

Comments  
Standard for the Flammability of  
Mattresses and Mattress Pads  
CPSC-2010-0105  
Comments Due: January 18, 2011

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# PUBLIC SUBMISSION

<b>As of:</b> March 18, 2011
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**Docket:** CPSC-2010-0105  
Standard for the Flammability of Mattresses and Mattress Pads

**Comment On:** CPSC-2010-0105-0001  
Standard for the Flammability of Mattresses and Mattress Pads

**Document:** CPSC-2010-0105-0002  
Comment from Matthew Cloward

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## Submitter Information

**Name:** Matthew Cloward

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## General Comment

I don't think that it is necessary to make a cigarette that burns any hotter or longer than any that are being produced. If you want to have an accurate study then you might as well base it on materials that are actually used by the general public.

It isn't very fair to make the mattress companies produce a mattress that can withstand heat that it will never be exposed to. Doing so requires them to spend more on materials and production and won't save a life any better than the one that they could produce to withstand a lower-heat producing cigarette that is actually available on the market.

# PUBLIC SUBMISSION

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**Docket:** CPSC-2010-0105  
Standard for the Flammability of Mattresses and Mattress Pads

**Comment On:** CPSC-2010-0105-0001  
Standard for the Flammability of Mattresses and Mattress Pads

**Document:** CPSC-2010-0105-0003  
Comment from Katherine Whitson

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## Submitter Information

**Name:** Katherine Whitson

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## General Comment

I agree with the other guy.  
In addition, you're spending \$245 per carton of cigarettes that no longer exist and no one can smoke for this reason, which is causing \$70,000 in total annual costs.

# PUBLIC SUBMISSION

<b>As of:</b> March 18, 2011
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**Docket:** CPSC-2010-0105  
Standard for the Flammability of Mattresses and Mattress Pads

**Comment On:** CPSC-2010-0105-0001  
Standard for the Flammability of Mattresses and Mattress Pads

**Document:** CPSC-2010-0105-0004  
Comment from Alan Shuman

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## Submitter Information

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**Fax:** 202-393-1296  
**Organization:** National Association of State Fire Marshals

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## General Comment

Please see attached comment on this rulemaking from the National Association of State Fire Marshals

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## Attachments

**CPSC-2010-0105-0004.1:** Comment from Alan Shuman



NATIONAL ASSOCIATION OF STATE FIRE MARSHALS  
**Executive Committee**

January 3, 2011

Office of the Secretary  
U.S. Consumer Product Safety Commission  
Room 820  
4330 East West Highway  
Bethesda, MD 20814

Re: Docket No. CPSC-2010-0105

To the Commission:

The members of the National Association of State Fire Marshals (NASFM) are the senior fire officials in the United States and the District of Columbia. NASFM's mission is to protect life, property and the environment from fire and related hazards. We have consulted NASFM's Science Advisory Committee in the development of this comment.

This comment addresses the proposed rule outlined in the Federal Register notice of November 1, 2010, which would amend the Standard for the Flammability of Mattresses and Mattress Pads, 16 CFR Part 1632, to replace the conventional unfiltered Pall Mall cigarette currently specified in the test – which is no longer available for use in smoldering ignition tests – with a Standard Reference Material cigarette developed by the National Institute of Standards and Technology (NIST). The new Standard Reference Material cigarette, which is equivalent in ignition strength to the highest known strength unfiltered Pall Mall cigarette, would be designated SRM 1196.

NASFM is aware that the standard conventional cigarette specified in this standard and in smoldering ignition standards for other products has not been available anywhere, worldwide, for some time. We understand that, to the extent that the testing has been conducted by manufacturers and researchers at all, a reduced ignition propensity cigarette has been used, which the CPSC confirms can lead to variable results from test to test and manufacturer to manufacturer, in addition to subjecting the products to a weaker ignition source than is currently specified.

NASFM agrees with NIST and the CPSC that the need to maintain the level of safety established by the original standard is of primary importance. Lowering the strength of the ignition source would be tantamount to a policy decision by CPSC to make the standard less effective, as it would reduce the level of resistance to smoldering ignition sources currently required of mattresses and mattress pads.

National Association of State Fire Marshals  
Docket No. CPSC-2010-0105  
January 3, 2011  
Page 2 of 2

This cannot be allowed to happen, and thus NASFM supports the decision to maintain the ignition strength of the original test cigarette by specifying SRM 1196.

NASFM also believes that it is appropriate and important for the CPSC to move ahead with research at NIST to develop a longer-term solution to the problem of a standardized ignition source for smoldering ignition standards that is not subject to any significant performance changes over time. As noted in the staff briefing package for this proposal, research on a surrogate smoldering ignition source that is not a cigarette will begin in this fiscal year. NASFM applauds the CPSC for taking this step. Given that the lack of availability of a standardized smoldering ignition source is being faced worldwide, the CPSC's leadership in this area will result in a standard surrogate ignition source that would be available to researchers and manufacturers internationally.

We also refer you to several references in which non-cigarette surrogates were used in research to produce smoldering ignitions of fabrics, filling materials and furnishings. Cartridge heaters, diesel (engine) glow plug ignitions, and piezoelectric heaters are all viable alternatives to cigarettes in research to produce smoldering ignitions.

M. Day and T. Suprunchuk, "Technique for Evaluating Smoldering of Loose Fill Cellulose," *Journal of Consumer Product Flammability*, vol. 6, December 1979.

S. Gandhi, S. M. Spivak and B. Pourdeyhimi, "Computer aided infrared imagery for fabric surface temperature fields under simulated cigarette exposure," *Journal of Fire Protection Engineering*, vol. 7, no. 4, pp. 107-124, 1995.

S. Gandhi, S. M. Spivak and B. Pourdeyhimi, "Simulated cigarette ignition of upholstery fabrics using computer aided infrared imagery," *Textile Research Journal*, vol. 68, no. 9, pp. 687-696, September 1998.

S. Gandi and S M Spivak, Forum Letter, "Comments on cigarette ignition of upholstered furniture," *Journal of Fire Sciences*, vol. 14, no. 2, pp. 87-90, March/April 1996.

G. Damant, unpublished research at the California Bureau of Home Furnishings using a cartridge heater to reproduce test results obtained from Pall Mall cigarettes, 1970s.

Thank you for the opportunity to comment on this important rulemaking. Please contact Ms. Karen Deppa at 202-737-1226 if you have questions.

Sincerely,



Alan R. Shuman  
President

# PUBLIC SUBMISSION

<b>As of:</b> March 18, 2011
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**Docket:** CPSC-2010-0105  
Standard for the Flammability of Mattresses and Mattress Pads

**Comment On:** CPSC-2010-0105-0001  
Standard for the Flammability of Mattresses and Mattress Pads

**Document:** CPSC-2010-0105-0005  
Comment from Roger Berkley

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## Submitter Information

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**Phone:** 617-542-8220  
**Fax:** 617-542-2199  
**Submitter's Representative:** Hardy Poole  
**Organization:** National Textile Association

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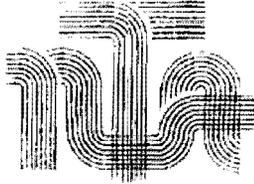
## General Comment

See attached file(s)

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## Attachments

**CPSC-2010-0105-0005.1:** Comment from Roger Berkley  
**CPSC-2010-0105-0005.2:** Comment from Roger Berkley



# National Textile Association

6 Beacon St., Ste. 1125  
Boston, MA 02108

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(617) 542-8220 • [info@nationaltextile.org](mailto:info@nationaltextile.org) • [www.nationaltextile.org](http://www.nationaltextile.org) • (617) 542-2199 fax

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August 3, 2009  
Sent via Email

Office of the Secretary  
Consumer Product Safety Commission  
Washington, DC 20207-0001  
[cpsc-os@cpsc.gov](mailto:cpsc-os@cpsc.gov)

Re: NIST Technical Note 1627

Dear Mr. Secretary:

The National Textile Association (NTA) is pleased to comment on the National Institute of Standards and Technology Technical Note 1627, "Modification of ASTM E 2187 for Measuring the Ignition Propensity of Conventional Cigarettes."

The NTA is the largest trade association representing the U.S. Textile Industry, and consists of textile companies that spin yarns; manufacture fabrics; and dye, finish and print fabrics. Our comments are submitted primarily on behalf of our Upholstery Fabrics Committee, a committee comprised largely of small businesses that manufacture an enormous number of upholstery fabric styles and products, many in lengths as small as 50 linear yards or shorter. Most products produced by these weavers of decorative fabric range in price from moderate to upper end, and they are sold to furniture manufacturers and distributors that service the upper end of the furniture and home remodeling markets.

Our upholstery fabric producers have been involved in the Commission's upholstered furniture flammability efforts since the 1970's and have cooperated in numerous testing programs and public meetings. We have seen this industry and its suppliers make terrific strides forward that make furniture safer, but we are convinced that no single regulatory effort can increase the level of safety as much as the requirement for reduced ignition propensity (RIP) cigarettes which now or soon will affect 99.8% of the U.S. Population according to the Coalition for Fire Safe Cigarettes (<http://www.firesafecigarettes.org/categoryList.asp?categoryID=9&URL=Home%20-%20The%20Coalition%20for%20Fire%20Safe%20Cigarettes>). We applaud this giant step that has been taken by state legislatures, and we expect it to reduce the fire losses for furniture and numerous other soft furnishings significantly.

