ("JPMA") noted, the Rule "necessitate[s] extensive product redesign and registration card requirements" and noted that in the past the CPSC determined that such concerns justified longer effective dates.[57] Heroes Technology raised similar concerns specifically noting that the Rule would necessitate substantial

---

rulemaking procedure described in [§ 2058] … is inapplicable to rules issued under [§ 2056a]. Section [§ 2056a] contains a different rulemaking authority and different rulemaking procedures. For example, 15 U.S.C. 2058(c) … also requires a preliminary regulatory analysis that is inapplicable to rules issued under [§ 2056a]").

[51] 5 U.S.C. § 706(2)(C), (D).

[52] 5 U.S.C. § 706(2)(A); to the extent that the agency's interpretation of "durable" raises a question of whether the Rule was consistent with statutory authorization and is cognizable under § 706(2)(A), the CPSC's determination, for the reasons articulated above, does not constitute the "best reading" of the statute. *See Loper Bright* and *Relentless*, 603 U.S. at 395–96.

[53] *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021).

[54] *Window Covering Mfrs. Ass'n v. CPSC*, 82 F.4th 1273, 1286 (D.C. Cir. 2023) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) and *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

[55] *Saad v. SEC*, 718 F.3d 904, 910–11 (D.C. Cir. 2013) (quoting *State Farm*, 463 U.S. at 43).

[56] 89 Fed. Reg. at 87,480; *see also* Letter from Alessio Bruni to Alberta Mills at 20–22.

[57] Letter from Lisa Trofe to Alberta Mills at 6–7 (Mar. 18, 2023), https://www.regulations.gov/comment/CPSC-2023-0047-0018.

changes to its products not just in terms of redesign and testing, but also in its supply chain and marketing practices.[58] It also noted that Heroes Technology would require additional time to conduct "the appropriate human factor testing to ensure [it is] producing the safest product possible."[59]

In response to those concerns, the Commission only stated that those commentators did not "provide any specific data or information showing that the level of effort to redesign and distribute" compliant in-scope products.[60] The Commission simply concluded that "the rule provides a reasonable effective date that takes into consideration manufacturers burdens and the risk of continued infant injuries and deaths."[61] But there is no data supporting the Commission's perceived sense of "urgency" beyond the fact that incidents have occurred in the past, with the most recent data being from 2022.[62] And there is no data establishing that the Rule will actually reduce risks in the future. Moreover, as Heroes Technology previously raised with the Commission, the Rule may have the opposite effect on safety and push consumers—who no longer have access to their preferred product choices—to adopt regrettable substitutions in their absence, which may cause increased risk of harm to infants.[63]

While the foregoing reasons are sufficient to warrant of a stay of the effective date of the Rule, the Rule suffers from additional infirmities, which reinforce the need for a stay. *First*, the scope of the Rule is incompatible with reasoned decisionmaking. The Rule covers a non-exhaustive list of twelve exemplary product categories (and an estimated 2,000 products currently on the market), each of which serves different consumer needs and are designed for different uses. Instead of regulating these products through the voluntary standards process, the Commission grouped all products that are "filled with cushy foam or soft fibrous batting" and "covered by flexible fabric"[64] into a single category and devised one-size-fits-all testing for products which serve very different purposes, as often reflected in their design and construction. The Commission failed to consider these differences in promulgating the Rule. *Second*, CPSC's tests and performance standards are not supported by the record. The novel tests developed to support the Rule make little sense when applied to in-scope products like Snuggle Me Loungers, which are designed and constructed in such a way that the required tests are either impracticable or leave companies to do guesswork to identify placement for the test probe. That guesswork, if CPSC later decides a company's placement determination was wrong, opens companies to liability despite the Rule's undefined and vague requirements. Likewise, the firmness test methods are not standardized and the record lacks any data supporting the replicability of the test methods. *Finally*,

---

[58] Letter from Alessio Bruni to Alberta Mills at 21.

[59] *Id.*

[60] 89 Fed. Reg. at 87,480

[61] *Id.*

[62] The incident data included incidents reported to have occurred between January 1, 2010 and December 31, 2022. The data does not account for potential reductions in incident rates as a direct result of the Commission's Infant Sleep Product Rule, 86 Fed. Reg. 33,052 (June 23, 2021) (effective June 23, 2022); *see also Window Covering Mfrs. Ass'n*, 82 F.4th at 1292 (finding that 180-day effective date was "not supported by substantial evidence").

