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February 14, 2006

Honorable Chairman Stratton
Honorable Commissioner Moore
Honorable Commissioner Nord
U.S. Consumer Product Safety Commission
Washington, D.C. 20207-0001

Dear Chairman Stratton, Commissioner Moore, and Commissioner Nord:

As public interest organizations that work to protect the rights, health and safety of consumers, we urge your opposition to the Draft Final Rule for Flammability of Mattress Sets (“Draft Final Rule”) made available to the public on February 2, 2006. Our opposition is focused solely upon the novel language in the preamble to the Draft Final Rule that purports to preempt state common law remedies, rather than upon the technical substantive provisions of the rule.

According to CPSC’s own data, annual national fire loss estimates for 1999-2002 indicate that mattresses or mattress bedding were the first item to ignite in 15,300 residential fires resulting in property loss of \$295 million, and causing 350 deaths and 1,750 injuries. Mattress flammability poses a significant threat to lives and property and compels a federal response to eliminate these injuries. However, insofar as the new CPSC Draft Final Rule seeks to preempt a consumers’ ability to hold mattress manufacturers accountable in state court, the Draft Final Rule could undermine public safety and consumers’ right of redress for harms caused by unreasonably dangerous products in state courts.

First, the proposed preemption of state common law remedies by a CPSC final rule is unprecedented. No other safety rule promulgated by the Commission has ever limited consumers’ ability to seek compensation in court if harmed by a product meeting a CPSC standard. The tort system provides a strong incentive for product manufacturers to make decisions that will not harm consumers. By reducing manufacturer accountability, preemption obviates an important inducement for safer designs in mattresses or other products.

Second, state common law claims resulting from dangerous products compensate consumers who have been harmed by the negligence of others. In contrast, mandatory CPSC rules provide no such compensation for the injured, instead

setting out minimum uniform safety standards for consumer products. The CPSC should not attempt to deny victims their right to seek compensation when CPSC cannot offer victims of unsafe mattresses or any other product needed assistance with medical care or other expenses related to the harm from manufacturer negligence.

Third, while CPSC rules sometimes include preemption of state safety standards, the language in the Draft Final Rule would also, for the first time, claim to preempt state common law tort claims. The text at Tab G of the Draft Final Rule, contends that the absence of a savings clause indicates “Congressional intent for broader preemption of state flammability requirements that seek to reduce the risk of mattress fires. . . . The Commission believes that a different standard or additional requirements imposed by state statutes *or common law* would upset this balance.” [*Emphasis added.*] The draft rule’s leap from preemption of state standards to common law claims lacks any explanation, rationale or evidence. Yet a compulsory state standard differs fundamentally from the obligations which flow from a tort judgment, as a manufacturer may choose to merely pay the claim without any alteration to the product.

Finally, the preemption language was added to the rule’s preamble after the notice and comment period closed, providing no opportunity for review or evaluation by the public. We further understand the CPSC General Counsel drafted a memorandum on the preemption issue which is not currently available to the public and that the proposed preemption language was omitted from the Draft Final Rule when the Draft Final Rule was made public. To the extent that it is not privileged, we ask the Commission to make public the General Counsel’s memo and to provide additional time for public comment on this new and troubling provision.

The U.S. Consumer Product Safety Commission’s main duty to Congress and the public is to protect the public from unreasonable risks of injury associated with consumer products. Since liability law enhances safety by providing continual incentives to improve product design, the inclusion of a preemption provision in a final rule would violate the CPSC’s core mission. We ask the Commission to reject any language in the preamble of the Draft Final Rule that attempts to preempt state common law.

Sincerely,

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