The authors of the Note have done a good job of evaluating past technical information and reviewing the literature on this issue; however, they have made assumptions and formed recommendations that will make the standard reference material (SRM) ignition source more severe than the standard cigarette which has been used for upholstered furniture and fabric testing for three decades. Unfortunately, if the new SRM conforming to the NIST Technical Note is adopted, its more severe insult will cause fewer fabrics to pass the test for usage on Type I furniture than if the standard cigarette had been used.

Examining Table 2 on page 10, it's clear that over time, the percent of full length burns (PFLB) clearly decreases as the vintage years increase. Though the sampling might be small, the trend is clear. With this being the case, we question why the PFLB is not established using the most current information available. We expect that the most recent test data generated by interested parties, including CPSC, was likely generated using cigarettes of the newer vintage period.

An equally important issue which could have a large impact on the outcome of whether furniture and fabric smolder flammability tests pass or not are some of the parameters recommended by NIST for the SRM. For example, cigarette length data in table 3, column 2 averages 83.26 mm; however, the report recommends a SRM that measures 85mm +/- 2 mm, though no cigarette in the population examined measures this long. This fact also questions why the 85 mm +/- 2 mm is currently in the proposed upholstered furniture flammability standard if cigarettes routinely measure 83+ mm.

The projected cost of the new SRM is also an enormous issue for the small jacquard weavers who make up the upholstery fabrics sector that will be impacted mostly by the proposed standard. We understand that a standard carton (10 packs) of SRM cigarettes will sell for approximately \$188. Overall, the SRM cost alone will be approximately \$1 per cigarette, a cost exceedingly high compared to the previous standard cigarette and a cost that is enormously high for small textile companies that are suffering economically from the business downturn and each with an enormous number of SKUs.

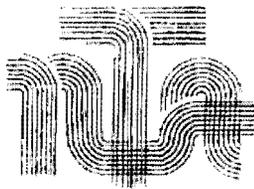
The overriding issue is why should the Agency support establishing a severe SRM and place a large order with a cigarette company for the product when the nation, almost in total, will be forbidden from selling the SRM-type of cigarettes in the near future. Taking this approach does not appear to have sound logic nor does it acknowledge the "real life" situation that we live in today – RIP cigarettes will soon be the only type available in the U.S. We ask that the Agency reconsider developing a SRM that depict the burning behavior of the old CPSC standard cigarettes and redirect efforts toward developing a substitute SRM that depicts RIP cigarettes which should be the ignition source for future textile-related activities.

We will be pleased to answer any questions regarding our comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Roger Berkley". The signature is fluid and cursive, with the first name "Roger" being more prominent than the last name "Berkley".

Roger Berkley  
Chairman,  
Upholstery Fabrics Committee and  
Chairman,  
National Textile Association



# National Textile Association

6 Beacon St., Ste. 1125  
Boston, MA 02108

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(617) 542-8220 • [info@nationaltextile.org](mailto:info@nationaltextile.org) • [www.nationaltextile.org](http://www.nationaltextile.org) • (617) 542-2199 fax

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January 18, 2011  
Sent via Email

Office of the Secretary  
Consumer Product Safety Commission  
Washington, DC 20207-0001  
[cpsc-os@cpsc.gov](mailto:cpsc-os@cpsc.gov)

Re: Docket No. CPSC-2010-0105

Dear Mr. Secretary:

The National Textile Association (NTA) is pleased to comment on the Consumer Product Safety Commission's (CPSC) proposal to amend the ignition source specified in the flammability standard for mattresses by substituting a standard reference material (SRM) in place of cigarettes. Our comments are directed at the SRM substitution only and do not address the mattress standard as a regulation.

The NTA is the national trade association representing the U.S. Textile Industry, and consists of textile companies that spin yarns; manufacture fabrics; and dye, finish and print fabrics. Our comments are submitted primarily on behalf of our Upholstery Fabrics Committee, a committee comprised largely of small businesses that manufacture an enormous number of upholstery fabric styles and products, many in lengths as small as 50 linear yards or shorter. Most products produced by these weavers of decorative fabric range in price from moderate to upper end, and they are sold to furniture manufacturers and distributors that service the upper end of the furniture and home remodeling markets.

NTA filed comments on August 3, 2009 which address the inappropriate ignition source (NIST Technical Note 1627) for upholstery fabric testing that this SRM represents. Our position, described in the August 3, 2009 letter, has not changed, and we incorporate this letter with these comments.

The ignition source described in NIST Technical Note 1627 is clearly an "over kill" because the material is designed to replicate cigarettes which are no longer available in the United States. Via a series of state laws, our entire nation is impacted by reduced ignition propensity (RIP) cigarettes which are prone to extinguish more readily than standard cigarettes such as that specified by CPSC for testing and which is the basis of the proposed SRM. The overly stringent SRM 1196 is not a reasonable ignition source since it does not depict "real world" conditions due to its highly elevated energy levels. This major change in ignition source should be reflected in the SRM required by CPSC for testing soft furnishings like upholstery fabrics.

Office of the Secretary  
January 18, 2011  
Page 2

In order to develop a reasonable, appropriate and practical ignition source for upholstery fabric testing, we strongly urge CPSC should ask NIST to develop a SRM to depict RIP cigarettes and thereby have a standard ignition source to evaluate upholstery fabrics that is indicative of our "real world" environment.

We will be pleased to answer any questions regarding our comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Roger Berkley". The signature is fluid and cursive, with the first name "Roger" being larger and more prominent than the last name "Berkley".

Roger Berkley  
Chairman,  
Upholstery Fabrics Committee and  
Chairman,  
National Textile Association

Copy: Upholstery Fabrics Committee

Enclosure: August 3, 2009 NTA Letter on NIST Technical Note 1627

# PUBLIC SUBMISSION

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<b>Submission Type:</b> Web

**Docket:** CPSC-2010-0105  
Standard for the Flammability of Mattresses and Mattress Pads

**Comment On:** CPSC-2010-0105-0001  
Standard for the Flammability of Mattresses and Mattress Pads

**Document:** CPSC-2010-0105-0006  
Comment from Ryan Trainer

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## Submitter Information

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**Organization:** International Sleep Products Association

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## General Comment

See attached file(s)

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## Attachments

**CPSC-2010-0105-0006.1:** Comment from Ryan Trainer



INTERNATIONAL  
SLEEP  
PRODUCTS  
ASSOCIATION

January 18, 2011

U.S. Consumer Product Safety Commission  
Office of the Secretary  
Room 502  
4330 East-West Highway  
Bethesda, MD 20814

Re: CPSC Docket No. CPSC–2010–0105; Standard for the Flammability of  
Mattresses and Mattress Pads; Proposed Rule to Amend 16 CFR Part  
1632; Comments of International Sleep Products Association

Dear Mr. Secretary:

The International Sleep Products Association (ISPA) submits these comments on behalf of the U.S. mattress industry to the Consumer Product Safety Commission (CPSC) regarding its proposal to amend the mattress standard now codified at 16 CFR Part 1632. 75 FR 67,047.

Please contact the undersigned if you have any questions regarding these comments.

Sincerely,

A handwritten signature in cursive script that reads "Ryan Trainer".

Ryan Trainer  
President  
International Sleep Products Association

**Comments submitted by  
The International Sleep Products Association**

**CPSC Docket No. CPSC–2010–0105**

**Standard for the Flammability of Mattresses  
and Mattress Pads**

**Proposed Rule to Amend 16 CFR Part 1632**

**January 18, 2011**

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**Comments submitted by  
The International Sleep Products Association**

**CPSC Docket No. CPSC–2010–0105  
Standard for the Flammability of Mattresses and Mattress Pads  
Proposed Rule to Amend 16 CFR Part 1632**

The International Sleep Products Association (ISPA) submits these comments on behalf of the mattress industry to the U.S. Consumer Product Safety Commission (CPSC) regarding its proposed rule to amend the mattress standard now codified at 16 CFR Part 1632. The CPSC proposes to amend Part 1632 “to require a standard reference material cigarette, which was developed by the National Institute of Standards and Technology, as the ignition source for testing to the mattress standard.”<sup>1</sup>

The mattress industry has a long history of working with the CPSC to develop standards that improve the safety of the products we make. ISPA has consistently supported standards that are effective in improving product safety, practical for mattress manufacturers to meet and allow manufacturers to make products that consumers will find comfortable and affordable. For the reasons discussed in more detail below, however, ISPA must object to the amendments to Part 1632 that the CPSC has proposed.

**Executive Summary**

Part 1632 in effect requires that mattresses be tested for vulnerability to ignition from a smoldering cigarette by using an unfiltered Pall Mall cigarette, given that was the “worst case” smoldering ignition threat that mattresses faced in 1972 when the predecessor to this standard was originally issued. Recently, the tobacco industry replaced these and all other cigarettes sold in the United States with so-called Reduced Ignition Propensity (RIP) cigarettes, designed to extinguish when left unattended. Research by the National Fire Protection Association shows that RIP cigarettes have the potential to reduce deaths resulting from cigarette-caused residential fires by 56-77%, compared to 2003 levels.

