STATEMENT OF THE HONORABLE THOMAS H. MOORE ON THE FINAL RULE AND PREAMBLE FOR THE FLAMMABILITY (OPEN-FLAME) OF MATTRESS SETS
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The new open flame mattress flammability standard represents a significant improvement in fire protection for consumers. It is anticipated that between 240 and 270 deaths will be prevented and that another 1150 to 1330 people will escape injury **each year** from fires due to mattress ignition once this standard is implemented. The National Institute of Science and Technology and the mattress industry were instrumental in making this new standard possible. I would be remiss if I did not also acknowledge the work done in this field by the State of California's Bureau of Home Furnishings and Thermal Insulation. States are often pioneers in consumer protection, providing the impetus for new or improved federal regulation and California is usually in the forefront on consumer issues.

Much will be said about the benefits of this new federal flammability standard. I would prefer to devote my entire statement to those benefits, but unfortunately there are other issues in this rulemaking proceeding that require comment. Since the issuance of Executive Order 12988 in 1996, the Commission has routinely inserted into the Preamble of any new regulation, the specific preemption provisions that apply to that regulation as stated in the authorizing statute. No commentary has accompanied the statement of the preemption provisions and, with one exception, the Commission has never expressed a view about their scope in a Preamble.[1] The proposed Preamble language in this Final Rule is a departure from Commission precedent and, in my opinion, errs on several important points. It errs when it makes the sweeping statement that in the absence of an exemption, "the federal standard will preempt all non-identical state requirements." It errs when it concludes that the preemption provisions preempt inconsistent "court created requirements." And it errs when it implies that the Executive Order requires the Commission to draw any such conclusions.

Non-identical Federal or State flammability standards can and do exist without an exemption from the Commission. Section 16 (b) of the Flammable Fabrics Act (FFA) allows the Federal Government, and the government of any State or political subdivision of a State, to establish a flammability standard "for its own use" that establishes a higher degree of protection from the risk or occurrence of fire than has been established under the Act. The legislative history gives certain examples of what "for its own use" means, such as for a State hospital, institution or old age facility. In some cases it is this language that has allowed most states to adopt stricter fire standards for mattresses used in high risk occupancies, such as prisons, dormitories, and nursing care facilities than the current federal cigarette ignition mattress standard. The intention of the new mattress open-flame standard, as stated in the Preamble on pages 14 and 37, is to cover the same mattresses that the existing cigarette ignition mattress standard covers. I take from that,

[1] There is a discussion about preemption of a California Bureau of Home Furnishings standard in the Preamble to the Notice of Proposed Rulemaking to this regulation, which is discussed later in this statement.

that state standards for high risk occupancies, for example, are in no more danger from preemption under this standard than they were under the cigarette standard, which appears to have had little or no affect on them.

The next issue is the attempt to read the preemption provisions in the Flammable Fabrics Act to preempt non-identical state court rulingss. The starting point of any analysis must be the statutory preemption language itself. Subsection (a) of section 16 lays out the basic preemption provision:

> "(a) Except as provided in subsections (b) and (c), whenever a **flammability standard or other regulation** for a fabric, related material, or product is in effect under this Act, no State or political subdivision of a State may establish or continue in effect a **flammability standard or other regulation** for such fabric, related material, or product if the same **standard or other regulation** is designed to protect against the same risk of occurrence of fire with respect to which the **standard or other regulation** under this Act is in effect unless the State or political subdivision **standard or other regulation** is identical to the Federal standard or other regulation."[2] [Emphasis added.]

This language is plain on its face. That the phrase "standard or other regulation" is used both in describing action by this agency and in describing the State actions that are preempted is strong evidence that the same type of actions are being referenced in both instances.

The Commission has addressed the issue of whether the phrase "standard or other regulation" included judicial decisions, when it gave guidance to the public on the exemption provisions in subsection (c) of section 16, which allows States or their political subdivisions to apply to the Commission to exempt a flammability standard or other regulation of such State or subdivision from the preemptive effect of the Act. The Commission concluded that this phrase did not include court actions.[3] Indeed it would be very odd for a court, or any other State entity, to petition the agency for an exemption to the federal standard because of a ruling in a particular court. As the Commission noted, "Generally, courts do not establish prospective standards or regulations applicable to a category of persons, but instead deal with the specific parties before them." The agency's interpretation of that subsection is not out of date, as some have stated. It was then, as it is now, a commonsense reading of the statutory language. That finding was tied directly to the exemption subsection. However, as has been noted above, Congress did not vary its choice of language in the three subsections of the preemption section. It seems unlikely that this phrase would mean one thing in subsection (c) but, without explanation, something else in the other two subsections.

It is also worth noting that the primary section of the FFA, section 4, which lays out the basis for Commission action, uses the same phraseology:

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[2] Subsection (b) was described in the preceding paragraph; subsection (c) is the provision by which States can apply for exemption for the preemption provisions for higher State standards.

[3] *See* Fed. Reg. 3414 (January 30, 1991).

