

May 13, 2008

The Honorable Nancy Nord, Acting Chairman
U.S. Consumer Product Safety Commission
4330 East West Highway
Room 502
Bethesda, MD 20814

Re: Notice of Proposed Rulemaking, Standard for the Flammability of Residential Upholstered Furniture, 16 CFR 1634

Dear Chairman Nord,

On March 4, 2008, the Consumer Product Safety Commission (CPSC) published in the *Federal Register* a request for comments on its proposed rulemaking titled, Flammability Standards for Residential Upholstered Furniture.¹ The rulemaking indicates that all manufacturers of upholstered furniture will be affected by the proposed rule, and that more than 97 percent of these manufacturers are small businesses.² The Office of Advocacy (Advocacy) has been closely following this issue for years, even filing comments on the CPSC's 1998 request for comments concerning the toxicity, exposure, bioavailability, and environmental effects of flame retardant chemicals that may be suitable for use in residential upholstered furniture.³

As Chief Counsel for Advocacy, I want to commend the CPSC for the quality and comprehensiveness of its regulatory analysis and discussion of alternatives. I am writing because my office has met with some of the affected small upholstery furniture manufacturers and upholstery fabric manufacturers and their representatives who have voiced concern with the rule. Industry representatives have told Advocacy that they are concerned the rulemaking will have a significant economic impact on their industry, which runs counter to the conclusion reached by the CPSC in its Initial Regulatory Flexibility Analysis (IRFA).⁴ These industry concerns primarily involve their view of the CPSC's regulatory policy assumptions as outlined in the rule's preamble and regulatory impact statement, versus what the regulated entities experience daily in the marketplace. Specifically, the small businesses suggest a disparity between CPSC's analysis of the

¹ 73 Fed. Reg. 11,702 (March 4, 2008).

² 73 Fed. Reg. at 11,734.

³ 63 Fed. Reg. 13,017 (March 17, 1998). See Advocacy's comments at:

http://www.sba.gov/advo/laws/comments/cpsc98_0428.pdf.

⁴ 73 Fed. Reg. 11,735.

total costs and benefits of the rule as contrasted with the industries' belief that the rule's economic impact has been underestimated because the incremental costs are significantly higher than estimated by the CPSC.

I believe there is value to be gained by bringing these small businesses' concerns to the attention of the CPSC in the hope that any disparity between the rule's costs and benefits can be narrowed or resolved.

Advocacy Background

Congress established Advocacy under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA); as such the views expressed by Advocacy do not necessarily reflect the views of the SBA, or of the Administration. Section 612 of the Regulatory Flexibility Act (RFA) also requires Advocacy to monitor agency compliance with the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act.⁵

In 2002, President George W. Bush signed Executive Order 13,272 (EO), requiring Federal agencies to implement policies protecting small businesses when writing new rules and regulations.⁶ The EO instructs Advocacy to provide comment on draft rules to the agency proposing them, as well as to the Office of Information and Regulatory Affairs of the Office of Management and Budget (OIRA).⁷ The Order also requires agencies to give every appropriate consideration to any comments provided by Advocacy.⁸ Under the EO, an agency must respond to any written comments submitted by Advocacy regarding a proposed rule when publishing the subsequent final rule in the *Federal Register*, or certify that the public is not served thereby.⁹

I. Upholstery fabric manufacturers disagree with certain assumptions and data relied on by CPSC in its analysis of the rule's impact on their industry.

Advocacy appreciates the detailed information provided by the CPSC in the Preliminary Regulatory Analysis (PRA) describing the products and industries likely affected by this regulation, and the costs associated with the rule.¹⁰ However, it is unclear whether the CPSC has concluded whether upholstery fabric manufacturers and fabric finishers will be directly impacted by this rule. The CPSC's statements as to direct impacts in the PRA appear to be inconsistent with the conclusions reached by the agency in the IRFA. In the IRFA, the CPSC states that, "the proposed standard will also affect manufacturers and finishers of upholstery fabrics and barrier materials used in the production of furniture."

⁵ Pub. L. No. 96-354, 94 Stat. 1164 (1981) (codified at 5 U.S.C. §§ 601-612) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. §612(a).

⁶ Exec. Order No. 13,272, § 1, 67 Fed. Reg. 53,461 (Aug. 13, 2002).

⁷ *Id.* at § 2.

⁸ *Id.* at § 3(c).

⁹ *Id.*

¹⁰ 73 Fed. Reg. 11,711.