Given that non-RIP Pall Malls are no longer commercially available, the CPSC contracted with the National Institute of Standards and Technology (NIST) to develop a Standard Reference Material (SRM) for use in conducting Part 1632 burn tests. In developing this substitute, the CPSC sought an SRM that would be “safety neutral” with respect to the ignition strength of Pall Malls that existed in

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<sup>1</sup> Notice of Proposed Rule, published on November 1, 2010 in the Federal Register at 75 FR 67,047 (the Notice).

1972. The CPSC took this approach despite the fact that those 38 year-old cigarettes are no longer the fire threat that mattresses today face, having been replaced by RIP cigarettes. (As a practical matter, no 1972 vintage cigarettes were available for testing and no data on their ignition strength exists. Instead, the CPSC assumed that the burn characteristics of cigarettes made between 1992 and 2006 are an appropriate proxy for the unknown ignition strength of 1972 materials.)

Nevertheless, the CPSC accepted NIST's recommendation that the SRM (called SRM 1196) have a Percentage of Full-Length Burn (PFLB) level of 70-95 (which in practice will be approximately 90 PFLB in the SRM that NIST developed for the CPSC). (The rate recommended for SRM 1196 is substantially higher than the PFLB of 35-50 for unfiltered non-RIP Pall Mall cigarettes produced in 2008 and 2009 (that is, immediately before the tobacco industry converted to RIP technology), and an even lower rate for today's RIP cigarettes.) The CPSC now proposes to amend the standard to require the use of SRM 1196 in Part 1632 burn tests.

Section 4 of the Flammable Fabrics Act (FFA) describes the process that the CPSC must follow whenever it amends an existing standard like Part 1632. As discussed in more detail below, the CPSC has failed to meet these requirements. In particular:

- A. The CPSC has misidentified the objective of Part 1632. The standard was intended to address **current** real world risks, not those that existed 38 years ago. Likewise, the FFA requires the CPSC to address current safety risks, not risks that are nearly 40 years old.
- B. The CPSC failed to properly consider all regulatory alternatives and other standards relevant to amending Part 1632. For example:
  - i. The CPSC did not consider the extent to which its own Part 1633 standard makes Part 1632 redundant, despite the fact that the CPSC has issued an Advance Notice of Proposed Rulemaking (ANPR) to consider whether to revoke Part 1632 for this reason.
  - ii. The CPSC did not consider the potential impact of its outstanding ANPR regarding the flammability of bedclothes.
  - iii. The CPSC did not properly consider the tremendous potential of RIP cigarettes in reducing tobacco-caused mattress fires.
  - iv. The CPSC did not consider whether to specify an SRM based on the ignition strength of Pall Malls made in 2007 and 2008, immediately before the conversion to RIP cigarettes.
  - v. The CPSC relied on invalid or unsubstantiated reasons in rejecting the RIP-based SRM as an alternative to the 1972 "safety neutral" option that it now seeks to make mandatory.
- C. The CPSC has based much of its regulatory analysis on assumptions, presumptions or unsubstantiated theories. Nevertheless, this method of regulation by supposition is not authorized by law. Rather, Section 4 of

- D. The proposed amendment is not a modest technical change, but may result in a significant substantive change to the Part 1632 test that could impose major new costs on mattress manufacturers. It in effect nearly doubles the ignition strength to be used in Part 1632 testing compared to the ignition strength of unfiltered Pall Malls made in 2007 and 2008.

For these reasons, ISPA urges the CPSC to:

- Halt its proceeding to amend Part 1632 to require the use of SRM 1196 as the Part 1632 ignition source,
- Act on the industry's pending request to revoke Part 1632,
- Take into account the redundancy that currently exists between Parts 1632 and 1633, and the impact of RIP cigarettes on current and future residential fire safety, and
- During the time that it is considering these arguments, issue an interim rule that either temporarily suspends application of Part 1632 until these issues are resolved, or clarifies that unfiltered RIP Pall Malls may be temporarily used to conduct Part 1632 tests.

## **Background**

### **1. Part 1632 – The Cigarette-Ignition Standard**

The U.S. Department of Commerce promulgated the mattress flammability standard now codified at 16 CFR Part 1632 in 1972 pursuant to its authority under the Flammable Fabrics Act (FFA).<sup>2</sup> Congress subsequently transferred the authority to set and enforce this and other FFA standards to the CPSC.

Part 1632 requires that a mattress resist ignition by a smoldering cigarette. Specifically, it requires that a mattress prototype be exposed to at least 18 ignited cigarettes set at specific locations on a mattress surface and under different circumstances. At present, the CPSC requires that at least two sleep surfaces of each mattress prototype be tested in this manner. This results in a total of at least 36 cigarettes being consumed in this process.

Part 1632 specifies that the ignition source used when testing a mattress' fire performance shall be:

cigarettes without filter tips made from natural tobacco, 85 +/- 2 mm long with a tobacco packing density of 0.270 +/-0.02 g/cm<sup>3</sup> and a total weight of 1.1 +/-gm.<sup>3</sup>

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<sup>2</sup> 15 USC § 1191 et seq.

<sup>3</sup> 16 CFR § 1632.4(a)(2).

Given that this standard was intended to address real world ignition risks posed by cigarettes, regulators intended for the test to be performed using ordinary commercially available cigarettes purchased in the market that met these physical criteria. At the time that the standard was first promulgated, the cigarette specified in the standard was intended to describe unfiltered Pall Malls, which were generally considered to be the “worst case” ignition material on the market at the time. Regulators have not formally proposed to change this requirement until now.

Part 1632 has been credited (along with several other factors) with producing a significant improvement in consumer safety. For example, in announcing the publication of the final version of the open-flame mattress flammability standard (Part 1633, discussed below) in early 2006, the CPSC stated that Part 1632 “has been in place for more than 30 years during which deaths and injuries from mattress fires caused by smoking materials have fallen dramatically.”<sup>4</sup> In fact, according to the National Fire Protection Association (NFPA) smoking related home fires started in mattresses and bedding **have fallen by 92%** over the period 1980 to 2008.<sup>5</sup>

## **2. Subsequent Developments Relevant to Part 1632**

Over the last several years, several regulatory and market developments have occurred that are relevant to the nature of the fire risk posed by mattresses, the ignition strength of commercially available cigarettes that can be purchased in the market today, and the mattress industry’s regulatory obligations and cost of complying with Part 1632 and other consumer safety rules.

### **A. Bed Clothes Advance Notice of Proposed Rulemaking**

In 2005, concurrent with its promulgation of the proposed open-flame mattress flammability standard, to be codified at 16 CFR Part 1633, the CPSC also published an Advance Notice of Proposed Rulemaking (ANPR) for a standard to address the open-flame ignition of bedclothes (that is, top-of-bed accessories that may include pillows, comforters, etc.), and invited parties to comment on this notice.<sup>6</sup> The CPSC published its ANPR based on evidence that “[b]edclothes contribute substantially to the complexity and magnitude of the mattress fire hazard.”<sup>7</sup>

Several parties filed comments in response to this notice, but the CPSC has yet to publish a proposed rule regarding a flammability standard for bedclothes.

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<sup>4</sup> CPSC Approves New Flammability Standard for Mattresses; Federal standard could prevent 270 deaths each year, Release #06-091 (Feb. 16, 2006), <http://www.cpsc.gov/cpsc/pub/prere/06/06091.html>

<sup>5</sup> Hall, John R., The Smoking-Material Fire Problem, NFPA Fire Analysis and Research Division (Sept. 2010) at 4, <http://www.nfpa.org/assets/files/PDF/OS.Smoking.pdf>.

<sup>6</sup> 70 FR 2,514 (Jan. 13, 2005).

<sup>7</sup> Id. at 2,515.

## **B. Part 1633 – The Open-Flame Standard**

In 2006, the CPSC, with support and input from the mattress industry, promulgated a second mattress flammability standard, codified at 16 CFR Part 1633.<sup>8</sup> This standard, which became effective in 2007, requires that a mattress resist ignition from an open-flame heat source (such as a match, cigarette lighter or a candle). This test is conducted by exposing a mattress prototype to a large burner that is intended to represent the type of fire that occurs when a pillow or comforter has been ignited by a candle or a child playing with matches or a cigarette lighter.

The CPSC's Part 1633 standard is patterned on, but also more stringent than, an open-flame mattress flammability standard promulgated by California, known as California Technical Bulletin 603 (TB 603), which became effective in 2005. The test methods for both the state and federal standards are nearly identical, but the pass/fail criteria for the federal standard are more severe than TB 603's requirements. Moreover, the Part 1633 test is substantially more rigorous than the Part 1632 test, and exposes the mattress to a much hotter ignition source.

