ADVISORY OPINION #288

U.S. CONSUMER PRODUCT SAFETY COMMISSION

WASHINGTON, D.C. 20207

April 11, 1983

OFFICE OF THE GENERAL COUNSEL

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William M. Goode, Esquire
Deputy Attorney General
Department of Justice
State of California
555 Capitol Mall, Suite 350
Sacramento, California 95814

Dear Mr. Goode:

This is in response to your letter dated March 21, 1983, requesting an advisory opinion about the status of a voluntary standard for the flammability of upholstered furniture under provisions of the Flammable Fabrics Act (FFA, 15 U.S.C. 1191 et seq.).

In your letter, you refer to the provisions of section 16 of the FFA, which state in part:

> (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 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.

You have asked if a voluntary standard for the production of furniture with improved resistance to cigarette ignition developed by the Upholstered Furniture Action Council (UFAC) is a "Federal standard or other regulation" as that phrase is used in section 16 of the FFA.

This office interprets the terms "flammability standard or other regulation for a fabric, related material, or product ... under this Act" and "Federal standard or other regulation," as they are used in section 16 of the FFA to be synonymous, and to mean "a flammability standard or other

regulation" developed and issued under provisions of section 4 of the FFA (15 U.S.C. 1193). The UFAC voluntary standard has not been developed or issued under provisions of section 4 of the Flammable Fabrics Act. For that reason, we conclude that it is not a "Federal standard or other regulation" as that phrase is used in section 16 of the FFA, and has no preemptive effect on any State flammability standard under provisions of section 16.

You also asked whether a voluntary standard submitted to the Commission in response to an advance notice of proposed rulemaking in accordance with provisions of section 4(g) of the FFA (15 U.S.C. 1193(g)) and relied upon by the Commission to terminate a proceeding for the development of a mandatory flammability standard under provisions of section 4(h) of the FFA (15 U.S.C. 1193(h)) preempts a State flammability standard under provisions of section 16 of the FFA.

As stated above, this office interprets the term "flammability standard or other regulation for a fabric, related material, or product ... under this Act," as it is used in section 16 of the FFA to mean a standard developed and issued under provisions of section 4 of that Act. A voluntary standard relied upon by the Commission to terminate a proceeding for the development of a mandatory standard under provisions of section 4(h) of the FFA is not, in our view, a "flammability standard or other regulation for a fabric, related material, or product ... under this Act." Consequently, we take the position that such a voluntary standard has no preemptive effect on any state flammability standard or regulation under provisions of section 16 of the FFA.

As you know, the UFAC voluntary standard has not been submitted to the Commission in response to an advance notice of proposed rulemaking under provisions of section 4(g) of the FFA, and the Commission has not terminated any proceeding under provisions of section 4(h) of the FFA in reliance on the UFAC voluntary standard.

Sincerely,

Martin Howard Katz
General Counsel

JOHN K. VAN DE KAMP
Attorney General

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DEPARTMENT OF JUSTICE

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March 21, 1983

MAR 25 1983
Consumer Product Safety Commission
General Counsel

Mr. Stephen Lemberg
Assistant General Counsel
U. S. Consumer Product Safety
Commission
Washington, D. C. 20207

Dear Mr. Lemberg:

Thank you for your courtesy in providing me with such a prompt reply to my letter of February 15, 1983, regardin the UFAC voluntary program.

In reviewing Title I6, CFR section 1604.4, I learned that the Office of General Counsel will render an advisory opinion to a state on whether state flammability standards would be preempted by the provision of the Flammable Fabrics Act.

In the pending case in the U. S. District Court in Sacramento, the defendant alleges that the California Upholstered Furniture Flammability Regulations have been preempted by the UFAC voluntary standard. I can find nothing in the Flammable Fabrics Act which permits an industry voluntary standard, even one which has been "relied on" by the Consumer Product Safety Commission pursuant to 15 U.S.C. 1193(h)(2), to preempt anything.

Could you advise us whether the UFAC voluntary standard is a federal standard or other regulation within the meaning of 15 U.S.C. 1203(a)?

We would also like to be advised whether a voluntary flammability standard preempts a state standard, and whether a published notice under 15 U.S.C. 1193(h)(2) that the CPSC will rely on the voluntary standard to protect the public given that voluntary standard the status of a federal standard so as to create preemption.

Your cooperation is greatly appreciated. We are scheduled for court on April 1, 1983. If your reply arrives by then, I can introduce it; otherwise, I will ask the court to keep the record open to permit introduction.

Very truly yours,

JOHN K. VAN DE KAMP
Attorney General

William M. Goode
WILLIAM M. GOODE
Deputy Attorney General

WMG:rr

cc: Justin Puerto