“Although their products are not directly regulated by the draft proposed standard, it is expected that they will provide guaranties to furniture manufacturers regarding fabric ignition resistance.”¹¹

Fabric industry representatives believe this issue of direct impacts is important as it relates to the requirements of the RFA. They believe that much of the economic impact of this rule will fall on upholstery fabric manufacturing companies that provide fabric to the furniture manufacturers. The CPSC acknowledges that the rule’s costs to furniture manufacturers will be mitigated because they will receive certain guarantees from the fabric industry certifying that the fabrics to be utilized on the upholstered furniture meet the regulation’s flammability standards.¹² Fabric upholstery manufacturers believe that the mitigated costs afforded to the furniture manufacturers will come directly from them increasing their costs.

Advocacy believes that despite the apparent inconsistency between the PRA and the IRFA on this point, it is clear that the rule will have a direct economic impact on upholstered furniture manufacturers. Under such circumstances, the RFA requires the CPSC to analyze the rule’s impacts on these directly regulated entities in the IRFA. While the IRFA, along with the PRA, does a good job of discussing how the rule is expected to effect small businesses, the fabric upholstery industry believes that the IRFA would be improved if CPSC better appreciated how certain requirements and costs (direct and incremental) associated with the rule will impact their industry. Based on discussions with affected fabric industry representatives, Advocacy would like to provide the CPSC with the following information that may be of use as the agency finalizes this regulation.

- **The CPSC should refine its estimate of the small business entities that will be affected by the rule.**

Upholstery fabric industry sources indicate that the CPSC has overestimated that number of fabric manufacturers that are likely to be affected by this rule. The CPSC estimates that 100 to 200 domestic manufacturers derive a significant share of their revenues from fabric they produce or import for residential upholstered furniture.¹³ Fabric representatives estimate that there are approximately twelve upholstery fabric manufacturers in the United States that produce the majority of all upholstery in the country which would be subject to the testing standards in this rule, all of which are considered small under SBA size standards.¹⁴ With the increased costs necessary to comply with the regulation, the rule will have an enormous economic impact on the upholstery fabric manufacturers, a fact that seems to have been underestimated by the CPSC. Since there appear to be so few fabric manufacturers currently doing business in the United States, the CPSC’s analysis of the industry takes on added importance. If the costs of compliance with rule prove too onerous, many of the fabric manufacturers may

¹¹ 73 Fed. Reg. at 11,734.

¹² *Id.*

¹³ 73 Fed. Reg. at 11,738.

¹⁴ Information obtained from the National Textile Association.

cease to operate in the marketplace. The fragility of the fabric manufacturing industry is not lost on the CPSC as it noted in the rule that recent bankruptcies, buy-outs and foreign competition has shaken the U.S. industry.¹⁵

This unintended consequence may have a significant impact on the furniture manufacturing business in the United States. Advocacy suggests that the CPSC reconsider the number of small upholstery fabric manufacturers and fabric finishers that will be affected by this rule as required by the RFA and how that information relates to the rule's impact on the industry.

- **Industry sources suggest that the CPSC has underestimated the true costs of this rule on upholstery fabric manufacturers.**

Advocacy is concerned by the assumptions in the IRFA that fabric testing for compliance with this rule will be relatively inexpensive, and that these tests will be performed by fabric manufacturers who will provide furniture manufacturers with a guarantee that the fabrics comply with the flammability standards.¹⁶ The CPSC also assumes that costs to upholstery fabric manufacturers will be reduced because most of the fabrics that fall under the new flammability standards already comply with the standards that exist under the Upholstered Furniture Action Council (UFAC) voluntary industry program of cigarette ignition tests developed in the 1970s.¹⁷ The fabric manufacturers assert that the CPSC has underestimated many of the incremental costs of the rule and therefore the CPSC's conclusion that the regulation's impact on their industry is minimal is misplaced.

While the CPSC assumes in the rule that Class I fabrics will pass the new flammability standard, industry representatives have noted that some CPSC employees have suggested that all UFAC Class I fabrics will not pass the new test. Therefore, a responsible upholstery fabric manufacturer must assume that they will have to test each fabric irrespective of its class in order to assure that the fabric passes the new flammability standard.