In the course of testing hundreds of different mattress prototypes under both TB 603 and Part 1633, the industry quickly realized that all prototypes that passed these open-flame standards also always passed the cigarette-ignition standard embodied in Part 1632. Based on these results, ISPA requested that the CPSC revoke the old Part 1632 standard because the new open-flame standard embodied in Part 1633 made the cigarette-ignition standard redundant and thus unnecessary. In 2005, the CPSC published an ANPR requesting public comment on ISPA's request.<sup>9</sup>

In its ANPR, the CPSC acknowledged the likelihood of overlap between Parts 1632 and 1633:

The essential question for the Commission in considering whether to proceed with rulemaking to revoke the standard (or amend it by eliminating some requirements) is what effect such revocation or modification would have on the risk of death or injury from fire due to cigarette ignition of mattresses. ***The recently proposed mattress flammability standard with its open flame test would likely address some of the risk of death and injury that is currently prevented by the existing mattress standard with its cigarette ignition test.*** The question is how much of the risk from cigarette ignition would remain or recur once an open flame test standard is in effect if there were no cigarette ignition test standard.

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<sup>8</sup> 71 FR 13,472 (Mar. 15, 2006).

<sup>9</sup> 70 FR 36,357 (June 23, 2005).

(Emphasis added.)<sup>10</sup>

ISPA and other parties filed comments in response to the ANPR, but the CPSC has taken no further regulatory action to date in connection with our request.

### **C. Advent of RIP Cigarette and NIST Research**

In tandem with efforts to improve the fire safety of mattresses and other consumer products in the home, safety regulators and the tobacco industry developed options for reducing the ignition risks posed by cigarettes. When a cigarette is left unattended (which can occur when a smoker carelessly discards a cigarette or falls asleep or passes out while smoking), it can continue to burn and ignite materials that are touching or near the cigarette. After years of research and testing, the tobacco industry developed a new product known as a Reduced Ignition Propensity (RIP) cigarette. The RIP cigarette was designed to reduce the number of residential fires ignited by smoldering cigarettes because the paper used to roll these cigarettes would stop it from burning when left unattended. (Other names commonly used for RIP cigarettes are “self-extinguishing” or “fire safe” cigarettes).

As increasing numbers of states began to require the use of RIP cigarettes within their jurisdictions, tobacco manufacturers converted their products to the RIP technology. Today, all 50 states have enacted laws requiring that cigarettes meet the RIP requirements, and those laws are in effect in 49 states (with Wyoming's law slated to become effective in a matter of months, on July 1, 2011).<sup>11</sup> As a result, in about 2009, new RIP products gradually replaced the unfiltered Pall Mall cigarettes that had been used for over 30 years to perform the Part 1632 cigarette ignition tests.

The NFPA has examined the impact of RIP cigarettes on public safety in a report published late last year.<sup>12</sup> Its analysis demonstrates that the RIP cigarette will be a major “game changer” in terms of improving public safety by significantly reducing the number of fires and related deaths caused by smoldering cigarettes. The NFPA compared the incidence of residential fires ignited by smoking materials both before and after enactment of state RIP cigarette mandates. In New York (the first state to require RIP cigarettes), NFPA compared “smoking material fire deaths” for the periods 2000-02 (before the RIP cigarette requirement in New York) and 2006-08 (following enactment and implementation of the requirement in New York in 2003 and 2004,

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<sup>10</sup> Id. at 36,360.

<sup>11</sup> Coalition for Fire-Safe Cigarettes, State-by-state efforts, <http://www.firesafecigarettes.org/itemDetail.asp?categoryID=93&itemID=1295&URL=Legislation%20updates/State-by-state%20efforts#wyoming> .

<sup>12</sup> Hall, John R., The Smoking-Material Fire Problem, NFPA Fire Analysis and Research Division (Sept. 2010), <http://www.nfpa.org/assets/files/PDF/OS.Smoking.pdf> .

respectively). NFPA concluded that those data “impl[y] a 41% reduction in those fire deaths.”<sup>13</sup>

NFPA also examined fire statistics for 18 more states that had mandated the use of RIP cigarettes by 2008. Depending on how the data are analyzed, NFPA concluded that in 2008, tobacco related fire deaths in those additional states fell by between 21-29%.<sup>14</sup>

Overall, NFPA concluded:

A simple projection linking the percentage decline in fires or fire deaths to the percentage of smokers covered would suggest that when the [RIP cigarette] law is fully effective across the entire country (in late 2012) [that is, after the laws in all states become effective and remaining supplies of non-RIP cigarettes are depleted], **the reduction in fires should reach 50-70% and the reduction in fire deaths should reach 56-77%**, both relative to levels in 2003, the last year before the fire-safe cigarette law was effective in any state.<sup>15</sup>

(Emphasis added.)

In response to the fact that a non-RIP version of unfiltered Pall Malls was no longer commercially available on the market, the CPSC contracted with the National Institute of Standards and Technology (NIST) in 2008 to develop a surrogate for the discontinued cigarette. The CPSC requested that NIST develop a test method for assessing a cigarette’s ignition strength that would lead to the development of a NIST Standard Reference Material (SRM) cigarette for use in Part 1632 (and other standards that use an unfiltered non-RIP Pall Mall cigarette as an ignition source).

NIST published the results of its research in 2009.<sup>16</sup> In approaching this assignment, NIST stated:

To ensure continuation of the same degree of cigarette ignition resistance shown by today's soft furnishings, the replacement standard ignition source (SIS) must be at least as potent as the CTC [Current Test Cigarette]. A weaker SIS would allow more susceptible furnishing composites to enter the market, effectively weakening the existing and proposed flammability rules.

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<sup>13</sup> Id. at ii.

<sup>14</sup> Id.

<sup>15</sup> Id. at i.

<sup>16</sup> “NIST Technical Note 1627: Modification of ASTM E 2187 for Measuring the Ignition Propensity of Conventional Cigarettes,” June 2009 (NIST Note), <http://www.cpsc.gov/volstd/research/nistastm.pdf>.

***For the SIS to be a “safety-neutral” replacement for the CTC, testing using the SIS should generally fail all furnishing materials and composites that fail presently and pass all that pass presently.***

Arriving at a truly equivalent ignition source requires careful replication of the properties of the CTC and/or enhanced knowledge of the physics of the ignition process.

(Emphasis added.)<sup>17</sup>

In other words, NIST intended to take a “safety-neutral” approach in developing an SIS that would replicate the CTC – that is, the test cigarette in use in 2008 before the conventional unfiltered Pall Malls were converted to RIP products. Thus, it would appear that NIST wanted to preserve the status quo as of 2008 so that those mattress prototypes that passed Part 1632 using the CTC in use at that time would also pass using the SIS, and those that failed the test using the 2008 CTC would also fail using the SIS.

Yet in making its SRM recommendations, NIST took a significantly different approach. Apparently using cigarette specimens taken from products that it happened to have stored, NIST tested the ignition strength of 17 batches of unfiltered “CTC” cigarettes manufactured in 1992, 2001, 2006, 2007 and 2008.<sup>18</sup> Although the report does not state that these were Pall Mall cigarettes, the reference to them being CTCs implies that they were. Evidently, NIST had access to no cigarettes manufactured in any other years. The report does not state why NIST chose to store cigarettes from some vintages, but not others. It is also unclear from the report whether and to what extent NIST confirmed that the CTC cigarettes it tested were typical of the hundreds of millions – if not billions – of Pall Mall unfiltered cigarettes manufactured between 1972 (when the predecessor to Part 1632 was promulgated) and 2008.

Among other things, NIST measured the “percentage of full-length burns (PFLB)” for cigarettes from each vintage year. The PFLB is an indication of the “ignition strength” of the cigarette. NIST’s report states that “[a] cigarette of high ignition strength continues burning its full length,” while one that does not continue to burn has a lower ignition strength.<sup>19</sup>

Based on the cigarettes tested, NIST found that the average PFLB was 89% for the 1992 samples (with actual observations ranging from 84-95%), and in general dropped in later years to an average PFLB of 47% in 2008 (with 2007 being the low at 35%). NIST concluded that “[t]he test results for the 1992, 2001, and 2006 vintage cigarettes are not significantly different,” and recommended that the SRM for Part 1632 have a PFLB of 70-95%, based on the PFLB for

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<sup>17</sup> Id. at 2.

<sup>18</sup> Id. at 9-10.

<sup>19</sup> Id. at 4.

1992, 2001 and 2006.<sup>20</sup> In making its SMR recommendations, NIST disregarded the PFLB data for 2007 and 2008 vintage Pall Malls, which correspond to the two years before the non-RIP cigarettes were replaced with RIP versions. The actual PFLBs that NIST measured for the 2007 and 2008 cigarettes tested ranged from 35-50%.<sup>21</sup>

ISPA filed comments with CPSC objecting to NIST's recommendations. ISPA argued that far from taking a "safety-neutral" approach to recommending surrogate criteria to the CPSC, NIST deliberately rejected data for cigarettes from 2007 and 2008, which were in fact the "current test cigarette" at the time the tobacco industry converted fully to RIP technology. NIST made no effort to preserve the status quo that existed in 2008, and instead recommended that the SRM have a significantly higher ignition strength, based on tests of cigarettes had not been manufactured since 1992.

ISPA requested that the CPSC reject NIST's recommendations and instead base the SRM on the ignition strength of the "current test cigarette" in use in 2008 in order that this change in fact be "safety neutral."

