

STATEMENT OF THE HONORABLE THOMAS H. MOORE
ON THE VOTE TO APPROVE THE DRAFT *FEDERAL REGISTER* NOTICE FOR
THE UPHOLSTERED FURNITURE RULEMAKING

February 1, 2008

I am voting today to approve the draft *Federal Register* (FR) notice on a Proposed Rule addressing the flammability of upholstered furniture. As I stated when I voted to direct the staff to draft this FR notice, the design and the implementation of the validation testing for this proposed standard will be critical in determining how effective the draft standard will be in reducing fire deaths and injuries. I will be following the development of that validation testing with great interest.

In my earlier statement I also indicated I would be reading this FR notice closely, particularly the preliminary regulatory analysis. While that analysis relies heavily on a number of, as yet, unproven assumptions, I hope those assumptions can be verified during the work that will be done between now and the adoption of any final rule. It will indeed be quite an accomplishment if our staff succeeds in developing a flammability standard in which: upholstery materials can be tested through reliable, reproducible bench scale testing; only modest amounts of flame retardant chemicals are needed to meet it; and, the hazard of upholstered furniture fires is significantly reduced.

My December 27th statement, which contains information vital to understanding the genesis of this proposal and my vote for it follows:

STATEMENT OF THE HONORABLE THOMAS H. MOORE
ON THE REGULATORY ALTERNATIVES TO ADDRESS THE FLAMMABILITY OF
UPHOLSTERED FURNITURE

December 27, 2007

When I came to the Commission in May of 1995, the saga of the upholstered furniture flammability rulemaking was just beginning. It was clear even back then that it was going to be a complicated task that would take some time and much testing to conclude. However, I never dreamed that over twelve years would go by without a vote on a proposed rule. Part of the delay stemmed from intervention by Congress, which expressed concern about the need to use flame retardant chemicals to meet the first draft staff proposal. At the time, I welcomed the additional outside review about a concern that I shared. The review vindicated our staff's assessment that there were flame retardant chemicals that could be used on fabric that presented little or no health risk.

The rulemaking was also delayed by a misguided attempt, beginning in about 2002, to forge a consensus standard with the various components of the industry and other stakeholders (a process more suitable for a voluntary standard activity than a regulatory one). That attempt ate up a number of years and gave the impression that our paramount concern was to find a politically acceptable alternative as opposed to one that focused on saving lives. In the meantime

our staff labored on, taking note of relevant information that came from the new mattress (open flame) proceeding and other developments in fire protection technology.

We now have a number of different alternatives before us, some deal only with small open flame ignition, some deal only with cigarette ignition, and some deal with both. Fabric has been a focal point of some of the options, whereas foam and other types of filling materials were included in other options. None of the alternatives has won unanimous support of the stakeholders and none ever will—a situation which should not trouble anyone as that is not the goal in a rulemaking proceeding.

The most recent alternative came, as she indicated in her statement at the December 6th Commission briefing, at the direction of Acting Chairman Nord. That caught me by surprise as I was unaware that staff had been given any such direction. While the possible inappropriateness of these types of directives always troubles me, in this case the alternative did not take the others off of the table, nor did it, as some have suggested, spring out of thin air.

To argue that this alternative caves to industry pressure completely ignores the thorough and troubling preliminary health risk assessment done by our staff on the chemicals that are predominantly used to flame retard polyurethane foam, an assessment which was made public as part of the December 2006 Status Report. That report makes clear that there are many, many unknowns with regard to the health risks of most of the chemicals tested, chemicals that are being used today in perhaps as much as half of the furniture made in America. The staff report contemplated further study and evaluation of the chemicals tested to answer the unknowns.

I hope that this work will continue, regardless of the vote today because finding safe (and consistently performing) FR-treated foams could allow us more flexibility in fashioning a final rule. A lack of information does not necessarily mean a chemical presents health risks, but it does not provide much assurance of its safety, either. It is possible that we will never find answers, at least in any reasonable amount of time, to some of the unanswered questions in that staff report. We could just continue to wait and hope that staff will find the answers that determine whether these chemicals can be used without worry or we could move ahead (finally) on a proposal, that while it may not be the most ambitious, does appear to be a starting point for improving the fire resistance of upholstered furniture. I agree with Acting Chairman Nord that we should proceed with the 2007 alternative draft standard, but I also do not want us to abandon the important research on the FR chemicals that are currently being used to treat FR foam. I was impressed by one of the peer review comments on this point:

“The experimental work presented in the provided documents is excellent and provides some much-needed data. As mentioned in a previous review for FR in mattresses and bedding, these data have been lacking from evaluations of flame-retardant materials conducted to date, and these experimental results are precious in that they represent a significant contribution to the field.”

This is important research. It is amazing that our little agency, with its limited resources, is in the forefront of it. While, from a fire safety standpoint, I would have preferred to proceed with an alternative closer to the staff's 2005 draft, too much in that alternative depends on the conclusions from continuing research on FR chemicals. For the moment, the fact that our scientists, after looking at the scientific data and test results, counsel caution, causes me to turn away from the 2005 draft and to focus on what could be a significant step in reducing fire deaths and injuries. I still have questions, still have some concerns and still have nagging doubts that

this is the best solution achievable, but at least now we have one target to evaluate and a platform upon which to build.