While upholstery fabric manufacturers have decades of experience with the voluntary testing procedures under the UFAC standards, no one has experience with the new testing procedures under this rule. Small furniture manufacturers and fabric manufacturers directly regulated by the rule are likely to either bear the costs of testing fabric for compliance, or utilize the option of employing barrier materials in the furniture when complying with this rule. One fabric manufacturer told Advocacy that it creates approximately 900 new styles of fabric per year and that the company has approximately 3000 fabrics currently in use. Even using the CPSC's estimate of \$50 per test, the cost of

¹⁵ 73 Fed. Reg. at 11,711.

¹⁶ 73 Fed. Reg. at 11,734.

¹⁷ 73 Fed. Reg. at 11,735.

testing the majority of these fabrics will be prohibitive for the industry. Industry representatives indicate that barrier material is more likely to be used in smaller production, more expensive, furniture. Therefore, the increased cost of using barrier material will likely be absorbed by small specialty furniture manufacturers further increasing the impact of this rule on small businesses.

Many small textile mills have neither the staff to perform the required tests, nor the funds to outsource such testing, as they operate on small revenue margins.¹⁸ If the majority of fabric manufacturers choose to test a large number of fabrics the commercial testing facilities will soon be overwhelmed, adding to production times for furniture; also, the price of testing the fabrics will likely increase with the increased demand for testing.

Advocacy urges the CPSC to review the costs of fabric testing under this rule and to entertain additional alternatives that will minimize the cost of fabric testing on fabric manufacturers or other related industries.

II. The CPSC's cost measurement data may be too restrictive and may hinder an appropriate analysis of small business impacts.

Advocacy is concerned that the IRFA measures the economic impact of the rule in terms of cost-per-unit-of-cloth and cost-per-piece-of-furniture, rather than measuring or estimating the overall cost borne by a typical small enterprise.¹⁹ Large enterprises generally have advantages over small businesses in terms of reducing these costs, whether by negotiating discounted prices for bulk purchases, by outsourcing the expensive, labor-intensive steps of production that small businesses can only feasibly perform themselves, or by the ability to benefit from economies of scale by spreading the fixed costs of compliance over a greater volume of sales. If the IRFA does not use the individual business enterprise as the basis of its analysis, it is not possible to develop an accurate measure the impact of the rule on a typical small business, or to determine whether or not the costs of a rule are borne disproportionately by small businesses.

Advocacy is also concerned that the IRFA assumes that costs incurred by furniture manufacturers can be passed on to residential consumers.²⁰ The IRFA does not provide data to support this conclusion. Affected small businesses may find that cost pass-through to the end user is problematic in economically inelastic product and service markets; the IRFA should provide justification for discounting costs in this manner. Advocacy urges the CPSC to include and explain the basis for these assumptions in its Final Regulatory Flexibility Analysis (FRFA) to be published in the final rule as this will result in a more transparent discussion of the actual costs to be incurred by the affected industries.

¹⁸ David Ryan, Director of Quality, Craftex Mills (representing the National Textile Association Upholstery Fabric Committee.), Remarks at the American Home Furnishings Alliance's 16th Annual Flammability Workshop (Mar. 20, 2008).

¹⁹ 73 Fed. Reg. at 11,734-38.

²⁰ *Id.* at 11,735-36.

In 2005, the American Home Furnishings Alliance, the National Home Furnishings Association, and the Upholstered Furniture Action Council jointly commissioned an economic study²¹ of the CPSC's Draft Standard for Upholstered Furniture Flammability.²² Advocacy urges the CPSC to address in the final rule the issues the study raises with regard to those cost measurements in the draft that the CPSC retained for use in the IRFA.

III. The CPSC should consider additional alternatives to the proposed rule.

Pursuant to section 603 of the RFA, an IRFA must consider any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities.²³ While Advocacy commends the CPSC for the discussion of alternatives contained in the IRFA,²⁴ Advocacy wishes to bring to CPSC's attention other alternatives suggested by industry representatives:

- **The use of reduced ignition propensity cigarettes may serve to reduce the need for this regulation.**

The relevant statute upon which this regulation rests is the Flammable Fabrics Act (FFA). The FFA's objective is to "protect the public against unreasonable risk of the occurrence of fire leading to death or personal injury, or significant property damage."²⁵ The CPSC states that this proposed rule is intended to fulfill that objective by reducing the risk of fire from smoldering ignition of furniture.²⁶ The CPSC's research indicates that the cause of smoldering ignition is "almost always cigarettes."²⁷ Yet, the CPSC also admits that reduced ignition propensity (RIP) cigarettes that will reduce the probability of igniting upholstered furniture are expected to increase in popularity.²⁸ However, the CPSC does not address the role of RIP cigarettes in reducing furniture flammability. Industry representatives told Advocacy that R.J. Reynolds Tobacco Company and Liggett Group have indicated that they will convert their entire line of cigarettes to the self-extinguishing type during 2009, and that other cigarette manufacturers are also moving that direction. This alternative gains credibility because the regulation requires that fabric testing be done using Pall Mall cigarettes as the ignition source, but R. J. Reynolds is phasing those cigarettes out in 2009.