#### **D. Impact of Consumer Product Safety Improvement Act on Part 1632**

In 2008, Congress enacted the Consumer Product Safety Improvement Act (CPSIA). The CPSC's implementation of the CPSIA with respect to mattresses has increased the regulatory burdens of meeting the requirements of Part 1632.

The first of these new Part 1632-related obligations is the CPSIA requirement that a "certificate of conformity" accompany all shipments of products subject to CPSC-administered standards, including mattresses.<sup>22</sup> Among other things, this certificate must specify the date and place where the product was tested for compliance with each relevant CPSC standard, and identify the laboratory on whose testing the certification depends.<sup>23</sup>

The range of products manufactured and sold by most mattress manufacturers requires them to test multiple product prototypes. In practice, the certification requirement means that manufacturers subject to this rule must carefully track when they test their CPSC-regulated products and confirm that their certificates of conformity are properly updated. As a result, many manufacturers have

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<sup>20</sup> *Id.* at 10.

<sup>21</sup> *Id.* In addition to measuring the PFLB of these cigarettes, NIST also measured the length, mass, circumference and density of the tested cigarettes. Although the physical characteristics of the tested cigarettes differed somewhat from the nominal requirements and tolerances specified in 16 CFR § 1632.4(a)(2), NIST recommended that the nominal measurements and tolerances for the SRM remain unchanged. The CPSC's proposed amendment accepts this recommendation.

<sup>22</sup> 73 FR 68,328 (Nov. 18, 2008).

<sup>23</sup> Sample General Certification of Conformity prepared by CPSC, points 6-7, <http://www.cpsc.gov/about/cpsia/faq/elecfaq.pdf>.

designated a specific company employee to be specifically responsible for this new regulatory obligation, increasing the manufacturer's costs and compliance risks. Each time that a new Part 1632 test is performed on a given mattress prototype, the manufacturer now has additional regulatory and recordkeeping obligations other than those set by Part 1632 itself, and must update its certificate of conformity accordingly.

The second CPSIA requirement that affects a manufacturer's Part 1632 obligations concerns a new rule that all CPSC-required testing of children's products (that is, products intended primarily for consumers 12 and under) be conducted by labs that the CPSC has accredited.<sup>24</sup> Historically, Part 1632 tests have either been conducted by the mattress manufacturers themselves or their components suppliers. The cost of Part 1632 tests performed for prototypes used for children's products will now increase given that this new rule requires that these (and other mattress tests like Part 1633) may now be performed only by accredited labs, most of whom are currently independent third parties that charge manufacturers a fee to conduct these tests.

### **3. The CPSC's Proposal to Amend Part 1632**

The CPSC proposes to amend Part 1632 to specify a standard reference material available from NIST named SRM 1196, based on the recommendations in NIST's Technical Note 1627. Specifically, the CPSC proposes that the SRM have an ignition strength of 70-95 PFLB.<sup>25</sup> In practice, ISPA understands that NIST's SRM 1196 has a PFLB of 90 +/- 2.1%.<sup>26</sup> (By comparison, the actual PFLBs that NIST measured for the 2007 and 2008 non-RIP cigarettes tested, which it excluded from the data used in its recommendations to the CPSC, ranged (as noted above) from 35-50%.)<sup>27</sup>

In proposing this change, the CPSC makes no effort to preserve the status quo that existed when the unfiltered non-RIP Pall Mall cigarette used for 36 years to test mattresses under Part 1632 was replaced in 2009 with the new RIP cigarette. Rather than specify an SRM that would be "safety neutral" circa 2008, the CPSC instead selected an SRM that would revert to cigarettes having a 1972 ignition strength, in order to achieve a safety level that existed when Part 1632's predecessor was first promulgated in 1972.

But there were several problems with the CPSC's circa 1972 "safety-neutral" objective. Most importantly, the CPSC lacked any data on the subject, given that "no cigarette ignition test data to characterize the ignition propensity of cigarettes

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<sup>24</sup> 75 FR 28,336 (May 20, 2010).

<sup>25</sup> 75 FR at 67,049.

<sup>26</sup> NIST SRM 1196 Certificate of Analysis, <https://www-s.nist.gov/srmors/certificates/1196.pdf?CFID=1331788&CFTOKEN=e2eb3c7a64dd2856-9AA5B3C5-AE90-C856-FA3DF0FEA64EDC33&jsessionid=f030c4c27a80499c94533e2e347244230593>.

<sup>27</sup> NIST Technical Note 1627 at 10.

from 1972, when the Standard was promulgated” exists.<sup>28</sup> To fill this big gap, the CPSC sought an SRM, based on the historical data collected from NIST’s tests, that is “equivalent in ignition strength to the previous highest known strength unfiltered Pall Mall cigarette.”<sup>29</sup> Thus, the CPSC used NIST’s test data for cigarettes from 1992 to approximate 1972 conditions so that the new SRM cigarette is “equivalent to the original test cigarette”<sup>30</sup> – that is, the unfiltered Pall Mall that existed in 1972.

The CPSC listed two potential benefits from this approach:

- i. Since the SRM would have an historically “worst case” ignition strength, the “level of protection provided by the Standard would neither increase nor decrease as a result.”
- ii. Even if adequate supplies of unfiltered non-RIP Pall Mall’s were available, the variability in the performance of these now-replace cigarettes “may lead to an unacceptably low level of test outcome reproducibility,” which “could lead to unnecessary additional testing,” and outcome that could be reduced by use of the proposed SRM 1196.<sup>31</sup>

### **Regulatory Alternatives**

The CPSC considered and rejected the following regulatory alternatives:

#### **A. Alternative SRM based on Performance of RIP Cigarettes**

The CPSC considered whether to specify an SRM based on the “worst case” RIP cigarettes currently available in the market. It noted that this approach had three advantages:

- i. It would address the reproducibility issue noted above.
- ii. It would better approximate the fire risk posed by current cigarettes.
- iii. Another NIST-developed SRM (SRM 1082) already exists (used by labs to calibrate equipment used to test the performance of RIP cigarettes under ASTM standard (E-2187-04)) that could be specified as the ignition source in Part 1632.<sup>32</sup>

Nevertheless, the CPSC rejected this alternative for reasons that included the following:

- i. Compared to the proposed high ignition strength SRM 1196, a lower ignition strength SRM 1082 would not be

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<sup>28</sup> 75 FR at 67,048.

<sup>29</sup> Id. at 67,049.

<sup>30</sup> Id.

<sup>31</sup> Id. at 67,050.

<sup>32</sup> Id. at 67,052.

“equivalent or ‘safety neutral.’” The CPSC reaches this conclusion based on a cascade of factual presumptions, assumptions and unsubstantiated theories, including:

1. “[T]he presumption that the use of such cigarettes would result in a less stringent flammability test.”
2. Acknowledging that although it lacks any data “to describe the extent of this potential difference,” the CPSC nevertheless theorizes that “it is quite possible that more mattress construction prototypes would pass a test using a lower ignition propensity SRM than do currently with commercially available cigarettes.”
3. If this circumstance exists, the CPSC assumes that it “may result in an unknown, but potentially adverse, impact on the level of safety benefits provided by the Standard.”

The CPSC cites no test data or other empirical evidence to support these points.<sup>33</sup>

- ii. The use of a lower propensity ignition source like SRM 1082 “appear[s] to be incompatible with” the Part 1632 test.
  1. Since Part 1632 allows up to three relights to achieve a full length burn, the CPSC assumes “[i]t is likely” either that the tester would waste many cigarettes in trying to complete the test, or the test could not be completed. As above, the CPSC cites no test data or other empirical evidence to support this rationale.
  2. The CPSC assumes that since SRM 1082 is not intended to represent “a typical or representative” RIP cigarette, “[i]t clearly would not represent a ‘worst case’ RIP cigarette.” (Nevertheless, as noted below, it appears that CPSC has neither determined which product would be a worst case RIP cigarette, what its ignition strength is and how that compares to the ignition strength of SRM 1082.)
  3. The length and density of SRM 1082 is different from that specified as the test cigarette in Part 1632.<sup>34</sup>
- iii. The ignition behavior of a worst case RIP cigarette has not been characterized. Thus, “[i]nsufficient research exists to support a new and different, low ignition propensity SRM,” and even if such an SRM existed, it would “likely” require “a variety of as-yet-unknown” changes to Part 1632. Therefore, the proposed amendment to Part 1632 is

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<sup>33</sup> Id.

<sup>34</sup> Id.

necessary in order to implement a short-term solution because there is not enough time to develop an alternative. In other words, SRM 1196 is preferable to an SRM designed to mimic to a real world worst case RIP cigarette because it would take time (“likely” an “as-yet-unknown” amount of time) to perform the work necessary to define such a low ignition SRM.<sup>35</sup>

Elsewhere in the notice, the CPSC offers the following additional reasons for rejecting this alternative:

- i. State laws requiring RIP cigarettes allow up to 25% of the product to burn its full length like non-RIP cigarettes.
- ii. Of the 50 states that now or will soon require RIP cigarettes, only eight require audits to confirm compliance.
- iii. The “extent of fire safety gains due to these circumstances is uncertain.”
- iv. Specifying an RIP cigarette as the Part 1632 ignition source “could reduce the level of fire safety” provided by the standard.<sup>36</sup>

#### **B. Take No Action**

If the CPSC were to take no action to amend Part 1632, parties would continue to conduct the necessary tests using available cigarettes that met the physical requirements of 16 CFR § 1632.4(a)(2). The only advantage of this alternative cited by the CPSC is the cost savings that would be achieved from not having to use SRM 1196 cigarettes at a cost of approximately \$250/carton, plus a high shipping cost to keep the SRM refrigerated.