[63] Letter from Alessio Bruni to Alberta Mills at 17–18.

[64] 89 Fed. Reg. at 87,469

the CPSC does not address the fact that the Rule may have the opposite effect it intends—that the Rule may actually decrease infant safety. The lower sidewall height is not supported by the record and may lead to more infants rolling out or off of in-scope products. It may also lead to the use of blankets, pillows, and other soft materials—which present known asphyxiation hazards—around in-scope products. The Commission studied neither of these foreseeable consequences and cannot reasonably explain how the Rule increases infant safety without doing so.

II. HEROES TECHNOLOGY HAS AND WILL CONTINUE TO SUFFER IRREPARABLE HARM IF THE CPSC DOES NOT POSTPONE THE RULE'S EFFECTIVE DATE

As indicated in its March 18, 2024 comment, Heroes Technology is a small company, and sales of its infant loungers represent a significant portion of its total revenues.[65] As a result of the Rule's pending effective date, Heroes Technology has incurred costs to redesign and test its products to ensure that they comply with the Rule. As highlighted in its comment, after the Rule was promulgated it has had to balance compliance with the Rule while also providing a safe, useful, affordable product that is wanted in the marketplace. While Heroes Technology is a privately held Minnesota company whose sales and revenue data are confidential, given its experience to date, the costs outlined in the Rule are significantly higher than the CPSC's estimates. Thus far, Heroes Technology has spent over $90,000 in new direct costs to comply with the Rule. For example, the company has spent over $9,000 in direct testing costs, and its testing processes are not yet complete. By way of comparison, the CPSC estimated the cost of third-party testing to be between $600–1,100.[66] The Commission's estimates are off by at least a factor of 10.

The Rule will also require Heroes Technology to incur significant costs to create new warnings, instructions, and safety collaterals, as well as website and other marketing changes. Heroes Technology will also be required to change its existing voluntary product registration processes to comply with those set by the Commission. As a result of the Rule, a significant portion of Heroes Technology's employees have been allocated to dealing with the effect of the Rule, rather than their sales, client relations, operations, product improvement, and other business roles.

The Rule is an existential threat to Heroes Technology that dramatically affects its operations and staffing, and may cause it to cease sales of its marquee product, more than a million of which have been sold since the company was formed in 2007.

III. THE BALANCE OF EQUITIES AND PUBLIC INTEREST SUPPORT POSTPONING THE RULE'S EFFECTIVE DATE

Postponing the Rule's effective date will not harm the public or the Commission. There "is generally no public interest in the perpetuation of unlawful agency action … [t]o the contrary, there is a substantial public interest 'in having governmental agencies abide by the federal laws

[65] Letter from Alessio Bruni to Alberta Mills at 22.
[66] 89 Fed. Reg. at 87,486.

that govern their existence and operations.'"[67] And Heroes Technology has made a substantial showing that the Commission did not follow the law when it promulgated the Rule.

The Commission also has not shown how delaying the rule will cause any risk of harm if it is stayed pending judicial review. As discussed above, it ignored significant concerns from manufacturers regarding their ability to redesign, successfully test, and market compliant products within the time allowed, as well as meeting the Rule's registration card requirements because they were not, in the Commission's view, specific enough. The Commission also relied on its view that the Rule was urgent, based on historical incident data, but it provided no reasoning for why or how a short delay would reduce the risks the Rule seeks to address and there is no data establishing that the Rule will actually reduce risks in the future.

But if the Rule is allowed to take effect it will harm consumers through reduced product choices, higher costs, and lower product utility. Further businesses, including Snuggle Me, will suffer significant economic harm to develop, redesign, and/or test in-scope products. As the Commission observed, in-scope products are sold both online and in-store at general retailers, "big box" retailers, baby products stores, specialty shops, and through marketplaces for hand-crafted items.[68] While CPSC does not quantify the market in terms of gross sales, either monetarily or by units sold, it does recognize that the infant support cushion market is large and supported by "[s]everal thousand manufacturers and importers, including hundreds of handcrafters and direct foreign shippers" most of whom are small businesses.[69] Given that the product category is new (*i.e.*, the term "infant support cushions" was developed by CPSC for purposes of the Rule), the Rule includes some twelve exemplary products, and the standard is broadly applicable across incongruent products it comes as little surprise that the Rule requires an estimated 2,000 product models to be redesigned at significant cost.[70] The Commission has also admitted some manufacturers suppliers may be forced out of the market.[71] It is obvious from the scope of the Rule, that compliance with the Rule cannot be accomplished within the 180-day period.