²¹ Mark P. Berkman, An Evaluation of the CPSC Staff Preliminary Regulatory Analysis of the Draft Upholstered Furniture Flammability Standard (Charles River Assoc.'s Int'l, Mar. 2, 2006). Available at <http://www.ahfa.us/uploads/documents/flammreportmarch06.pdf> (accessed Apr. 15, 2008).

²² *CPSC Draft Standard for Upholstered Furniture Flammability*, Description of Draft Standard Performance Test Requirements, Working Draft, May 2005.

²³ 5 U.S.C. § 603(c).

²⁴ 73 Fed. Reg. at 11,735-11,737.

²⁵ Flammable Fabrics Act, 15 U.S.C. § 1193(a) (1953).

²⁶ 73 Fed. Reg. at 11,705.

²⁷ 73 Fed. Reg. at 11,704.

²⁸ 73 Fed. Reg. 11,707.

The upholstered furniture industry suggests that RIP cigarettes should play a vital role in any federal upholstered furniture flammability standard. Data from the National Fire Prevention Association and the Coalition for Fire Safe Cigarettes indicate that 45 out of 50 States have either adopted, or are moving towards, legislation that will require use of fire-safe cigarettes.²⁹ While the CPSC acknowledges that it is studying the reduction in smoldering ignition propensity in relation to RIP cigarettes, this information may serve to substantially obviate the need for this regulation.

- **The CPSC should consider allowing the use of non-silicone treated polyester fiberfill as an alternative.**

The CPSC admits that, “most furniture covered with fabrics that would benefit most from a barrier of polyester fiberfill over urethane foam is already manufactured in that way.”³⁰ However, the CPSC does not acknowledge that the use of fiberfill in the mandatory fabric test for Type 1 furniture would be beneficial in reducing flammability of upholstered furniture. Industry sources suggest that the CPSC should add a second fabric test for Type 1 furniture consisting of non-silicone treated polyester fiberfill placed between the polyurethane foam and the cover fabric. This alternative would allow for more decorative woven upholstery fabrics to pass the upholstery flammability standard which would allow the fabrics to be used in Type 1 furniture.

- **Reduced deaths from smoldering cigarettes coupled with the States requiring the use of fire-safe cigarettes may mitigate the public policy concerns of this rule.**

While it is often Advocacy’s position that “pursuing no rule”³¹ is generally not considered a reasonable alternative under the requirements of section 603(c) of the RFA, the CPSC may want to study whether the public policy underlying the rule continues to be warranted. Currently, deaths caused by cigarette ignition of upholstered fabric are trending down; from 1350 in 1978 to 280 in 2002 to 2004.³² Reduced deaths, coupled with advancements in self-extinguishing cigarettes may serve to mitigate the deaths and injuries addressed by public policy underlying the rule.

²⁹ Eleven States have legislation that has become effective; 17 States have passed legislation; 6 States have filed legislation that carried over from 2007; and 11 States have filed legislation in 2008. See: www.nfpa.org/gallery/FSC_2map2.htm.

³⁰ 73 Fed. Reg. at 11,736.

³¹ 73 Fed. Reg. at 11,737.

³² The data for the years 2002 to 2004 can be located at <http://www.cpsc.gov/library/fire04.pdf> and the data for 1995 can be located at <http://www.cpsc.gov/library/datafire.html>.

Conclusion

It is my hope that the CPSC takes these comments into consideration while drafting the final rule establishing a flammability standard for upholstered furniture. Advocacy appreciates being given a chance to provide the CPSC with these comments. If you have any questions or concerns, please do not hesitate to contact me or Assistant Chief Counsel Linwood Rayford at (202) 401-6880, or via e-mail at linwood.rayford@sba.gov.

Sincerely yours,

/s/

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cc: The Honorable Susan Dudley, Administrator, Office of Information and Regulatory Affairs