The disadvantages to this approach that CPSC cites are:

- i. Lack of consistent test material, leading to uncertainty and confusion.
- ii. Waste of cigarettes resulting from having to relight multiple times.
- iii. Irreproducible results.<sup>37</sup>

\* \* \* \*

Absent from the CPSC’s analysis of regulatory alternatives is any discussion of:

- A. Rescinding Part 1632 in light of Part 1633.
- B. The impact of a flammability standard on bedclothes on the need and nature of Part 1632.

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<sup>35</sup> Id.

<sup>36</sup> Id. at 67,049.

<sup>37</sup> Id. at 67,052.

- C. Creation of an SRM based on the non-RIP unfiltered Pall Mall cigarette that existed in 2008 in order that the surrogate be “safety neutral” as of the transition to RIP cigarettes.

### **The CPSC’s Proposed Findings**

The CPSC concludes the discussion of its reasons for proposing to amend Part 1632 with a brief summary of “proposed findings” that include the following:

- A. Amending Part 1632 to require the use of SMR 1196 is necessary “to adequately protect the public against unreasonable risk of the occurrence of fire,” given that Part 1632 “specifies as the ignition source cigarettes that are no longer being produced.”<sup>38</sup> SRM 1196 is necessary for Part 1632 to remain effective, and to permit reliable testing results.
- B. Amending Part 1632 to require the use of SRM 1196 “is reasonable, technologically practicable, and appropriate.”<sup>39</sup>
- C. “[A] reasonable relationship between [the] benefits and costs of the proposed amendment” exist because amending Part 1632 to require the use of SRM 1196 “would allow testing to the Standard to continue without interruption, would maintain the effectiveness of the Standard, and would not significantly increase testing costs to manufacturers and importers of mattresses and mattress pads.”<sup>40</sup>
- D. “[T]he proposed amendment imposes the least burdensome requirement that would adequately address the risk of injury” because “[n]o other alternative would allow the Standard’s level of safety and effectiveness to continue.”<sup>41</sup>

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<sup>38</sup> Id. at 67,054.

<sup>39</sup> Id.

<sup>40</sup> Id.

<sup>41</sup> Id.

## Argument

### The Proposed Amendment Violates the Flammable Fabrics Act

As the CPSC acknowledges, Section 4 of the Flammable Fabrics Act (the FFA) sets forth a number of requirements that the agency must meet before it may amend an existing federal flammability.<sup>42</sup> The CPSC's proposal to amend Part 1632 to require the use of SRM 1196 satisfies none of these requirements. Therefore, the CPSC must halt this rulemaking proceeding until it does.

1. **Section 4 requires the CPSC –**
    - A. **to find that a proposed amended standard is needed to protect the public against an unreasonable risk of fire,**
    - B. **to identify the nature of the risk of injury that would be addressed by the amended standard,**
    - C. **to describe reasonable alternatives to the proposed amended standard,**
    - D. **to consider existing standards that might be relevant to the proceeding, and**
    - E. **to describe the potential costs and benefits of the proposed standard**
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The CPSC may amend an existing standard only if, on the basis of research and investigation, it concludes that an appropriate amended standard is needed “to protect the public against unreasonable risk of the occurrence of fire leading to death or personal injury, or significant property damage.”<sup>43</sup> The CPSC must define the “nature of the risk of injury” that the amended standard would address,<sup>44</sup> and make findings that the amended standard is:

needed to adequately protect the public against unreasonable risk of the occurrence of fire leading to death, injury, or significant property damage, is reasonable, technologically practicable, and appropriate, is limited to such fabrics, related materials, or products which have been determined

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<sup>42</sup> 15 U.S.C. § 1193.

<sup>43</sup> 15 U.S.C. § 1193(a) provides:

Whenever the Commission finds on the basis of the investigations or research conducted pursuant to section 14 of this title, [15 U.S.C. § 1201] 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.

<sup>44</sup> 15 U.S.C. § 1193(g)(1).

to present such unreasonable risks, and shall be stated in objective terms.<sup>45</sup>

The CPSC's regulatory analysis must also, among other information, contain:

(1) "a preliminary description of the potential benefits and potential costs of the proposed regulation,"<sup>46</sup> and

(2) "a description of any reasonable alternatives to the proposed regulation, together with a summary description of their potential costs and benefits, and a brief explanation of why such alternatives should not be published as a proposed regulation."<sup>47</sup>

The reasonable alternatives that the CPSC must consider include "information with respect to any existing standard known to the Commission which may be relevant to the proceedings, together with a summary of the reasons why the Commission believes preliminarily that such standard does not eliminate or adequately reduce the [identified] risk of injury."<sup>48</sup>

## **2. The CPSC has not met the requirements of Section 4**

### **A. The CPSC has misidentified the objective of Part 1632**

The CPSC's proposed amendment to Part 1632 is based on a fundamentally flawed premise. The CPSC incorrectly assumes that the proposed amendment to Part 1632 must replicate the "worst case" cigarettes that existed in 1972, when the standard was first promulgated. The CPSC claims that amending Part 1632 to require the use of SMR 1196 is necessary to protect the public against an unreasonable risk of the occurrence of fire, given that Part 1632 specifies as the ignition source a type of non-RIP cigarette that is no longer produced.<sup>49</sup> Nevertheless, the CPSC's intent to replicate 1972 cigarette ignition conditions is made impossible by the lack of ignition strength data for 1972 vintage cigarettes. The CPSC instead has used data from 1992 to 2006 as a proxy for 1972 information.

In taking this convoluted path, however, the CPSC has misunderstood the purpose served by Part 1632. Section 4 of the Flammable Fabrics Act requires the CPSC to protect consumers against "an unreasonable risk of the occurrence of fire leading to death or personal injury, or significant property damage."

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<sup>45</sup> 15 U.S.C. § 1193(b).

<sup>46</sup> 15 U.S.C. § 1193(i)(1).

<sup>47</sup> 15 U.S.C. § 1193(i)(4).

<sup>48</sup> 15 U.S.C. § 1193(g)(2).

<sup>49</sup> *Id.* at 67,054.

What kind of risk is it that Congress intended to encompass in this phrase? Is it a theoretical risk? One that might occur if a consumer were to act in an illogical or wholly unforeseen fashion (like leaving a 1972 vintage cigarette to smolder on a mattress)? Is it a risk from some distant time in the past, one that might have existed 20, 50 or even 100 years ago, but not today? Or is it a current risk that exists now in the real world?

The FFA requires that all amendments to existing flammability standards be done with reference to current conditions, not those that existed in the past. Specifically, Subsection 4(b) provides in relevant part:

Each . . . amendment [to an existing flammability standard] . . . promulgated pursuant to this section **shall be based on findings that such . . . amendment . . . is needed** to adequately protect the public against unreasonable risk of the occurrence of fire leading to death, injury, or significant property damage, **is reasonable**, technologically practicable, and appropriate, **is limited** to such . . . products which have been determined to present such unreasonable risks, and shall be stated in objective terms.

(Emphasis added.)

Thus, the only logical interpretation is that Section 4 requires that amended flammability standards address current, real world risks that exist today.

As a result, Part 1632 was designed to respond to “real world” fire risks involving mattresses ignited by cigarettes. As such, regulators intended for the test to be performed using ordinary commercially available cigarettes purchased in the market that met specific physical criteria. At the time that the standard was first promulgated, the cigarette specified in the standard was intended to describe unfiltered Pall Malls, which were generally considered to be the “worst case” ignition material Available in the market at the time.

A cigarette is a product that typically is consumed relatively soon after its manufacture. Unless refrigerated, it becomes stale relatively quickly. Furthermore, as the NFPA report on the impact of RIP cigarettes discusses, once a state adopts an RIP requirement, non-compliant cigarettes have left the market within 1-2 years after the requirement goes into effect. This means that the real world risk that cigarettes pose to mattresses is those cigarettes manufactured within the past 12-24 months.

Therefore, the ignition strength of a 1972 unfiltered Pall Mall (or for that matter, cigarettes manufactured in 1992) should be irrelevant to whether a mattress passes Part 1632. As a result, the CPSC has erred in focusing exclusively on an SRM that is “safety neutral” as of 1972. The risk of fires caused by cigarettes

made today (and for the past 12-24 months) is the real risk that Part 1632 should address.