"(a) Whenever the…[Commission] finds on the basis of the investigations or research conducted pursuant to section 14 of this Act that a new or amended **flammability standard or other regulation**, including labeling, for a fabric, related material, or product may be needed to protect the public against unreasonable risk of the occurrence of fire leading to death or personal injury, or significant property damage… [it] shall institute proceedings for the determination of an appropriate **flammability standard** (including conditions and manner of testing) **or other regulation** or amendment thereto for such fabric, related material, or product." [Emphasis added.]

When a preemption provision plainly does not preempt state court remedies, there is no need for a savings clause. Thus the absence of one in the FFA is not remarkable.

As the statutory preemption language is clear, looking beyond it to the legislative history of that language does not seem necessary. However, since the proposed preemption interpretive language in the Preamble attempts to rewrite the phrase "standard or other regulation" as if the wording in the statute was "requirements," and then use that potentially broader term to justify preemption of state common law, a few words must be said on the legislative history of section 16. While it is true that the 1976 House Conference Committee Report uses the word "requirements" to describe both this agency's regulatory actions and the State and local actions that are preempted, there is absolutely no indication that this shorthand for the longer and unwieldy phrase "standard or other regulation," was meant as anything more than that. In fact, the examples that are given in the report refer to state administrative standards, not court rulings. Nothing in the legislative history indicates Congress intended this language to preempt common law remedies and without a clear statement by Congress that this was intended, no preemption of court common law remedies can be assumed. There is similarly no legislative history to support that the language which the 1976 preemption section replaced ("any law of any State or political subdivision") was intended to encompass state common law.

As stated in section 4, the purpose of Commission action under the FFA is to "…protect the public against unreasonable risk of the occurrence of fire leading to death or personal injury, or significant property damage…." That is the Commission's primary responsibility. Obviously, because federal regulations are meant to have national effect, we want them to replace any non-identical state regulations which provide <u>less</u> protection for consumers. After the adoption of a federal regulation, no State should go through a duplicative standard-setting process (with the attendant costs that this entails for industry) when that State had the opportunity to present information to the Commission in the federal proceeding, unless of course such information was simply not available at the time of the Commission's rulemaking proceeding, or the State feels a stricter standard is essential to protect its citizens. The longer our standards are in effect, the more likely it is that new information or new technology may make stricter standards desirable. The FFA provides both a blanket exclusion from preemption for stricter State standards and regulations and an opportunity to apply to the Commission for an exemption. Thus Congress did not intend for CPSC regulations to occupy the field in fire

protection related to consumer products covered by the FFA and contemplated that States might come up with better solutions.

The exclusion and exemption provisions reflect the recognition that no agency promulgates perfect regulations (although I think our agency does an extremely good job). For example, in this regulation, the T-shaped burners in the test method are meant to simulate burning bed clothes, since most beds will have sheets and blankets and other items on them when they catch fire that create a larger flame impinging on the mattress than the initial ignition source. However, the tests have shown that in many, if not most, cases (particularly with the new one-sided mattresses) the burners do not accurately reflect the effect of burning bed clothes. In a number of instances where the new mattresses failed to perform as staff hoped, the solution was to lower our expectations as to how many people the standard would save, not to make the standard tougher. Nevertheless, we do know that this standard will result in significant improvements in fire resistance over the old non-flame resistant mattresses. It appears, for the time being, that this rule is the best that can be done. But it makes no sense to risk eliminating sources of new information that might come from private litigation. Just as litigation informs our compliance activities, so should we allow it to inform our regulatory process.

I do not think any state court cases should be foreclosed by the preemption language in the FFA. The Commission has always, wisely to my way of thinking, stayed out of the business of trying to read anything more into the language of the preemption statute than is there.[4] It is always possible that some state court cases will be preempted by other principles the courts may apply. But that is for the courts to decide, not the Commission. It is the courts, with specific fact patterns in front of them, that are best

[4] It is worth noting that Conference Committee Report 94-1022, which described the change in the preemption language in the FFA, contains language that has been construed by the agency's Office of General Counsel to mean that our current cigarette ignition mattress standard would preempt State standards dealing with open-flame ignition of mattresses. To date, the Commission has treated cigarette ignition and open flame ignition of complex products as very different fire scenarios requiring different types of standards. I believe the Report language was focusing on different testing methods for determining compliance with the same fire scenario. It used the flammability of a simple piece of fabric as the example of when a standard that used a match to test a fabric's flammability did not differ from a standard that used a lit cigarette. And for a single piece of fabric stretched in a holder, these test methods probably would result in no significant difference in fire protection. But the Commission has found, when dealing with complex structures such as upholstered furniture and mattresses, which contain multiple materials all of which may react differently to a smoldering or to a flaming ignition, that there are differences in the way the fires are started and in the way in which the fires progress and that different product construction methods are needed to address each type of fire situation. That we started an open-flame mattress proceeding when we already had a cigarette ignition mattress standard is proof of that. Technology may eventually overcome the need to have separate standards in these situations but they certainly had not done so at the time the Conference Committee Report was written.

equipped to decide whether a case should go forward or not. If we have gotten this standard right, then law suits against manufacturers should be a rarity and prevailing ones even less common. But if we have gotten it wrong, the fastest way we will find out is through people bringing lawsuits that challenge our conclusions. That people bring lawsuits in which they do not prevail is not an indication that our judicial system is broken. It is an indication that it is working.

