

**[To be inserted on p. 136 of draft preamble (Tab G)]**

**N. Executive Order 12988**

Under Executive Order 12988 (Feb. 5, 1996) federal agencies must specify the preemptive effect, if any, of new regulations. Requirements imposed under state law, including laws developed in state courts, may be limited, foreclosed or barred by express language in a Congressional enactment, by implication from the breadth of a Congressional regulatory scheme that occupies the legislative field, or by implication because of a conflict with a Congressional enactment.

The Commission intends and expects that the new mattress flammability standard will preempt inconsistent state standards and requirements, whether in the form of positive enactments or court created requirements. State requirements intended to reduce the risk of mattress fire, no matter how well intentioned, have the potential to undercut the Commission's uniform national flammability standard, create impediments for manufacturers whose mattress products enter the stream of interstate commerce, establish requirements that make dual state and federal compliance physically impossible, and cause confusion among consumers seeking to understand differing state and federal mattress fire requirements.

To fully accomplish the Congressional purpose of the FFA in this area, this mattress flammability rule must take precedence over any non-identical state requirements that seek to reduce the risk of mattress fire. Preemption of non-identical state requirements is expressly and impliedly supported by the words of the statute, its legislative history, and public policy. The FFA expressly provides that if the

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Commission issues a flammability standard for a fabric or product under the FFA, “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 the 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.” 15 U.S.C. §1203(a). The statute also provides an application process for an exemption from federal preemption for non-identical State or political subdivision flammability requirements. Thus, in the absence of such an exemption, the federal standard will preempt all non-identical state requirements.

The legislative history of the FFA affirms the broad preemptive scope of the federal rule. The Conference Committee Report explicitly explained the preemptive reach of the FFA:

The conferees wish to emphasize that in determining whether a Federal requirement preempts State or local requirements, the key factor is whether the State or local requirement respecting a product is designed to deal with the same risk of injury or illness associated with the product as the Federal requirement. Even though the State or local requirement is characterized in different terms than the Federal requirement or may have different testing methods for determining compliance, so long as the Federal and State or local requirements deal with the same risk of injury associated with a product, the Federal requirement preempts a different State or local requirement.

[A] State standard designed to protect against the risk of injury from a fabric catching on fire would be preempted by a Federal flammability standard covering the same fabric even though the Federal flammability standard called for tests using matches and the State standard called for tests using cigarettes. When an item is covered by a Federal flammability standard . . . a different State or local flammability requirement applicable to the same item will be preempted since both are designed to protect against the same risk, that is the occurrence of death or injury from fire.

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H.R. Rep. No. 1022, 94<sup>th</sup> Cong., 2d Sess. 29 (1976).

The broad preemptive reach of the new rule is further supported by Congress' omission from the FFA of a savings clause. A savings clause is commonly used to restrict the preemptive reach of a federal law. In the context of the Commission, the Congress included savings clauses to preserve state common law requirements in the Consumer Product Safety Act, 15 U.S.C. §§2074(a) and 2072(c). Moreover, the existence or absence of a savings clause in a statutory scheme is a significant factor in court decisions reviewing the scope of preemption. The absence of a savings clause generally indicates Congressional intent for broader preemption of state flammability requirements that seek to reduce the risk of mattress fires.

In developing this mattress flammability standard, the Commission carefully balanced numerous factors to craft a rule that will improve consumer safety and meet the Commission's other statutory obligations. The Commission believes that a different standard or additional requirements imposed by state statutes or common law would upset this balance. The FFA requires the Commission to find that the benefits of the regulation bear a reasonable relationship to its costs and that the regulation imposes the "least burdensome" requirement to prevent or adequately reduce the risk of injury. *See* 15 U.S.C. §1193(j)(1)-(2). The Commission has performed such analysis and believes that requiring mattresses to meet a different flammability requirement – even one that is effectively more stringent - would impose greater costs, in both monetary and non-monetary terms, on manufacturers and consumers and thereby upset the carefully tailored balance of costs and benefits this standard achieves.

This standard prescribes a performance test. Requiring mattress manufacturers to

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use specific materials or methodologies to reach the flammability standard's goals could impose greater costs and interfere with the particular balance the Commission struck between competing public policy considerations. Mattress manufacturers need to maintain the flexibility and business discretion to decide what combination of design and materials is appropriate to meet the federal flammability standard.

Finally, non-identical requirements imposed by state courts conflict with the federal standard no less than requirements imposed by state legislatures or state agencies. Congress' repeated characterization in the Conference Report of the FFA's "requirements" could not have intended to exclude state common law causes of action. If it did, then each state could use its tort law to enforce whatever flammability standard it deemed appropriate, potentially creating fifty different mattress fire standards across the nation. This is precisely the result Congress sought to avoid. Congress' explicit ban on non-identical state flammability requirements would be meaningless if states were free to incorporate such standards into their common law duties of care.

For all these reasons, this standard would preempt all non-identical state requirements which seek to reduce the risk of death or injury from mattress fires.