The CPSC seeks to amend Part 1632 to require the use of 1972 cigarettes because NIST's analysis of cigarette samples manufactured in different years between 1992 and 2008 in general show a falling PFLB. Assuming for the sake of argument that NIST's tests were sufficient to provide a basis on which the CPSC could rely, what if the NIST data instead had shown that the PFLB was **increasing** since 1972, and NOT decreasing? Would the CPSC still be focused so intently on amending Part 1632 to specify a nearly 40-year old cigarette as the ignition source? Of course not.

The **purpose** of Part 1632 should be the same as it was in 1972, but not necessarily the **ignition source**. Just as safety regulators did in 1972, the CPSC in 2011 should take regulatory action regarding Part 1632 that will protect consumers from current real world risks. The question that the CPSC should be asking is: What is the "worst case" commercially available cigarette sold in the market today?

The CPSC's premise that the cigarette used in Part 1632 tests must harken back to Pall Malls made nearly 40 years ago is not only mistaken, but it is wrong as a matter of law.

**B. The CPSC failed to properly consider all regulatory alternatives and other standards relevant to amending Part 1632**

The CPSC considered two regulatory alternatives to SRM 1196 and rejected them for inadequate reasons. The alternatives it considered were:

- o An SRM based on the "worst case" RIP cigarettes currently available in the market.
- o No action.<sup>50</sup>

None of the following CPSC reasons for rejecting a lower strength SRM hold up under scrutiny:

1. The CPSC argues that compared to the proposed high ignition strength SRM 1196, a lower ignition strength SRM like the SRM 1082 would not be "equivalent or 'safety neutral'" to the 1972 unfiltered Pall Mall.<sup>51</sup> As noted in the preceding section of these comments, the CPSC's premise that Part 1632 requires the use of an SRM with an ignition strength from 1972 is wrong.
2. The CPSC assumes "[i]t is likely" either that a tester using a lower ignition strength SRM would waste many cigarettes in trying to complete the Part

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<sup>50</sup> 75 FR 67,052.

<sup>51</sup> *Id.*

1632 test, or the test could not be completed.<sup>52</sup> The CPSC's rejection, however, is based on hunches, with no test data to support this conclusion.

3. The CPSC states that since SRM 1082 is not intended to represent "a typical or representative" RIP cigarette, "[i]t clearly would not represent a 'worst case' RIP cigarette."<sup>53</sup> Yet a few sentences later, the CPSC admits that the ignition behavior of a worst case RIP cigarette has not been characterized. Thus, "[i]nsufficient research exists to support a new and different, low ignition propensity SRM," and even if such an SRM existed, it would "likely" require "a variety of as-yet-unknown" changes to Part 1632.<sup>54</sup>

Based on this analysis, it would seem that the CPSC's rejection of SRM 1082 or another lower ignition propensity cigarette is premature given the lack of data on the subject. If insufficient research exists to address these issues, it makes more sense to conduct that research, identify which is the worst case RIP cigarette, measure its ignition strength and consider how that compares to the ignition strength of SRM 1082. Only then can the CPSC properly evaluate which regulatory alternative is the best.

4. The CPSC argues that SRM 1196 should be used because it meets the size and density requirements in Part 1632, as compared to SRM 1082, which does not.<sup>55</sup> This seems like a highly superficial reason for rejecting this option. If the SRM 1082 alternative is superior to SRM 1196, then that should be adopted and the corresponding changes to Part 1632 should be made, rather than adopting a rough replica of an archaic cigarette that meets the physical parameters of that now extinct cigarette species.
5. Of the 50 states that now or will soon mandate RIP cigarettes, only eight require audits to confirm compliance.<sup>56</sup> In making this point, the CPSC implies that in the 42 states that do not audit compliance, the fire performance of RIP cigarettes might be worse than in the eight states that do. Given the national scope of the tobacco industry and the uniformity with which all 50 states now or soon will require the use of RIP cigarettes, this seems extremely unlikely. The likelihood of a tobacco company manufacturing cigarettes differently depending on whether they are destined for sale in an auditing or a non-auditing state seems remote to non-existent, and provides an extraordinarily weak basis for rejecting the SRM 1082 alternative.
6. The "extent of fire safety gains due to these circumstances [that is, the use of RIP cigarettes] is uncertain."<sup>57</sup> The CPSC, however, makes no reference to

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 67,049.

<sup>57</sup> *Id.*

the findings in the NFPA study that, based on strong reductions in tobacco-related fires in 19 states that had implemented RIP requirements, resulting deaths could be reduced by up to 77%:

A simple projection linking the percentage decline in fires or fire deaths to the percentage of smokers covered would suggest that when the [RIP cigarette] law is fully effective across the entire country (in late 2012) [that is, after the laws in all states become effective and remaining supplies of non-RIP cigarettes are depleted], **the reduction in fires should reach 50-70% and the reduction in fire deaths should reach 56-77%**, both relative to levels in 2003, the last year before the fire-safe cigarette law was effective in any state.<sup>58</sup>

(Emphasis added.)

Perhaps the CPSC did not include the NFPA's findings in its discussion of regulatory alternatives because that study was published in September 2010, and the CPSC's notice proposing to amend Part 1632 is dated October 26, 2010. In any event, given that the NFPA study resolves some of the uncertainties that the CPSC raised, the agency should revisit this important issue. In particular, given the significant positive impact of RIP cigarettes on residential fires, the CPSC needs to consider whether amending Part 1632 to require the use of a worst case RIP cigarette would be the better regulatory alternative. This approach might necessitate other amendments to the standard (such as, to the physical dimensions of the cigarette, the number of times a cigarette may be relit, etc.).

The CPSC's analysis also omitted some notable regulatory alternatives and other standards. Analysis of each of these points is critical in determining whether amending Part 1632 to require the use of SRM 1196 is the best alternative.

For example:

1. Part 1633: As noted above, the CPSC in 2005 published an ANPR requesting comment on whether to revoke Part 1632 based on the fact that Part 1633 makes the cigarette ignition standard redundant. In that ANPR, the CPSC noted:

The recently proposed mattress flammability standard with its open flame test would likely address some of the risk of death and injury that is currently prevented by the existing mattress standard with its cigarette ignition test.<sup>59</sup>

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<sup>58</sup> Hall, John R., The Smoking-Material Fire Problem, NFPA Fire Analysis and Research Division (Sept. 2010) at i, <http://www.nfpa.org/assets/files/PDF/OS.Smoking.pdf>.

<sup>59</sup> 70 FR 36,357, 36,360 (June 23, 2005).

The CPSC has yet to announce whether it will proceed with revoking Part 1632 or rescinding its ANPR. At the same time, the CPSC has given no indication that it now disagrees with the statement quoted above.

Therefore, before the CPSC proceeds further with amending Part 1632, it should first decide whether or not it will act on the 2005 ANPR to revoke Part 1632. The relevant question under Section 4 of the Act is, if Part 1632 were revoked, how would that affect “risk of the occurrence of fire leading to death or personal injury, or significant property damage”? Would that risk be addressed by a combination of the more robust requirements of Part 1633 as well as the positive impact of RIP cigarette laws?

At the very least, the CPSC must take into account the extent to which Part 1633, as stated above, addresses some of the risks currently addressed by Part 1632.

2. Bedclothes Standard ANPR: Similarly, the CPSC made statements in its 2005 ANPR regarding a possible flammability standard for bedclothes that bear on whether to amend Part 1632, and that the agency therefore must consider in its regulatory analysis. The CPSC based its ANPR on evidence that “[b]edclothes contribute substantially to the complexity and magnitude of the mattress fire hazard.”<sup>60</sup>

Mattresses usually are covered with bedclothes. As a result, mattresses are seldom ignited by a cigarette that is in direct contact with the mattress surface. Instead, a smoldering cigarette usually ignites a mattress only indirectly, after it first ignites the bedclothes. Therefore, the CPSC needs to take into account the interaction between the issues identified in this ANPR before it takes further action to amend Part 1632.

3. SRM Based on 2008 Unfiltered Pall Malls: In its Technical Note 1627, NIST stated that it intended for its proposed SRM to be “safety neutral,” which it described as follows:

***For the SIS [standard ignition source] to be a “safety-neutral” replacement for the CTC, testing using the SIS should generally fail all furnishing materials and composites that fail presently and pass all that pass presently.*** Arriving at a truly equivalent ignition source requires careful replication of the properties of the CTC and/or enhanced knowledge of the physics of the ignition process.

(Emphasis added.)<sup>61</sup>

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<sup>60</sup> 70 FR 2,514, 2,515 (Jan. 13, 2005).

<sup>61</sup> Id. at 2. “NIST Technical Note 1627: Modification of ASTM E 2187 for Measuring the Ignition Propensity of Conventional Cigarettes,” June 2009 at 2, <http://www.cpsc.gov/volstd/research/nistastm.pdf>.

Obviously, by proposing a replacement SIS with an ignition strength range of 70-95 PFLB (compared with a prevailing 35-50 PFLB for 2007-08 unfiltered cigarettes that were contemporaneous with the transition from non-RIP to RIP cigarettes), NIST in fact took a much different course than stated above.

Nevertheless, consistent with NIST's stated objective, ISPA requested in comments filed with the CPSC regarding Note 1627 that the CPSC base the SRM on the ignition strength of the "current test cigarettes" actually in use in 2008 in order that this change in fact be "safety neutral." The CPSC failed to include any consideration of this alternative in its regulatory analysis.

