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LOG OF MEETING

DATE OF MEETING: March 23, 1995

PLACE: Headquarters, Consumer Product Safety Commission
4330 East West Highway, Bethesda, Maryland.

LOG ENTRY SOURCE: Allen F. Brauninger, Attorney, OGC

DATE OF ENTRY: March 27, 1995

SUBJECT: Preemption of state and local building code requirements for cellulose insulation by the Amended Interim Safety Standard for Cellulose Insulation (16 C.F.R. Part 1209)

COMMISSION ATTENDEES:

Eric A. Rubel, General Counsel
Stephen Lemberg, Assistant General Counsel
Allen F. Brauninger, Attorney, OGC
Michael Bogumill, Compliance Officer, CPSC

NON-COMMISSION ATTENDEES:

Andrew Krulwich	-	Wiley, Rein, and Fielding
Gary Marchant	-	Kirkland and Ellis
James Hostetler	-	Kirkland and Ellis
Steve Braun	-	North American Insulation Manufacturers Association
Donald W. Belles	-	Belles & Associates
Patrick J. Stueve	-	Stinson, Mag, & Fizzell
Steven Gerber	-	Cellulose Insulation Manufacturers Association (CIMA)
Dan Lea	-	CIMA
Ken Schoonover	-	Building Officials and Code Administrators International
Richard P. Kuchniki	-	Council of American Building Officials
Nick Wakeman	-	Product Safety Letter

SUMMARY OF MEETING: Three organizations of building officials which publish model building codes have included in those model codes certain tests for flame resistance and smoke density of cellulose insulation which are not identical to the requirements of the Amended Interim Standard. All three model code organizations have requested an advisory opinion from the Office of the General Counsel of the Commission about whether the state or local requirements based on the model code provisions would be preempted by provisions of the Amended Interim Standard and section 26(a) of the Consumer Product Safety Act. This meeting was requested by Gary Marchant to present the position of the

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North American Insulation Manufacturers Association that provisions of the Amended Interim Standard for Cellulose Insulation and section 26 of the CPSA do not preempt provisions of state and local building codes regulating cellulose insulation.

Mr. Rubel asked Mr. Marchant and Mr. Krulwich to open the meeting by presenting their client's position. Mr. Krulwich made a short statement about legal and policy considerations supporting the position that the federal standard does not preempt the state and local requirements for cellulose insulation. Mr. Krulwich expressed the view that if the federal standard for cellulose insulation preempted the state or local requirements under consideration, the safety of consumers would be reduced. Mr. Marchant elaborated on the legal considerations against preemption. Those considerations included: (1) an assertion that state and local requirements are applicable to some types of cellulose insulation which are not "consumer products" as that term is defined by the Consumer Product Safety Act; (2) an assertion that state and local requirements have a more appropriate test to measure the flammability of some types of cellulose insulation after installation; and (3) an assertion that state and local requirements have tests to measure the flame-resistance of cellulose insulation throughout its anticipated use whereas the federal standard tests cellulose insulation for flame resistance immediately after it is manufactured. Accordingly, Mr. Marchant stated that the Federal standard is not applicable to the same products as the state and local requirements, and does not address the same risks of injury as the state and local requirements.

Mr. Rubel asked if the state and local requirements were requirements for installation of cellulose insulation or requirements applicable to the product itself. Mr. Marchant stated that they were requirements for installation of insulation. Ken Schoonover stated that State and local building codes incorporating the provisions of the BOCA model code contained requirements of general applicability for the installation of various products and appliances by requiring installation in accordance with tolerances or specifications prescribed by the manufacturer.

Patrick J. Stueve discussed language in the preamble to the Amended Interim Standard stating that the Commission intended to regulate all risks of flammability associated with all types of cellulose insulation. He expressed the view that the Amended Interim standard and the CPSA would preempt any nonidentical requirement for the flammability of cellulose insulation contained in any state or local building code. However, he acknowledged in response to a question that he does not believe that state or local requirements covering smoke from cellulose insulation are preempted.

Other issues discussed included: (1) whether the state and local requirements under consideration are applicable to cellulose insulation at the time it is introduced into interstate commerce; (2) whether the term "risk of injury" used in section 26 of the CPSA can be broken up into different risks for purposes of the preemption, depending on the hazard scenarios addressed by the CPSC standard; and (3) whether the state and local requirements discussed here are "installation requirements" of the type mentioned in the legislative history of the 1978 legislation authorizing issuance of the Amended Interim Standard. Mr. Rubel invited any attendee with additional information relevant to the preemption issue to submit that information to him in writing.