Absent a clear mandate from Congress, the Commission should not put its thumb on the scale of justice to tip it one way or the other. We all have the same objective: keeping consumers safe from unreasonable risks of fire. Federal regulation is not the only way of achieving that goal.

Finally, we have the Presidential Executive Order which has been read to require the Commission to state whether or not this regulation issued under the FFA preempts not only non-identical positive State actions issued by legislative bodies and administrative agencies, but whether it also necessarily preempts State court holdings.

When he issued the Executive Order, the President stated the purpose was "…to improve access to justice for all persons who wish to avail themselves of court and administrative adjudicatory tribunals to resolve disputes, to facilitate the just and efficient resolution of civil claims involving the United States Government, to encourage the filing of only meritorious civil claims, to improve legislative and regulatory drafting to reduce needless litigation, to promote fair and prompt adjudication before administrative tribunals, and to provide a model for similar reforms of litigation practices in the private sector and in various states.…"

The preemption language is placed in the Order under Section 3, which is entitled "Principles to Enact Legislation and Promulgate Regulations Which Do Not Unduly Burden the Federal Court System." It states that a regulation specify "in clear language the preemptive effect, if any, to be given to the regulation." Nearly every principle in this section deals with eliminating errors, using clear and specific language to reduce needless misunderstandings and to make sure all the necessary information that pertains to a regulation is included it in. Since this Order was signed in 1996, the Commission has interpreted it to mean that we should make sure each new regulation lays out the preemption language in the governing statute so that people affected by it are aware of the preemption provisions. The Commission has not felt it was required to go beyond the words of the governing statute which would risk creating misunderstandings or confusion. The President who signed this Order never expressed any dissatisfaction with the way the Commission responded to it on this subject. I do not know why there is a need <u>now</u> to define what the Commission considers to be preempted. But I do know that the need does **not** flow from this Executive Order.

I do want to thank my colleagues for responding to my request and releasing the new proposed preemption language to the public, although I still do not understand why it was withheld in the first place. One explanation I have received is that there is really nothing new in the language. If that were the case, it makes the withholding of the

language even odder. Its release at the twelfth hour, buried in the tabs of the briefing package on our web site, did not give it the public exposure it deserved. The way in which it was handled may give it more exposure than intended.

It has been said that the public got notice of this new interpretation in the Notice of Proposed Rulemaking of January 13, 2005. Nothing in that language, except for the discussion of a General Counsel Advisory Opinion with regard to the preemptive effect on a California **standard,**[5] is different from the language the Commission had been using since 1996. If that discussion was meant to alert the public that the Commission was about to embark on an interpretive exercise on preemption, it escaped not only the public's notice, but mine as well.

I would have preferred if both the Preamble language, and our General Counsel's memo, which gives the rationale behind that language, had been made public and if more time for public comment on these documents had been allowed. This would be in keeping with the one other time in which I am aware that the General Counsel's office proffered a rationale for interpreting language in one of our statutes in a restricted memo to the Commission. When a new interpretation of the term "substantial compliance" was going to be inserted in the preamble to the bunk bed rule, based on a General Counsel memo, the Commission voted unanimously to release that General Counsel memo to the public and to give interested parties ample time to respond to it. We received some very good comments on it, which helped the Commission come to a different, and unanimous, rewording of the Preamble language. That model was not followed in this case, although the outline of the General Counsel's reasoning is to be found in the language that is proposed to be inserted into the Preamble.

I am voting today to approve the text of the mattress (open-flame) rule because it is an important and needed improvement in fire safety for this country. However, I cannot support the preemption language in the Preamble which purports to expand the scope of the preemption provision in the FFA. To some, this new preemption language may not seem of much consequence in the mattress context, but it (or something very like it) will be inserted in every new regulation the Commission issues. The consumer's right to sue a manufacturer, potentially any manufacturer of a regulated consumer product, for injuries from that product, may be seriously curtailed. That surely is not without consequence. The courts will eventually decide how much deference to give the agency's interpretation of the preemption language. Perhaps they will heed the opinion of Supreme Court Justice Sandra Day O'Connor when she said, "It is not certain that an agency regulation determining the pre-emptive effect of *any* federal statute is entitled to deference…."[6]

[5] *See* footnote 2. This Conference Report language is now being used to bolster the argument that FFA regulations preempt state common law remedies. This is not supported by anything in the legislative history.

[6] *Medtronic, Inc. v. Lohr*, 518 U.S. at 512, 116 S.Ct. 2240.

If we were the ones having to sit in judgment of whether a potential lawsuit should be preempted, then we would have to make such a determination. But we are not, and we should not.