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There is another regulatory alternative that the CPSC should consider. If the CPSC is unwilling to revoke Part 1632 in full, perhaps a middle ground exists that would address the agency's concerns, and yet result in a standard that takes into account the above relevant regulatory alternatives and existing standards. For example, the CPSC could identify those materials and product designs that mattress manufacturers use today that readily meet Part 1632. Based on that information, the CPSC could define a so-called "safe harbor" in which mattress manufacturers that follow those defined practices could operate without being required to conduct further Part 1632 testing. Such testing would be required only for products that fall outside this safe harbor.

**C. Section 4 requires the CPSC to base its decision to amend an existing flammability standard on research and investigation, NOT on assumptions, presumptions, unsubstantiated theories, or conclusory analysis**

Congress authorized the CPSC to regulate the safety of consumer products based on facts. It did not authorize regulation based on mere conclusory statements or theories. Thus, Section 4 of the FFA requires the CPSC to conduct an investigation or research before it proceeds with amending an existing flammability standard.

In its proposed amendment to Part 1632, however, much of the CPSC's regulatory analysis relies too heavily on assumptions, presumptions or unsubstantiated theories. The Act requires more than this. For example, in rejecting the use of a lower ignition propensity cigarette:

1. The CPSC states that compared to the proposed high ignition strength SRM 1196, a lower ignition strength SRM 1082 would not be "equivalent or 'safety neutral,'" based in part on "**the presumption** that the use of such cigarettes would result in a less stringent flammability test" (emphasis added).<sup>62</sup> The

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<sup>62</sup> 74 FR at 67,052.

CPSC cites no factual support for this presumption or explanation that such information is not ascertainable.

2. The CPSC acknowledges that it lacks any data “to describe the extent of this potential difference [that is, whether tests using an SRM 1082 would be less stringent than on using an SRM 1196].” Nevertheless, it theorizes that “**it is quite possible** that more mattress construction prototypes would pass a test using a lower ignition propensity SRM than do currently with commercially available cigarettes” (emphasis added).<sup>63</sup> As before, the CPSC cites no factual support for this theory or explanation that such data are not ascertainable. Yet it is precisely this kind of information that the CPSC should develop through its research in order to decide which is the preferable regulatory outcome.
3. If more mattress constructions pass using a lower ignition propensity cigarette, the CPSC assumes that it “**may result in an unknown, but potentially adverse**, impact on the level of safety benefits provided by the Standard” (emphasis added).<sup>64</sup> Like the other assumptions, this is an important issue that the CPSC should attempt to resolve through research.
4. Since Part 1632 allows up to three relights to achieve a full length burn, the CPSC assumes “[i]t is likely” either that the tester would waste many cigarettes in trying to complete the test, or the test could not be completed (emphasis added).<sup>65</sup> As above, this is a factual question that should be resolved before proceeding with any amendments to Part 1632. We note that the NIST research on the ignition strength of cigarettes would not support this assumption, given that its data only measure how many cigarettes burn the full length of the product. The NIST data do not record how much of each self-extinguished cigarette burned before extinguishment occurred.
5. Perhaps the worst example appears when the CPSC decides that SRM 1196 is the preferred regulatory alternative because the ignition behavior of a worst case RIP cigarette has not been characterized. The CPSC states that “[i]nsufficient research exists to support a new and different, low ignition propensity SRM,” and even if such an SRM existed, it would “likely” require “a variety of **as-yet-unknown**” changes to Part 1632 (emphasis added).<sup>66</sup> But these are important questions that go to the fundamental question of whether Part 1632 should require the use of SRM 1196 or a worst case RIP cigarette.

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<sup>63</sup> Id.

<sup>64</sup> Id.

<sup>65</sup> Id.

<sup>66</sup> Id.

6. The CPSC implies that since only eight states require audits to confirm whether RIP cigarettes meet the appropriate standard, RIP cigarettes sold in the other 42 states might not be as good as those sold in the audit states.<sup>67</sup> On its face, this implication seems unwarranted, and the CPSC offers no research to support its position.
7. The CPSC states that the “extent of fire safety gains due to these circumstances [that is, the impact of state RIP cigarette laws on residential fires] **is uncertain**” (emphasis added).<sup>68</sup> But this too is a fundamental question in these proceedings. Further, the September 2010 NFPA report discussed above, to which the CPSC makes no reference in its analysis, goes to the heart of this issue.

Leaving this many unanswered questions, and relying so much on factual assumptions, presumptions and unsubstantiated theories to make fundamental decisions simply does not meet the CPSC’s statutory duty to base its decision to amend an existing flammability standard on research and investigation. The CPSC must resolve these basic points before it proceeds further with its efforts to amend Part 1632.

**D. The CPSC’s findings about SRM 1996 being the least burdensome alternative are premature; the proposed amendment is not a modest technical change, but may result in a significant substantive change to the Part 1632 test that could impose major new costs on mattress manufacturers.**

In its findings, the CPSC states that “the proposed amendment imposes the least burdensome requirement that would adequately address the risk of injury” because “[n]o other alternative would allow the Standard’s level of safety and effectiveness to continue.”<sup>69</sup> At the very least, the CPSC’s pronouncements as to SRM 1196 being the least burdensome alternative seem extraordinarily premature.

Throughout its analysis of the proposed amendment to Part 1632, the CPSC minimizes the apparent significance of requiring mattresses to be ignited by SRM 1196. For example, the CPSC states that:

- o the change is “safety neutral,”
- o SRM 1196 is simply a surrogate for the unfiltered Pall Malls sold in the market when the predecessor to Part 1632 was promulgated in 1972,
- o the change requires no amendments to the density or dimensional characteristic of the ignition source currently specified in Part 1632, and

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<sup>67</sup> Id. at 67,049.

<sup>68</sup> Id.

<sup>69</sup> Id.

- the relevant cost increases that will result from the amendment are essentially limited to the cost of the new test material.

Nevertheless, the proposed changes involve far more than simply a technical or otherwise modest amendment to Part 1632. It could result in a significant substantive change that will affect which mattresses pass Part 1632. The record, however, contains no information on this important point. The CPSC needs to research exactly how its proposed change will affect Part 1632 testing and mattress manufacturers before it proceeds with this amendment.

In proposing to amend Part 1632 to require the use of SRM 1196, the CPSC proposes to use a test material that has an ignition strength that ranges from 70-95 PFLB. In practice, however, NIST has designed SRM 1196 to have a consistent PFLB of about 90 +/- 2.1%. This compares to the ignition strength for the 2007-08 unfiltered non-RIP Pall Malls (that NIST excluded from its calculations), which range from 35-50 PFLB. This difference between the ignition strength of (1) the cigarettes used in 2007-08 when RIP cigarettes replaced conventional unfiltered Pall Malls, and (2) SRM 1196 may result in fundamental substantive changes Part 1632.

Whenever a manufacturer must make products to meet a given performance standard, it will never intend to hit right on the pass/fail mark. Rather, it will design and build its products so that they consistently exceed the performance target by a comfortable safety margin. This improves the likelihood that its products will always pass the standard.

Thus, when confronted with an SRM 1196 that has an ignition strength of 90 PFLB, it will design its product with a safety margin, so that they will pass with cigarettes that have something over a 90 PFLR. If the standard were instead defined to use a lower ignition propensity SRM in the 35 to 50 PFLB range, the manufacturer would design its product to pass with cigarettes that have a 50 PFLR, plus a safety margin. As a result, the actual target that a manufacturer will want to hit in tests involving an SRM 1196 ignition source is nearly twice that of the target for a lower ignition propensity SRM.

Obviously, such a difference exposes a mattress to a very different ignition threat. The CPSC, however, has not quantified the impact of this significant change on mattress testing.

To help put this change into perspective, a difference of this magnitude is far from inconsequential. A change of this size would be analogous to proposing that the test period for the Part 1633 burn test be doubled from 30 to 60 minutes. Therefore, it is imperative that the CPSC more thoroughly assess the impact of SRM 1196 before it proceeds with any proposed amendments to Part 1632.

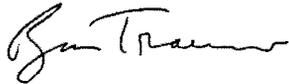
## Conclusion

For the foregoing reasons, ISPA requests that the CPSC halt its proceeding to amend Part 1632 to require the use of SRM 1196 because this proposal does not meet the requirements of Section 4 of the FFA. Instead, ISPA urges the CPSC to act on the industry's request to revoke Part 1632. In addition to the redundancy that currently exists between Parts 1632 and 1633 that warrants this action, the advent of RIP cigarettes reinforces the appropriateness of this action. RIP cigarettes have already begun to have a significant impact on consumer safety by substantially reducing the number of tobacco-ignited residential fires.

While the CPSC considers these arguments, ISPA further requests that the CPSC issue an interim rule that either temporarily suspends application of Part 1632 until these issues are resolved, or clarifies that unfiltered RIP Pall Malls may be used to conduct Part 1632 tests.

Please contact the undersigned should you have any questions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ryan Trainer". The signature is written in a cursive, flowing style.

Ryan Trainer  
President  
International Sleep Products Association