On its face, the 2007 alternative draft standard would seem to have a number of positive things going for it. The standard is relatively simple, either the fabric passes a smoldering test or it does not. Both the fabric and the barrier test (if a barrier is used) are more stringent than the corresponding tests in the staff's 2005 alternative, which in turn are more stringent than UFAC's tests and that should make it less likely that the interior foam will become compromised in a cigarette ignition fire. The 2007 alternative focuses on what we have been told is the larger part of the fire problem, that is, cigarette ignition. It could result in significantly less FR chemicals being used in the finished product than most of the other alternatives and it avoids the problem of there currently not being a standard FR foam that produces consistent results in smoldering tests.

The 2007 alternative does also present its share of questions and concerns. Until validation testing is done on large scale mockups or full scale furniture samples, we do not know how effective the standard will really be or how well the bench scale mockup is at predicting effectiveness (this is true of all the other alternatives too, except for UFAC where staff testing indicates there is not necessarily any correlation between the UFAC bench scale test and how the actual UFAC chair performs). In addition, except where a barrier is used, this proposal seems a modest change from current practice and since polyurethane foam is the primary fuel load in an upholstered furniture fire, the concern remains as to whether the proposed alternative is stringent enough to provide significant protection for the foam. Moreover, the ANPR upon which staff has been proceeding, envisioned addressing both small open flame and cigarette ignition, but this alternative does not deal with small open flame fires except to the extent cigarette ignition leads to a larger fire on furniture that has a flame retardant barrier. Thus we lose most of the benefits of small open flame fire reduction.

Another concern is that it is unclear whether, as staff indicates, reengineering fabrics is a relatively simple feat that textile manufacturers do all the time, or, as the textile manufacturers say, it is a complex task that can change many characteristics of the fabric. That latter issue may also ultimately determine whether staff is correct that most fabrics will be reengineered or will be used with barriers, as opposed to being treated with FR chemicals. If staff is wrong about that point, the use of FR chemicals will be greater than predicted and will undercut one of the professed advantages of the 2007 alternative, although there do appear to be less problematic choices of FR chemicals for fabric treatment than there are for foam.

Some stakeholders have complained that they have not had enough time to review this latest alternative, come up with a position, do testing on it, etc. There will, of course, be time for all of that after a standard is proposed. I can sympathize with their feeling that this is being rushed through, as my staff and I have had to deal with being rushed with regard to this latest alternative as well. However, I think what also is going on is that stakeholders had gotten used to having our staff run every alternative by them and having input on each one before it became a formal proposal to the Commission. This is typically NOT done in rulemakings and I believe it led to much of the paralysis on this issue in the last few years as staff felt they had to come up with a fully acceptable "compromise."

The process used in presenting the 2007 alternative, where the proposal was sent to the Commission without it first being vetted by the stakeholders, with the expectation that there would be a Commission vote to go out for comments on it, is the usual practice and the one I much prefer. However, I can understand that some stakeholders may have been surprised by it.

The proof of any standard is in the testing. How the validation testing is done and what exactly it will be designed to show will be very important considerations. When evaluating the barrier test, will staff be measuring maximum heat release, for example, or some other attribute? Will, as in the mattress standard, they be correlating the results of that measure with increased escape time or something else? What will the validation testing of the fabric, which is the linchpin of this standard, measure? I would hope that industry will cooperate and make some chairs for us to our specifications that, based on bench scale testing, should meet this proposed standard to allow us to see how they perform in comparison to both the bench scale test and to similarly constructed chairs currently on the market.

This 2007 alternative does not provide the greatest net benefits from among the alternatives before the Commission, but it does have the virtue of being one that can, for the moment, garner the votes necessary to move the rulemaking process forward. No one wants to trade fire risks for chemical toxicity risks. While it is not clear to me that this proposal necessarily avoids that result or that there are no FR chemicals that are free of health risks, we could debate that issue endlessly. Sometimes it seems like we have. While I have reservations as to how effective the 2007 alternative will really be and as to how manufacturers would ultimately choose to meet such a standard, I think it is time to put a proposal out for comment and do rigorous testing of it. Having a proposal to focus on—one proposal, not a plethora of them—should sharpen the issues and bring us, I hope, to a conclusion on this extremely important fire safety issue. I also hope that the work that Underwriters Laboratories, Inc. is doing in this area may help staff in evaluating and refining this proposal. Changes will most likely have to be made to the proposal based on further testing and comments and no one should be surprised if that happens given the twists and turns we have already seen on this issue. It is my hope and expectation that any changes will make the standard a stronger one in terms of lives saved and injuries prevented.

Since we are only voting at this point to direct the staff to prepare a draft Federal Register notice, there is no proposed draft standard to review as yet. It is difficult to completely understand how a proposed standard will work until you read the actual language of it. Additionally, staff has yet to do a comprehensive preliminary regulatory analysis on the 2007 alternative. There is only a sketchy summary in the briefing package and the conclusions drawn in that part of the FR notice will be very important in any decision to go forward with that proposed alternative. The draft notice may answer some questions and it may raise new ones. I will be very interested in the language of the FR notice. I intend to review it carefully before I vote on it and I hope that it will steer clear of extraneous preamble issues that would detract from the more important need to finally propose a fire safety standard in this proceeding.