---

[67] *League of Women Voters of United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (internal citation omitted).

[68] 89 Fed. Reg. at 87,469.

[69] *Id.*; *see also* Memorandum from Daniel R. Vice, Assistant General Counsel, and Elizabeth Layton, Attorney, to CPSC and Alberta E. Mills, Secretary, at 34 (Nov. 8, 2023)https://www.cpsc.gov/s3fs-public/Briefing-Package-Notice-of-Proposed-Rulemaking-Safety-Standard-for-Infant-Support-Cushions.pdf?VersionId=rA60lesWHddS1.wrk_EvV00xeX75dsFc (identifying "more than 2,000 suppliers of infant support cushions"); 89 Fed. Reg. 2,530, 2,543 (Jan. 16, 2024).

[70] *See id.* 89 Fed. Reg. at 2,542; 89 Fed. Reg. at 87,486.

[71] 89 Fed. Reg. at 2,542.

IV. THE *REGULATORY FREEZE PENDING REVIEW* EXECUTIVE MEMORANDUM REQUIRES CPSC TO CONSIDER POSTPONING THE INFANT SUPPORT CUSHION RULE TO CONDUCT ADDITIONAL REVIEW

In his first day in office, President Trump issued the *Regulatory Freeze Pending Review* Executive Memorandum.[72] That Executive Memorandum requires "all executive departments and agencies" to take certain steps with regard to pending regulations.[73] Regarding regulations like the Rule, those that were promulgated but "have not taken effect[,]" agencies should "consider postponing for 60 days from [January 20, 2025] the effective date … for the purpose of reviewing any questions of fact, law, and policy that the rules may raise."[74] The Executive Memorandum commands agencies to "consider opening a comment period to allow interested parties to provide comments about issues of fact, law, and policy raised by the rules postponed under this memorandum, and consider reevaluating pending petitions involving such rules."[75] The Executive Memorandum contemplates further delays of such rules "where necessary to continue to review these questions of fact, law, and policy[.]"[76] And, where, as here, a rule "raise[s] substantial questions of fact, law, or policy, agencies should notify and take further appropriate action in consultation with the OMB Director."[77]

As discussed above, the Rule raises a substantial question of law regarding the meaning of "durable infant or toddler product." Heroes Technology's products, and potentially the entire class of infant support cushions, are not durable goods with the ordinary meaning of that term. Thus, the Commission erred by regulating such products under § 2056a. Heroes Technology has also raised substantial questions regarding the procedures used to adopt the rule and the facts and data the Commission relied on. The Commission should postpone the rule and notify the OMB Director pursuant to the *Regulatory Freeze Pending Review* Executive Memorandum.

CONCLUSION

For the foregoing reasons, Snuggle Me requests that the CPSC stay the Rule's May 5, 2025 effective date pending the D.C. Circuit's review, or, in the alternative, postpone the Rule pursuant to the *Regulatory Freeze Pending Review* Executive Memorandum.

Respectfully,

/s/ Kara M. Rollins
KARA MCKENNA ROLLINS*
Litigation Counsel
JOHN J. VECCHIONE
Senior Litigation Counsel

---

[72] 90 Fed. Reg. 8,249.
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*

NEW CIVIL LIBERTIES ALLIANCE
4250 N. Fairfax Drive, Suite 300
Arlington, VA 22203
Direct: (202) 869-5210
Kara.Rollins@NCLA.legal
John.Vecchione@NCLA.legal

Counsel for Heroes Technology (US) LLC d/b/a Snuggle Me Organic

** Not licensed in Virginia; admitted to practice in New Jersey, New York, D.C., and select federal jurisdictions*

CC:

Kelsey Fraser via email (kelsey.g.fraser@usdoj.gov)
Gerard Sinzdak via email (gerard.j.sinzdak@usdoj.gov)