



UNITED STATES
 CONSUMER PRODUCT SAFETY COMMISSION
 4330 EAST WEST HIGHWAY
 BETHESDA, MD 20814

BALLOT VOTE SHEET

DATE: November 10, 2010

TO: The Commission
 Todd A. Stevenson, Secretary

THROUGH: Cheryl A. Falvey, General Counsel *CAF*
 Kenneth R. Hinson, Executive Director *KRH*

FROM: Philip L. Chao, Assistant General Counsel *PLC*

SUBJECT: Third Party Testing for Certain Children’s Products; Mattresses, Mattress Pads, and/or Mattress Sets: Revisions to Terms of Acceptance of Children’s Product Certifications Based on Third Party Conformity Assessment Body Testing Prior to Commission’s Acceptance of Accreditation

Ballot Vote Due: NOV 19 2010

The Office of the General Counsel is providing a draft *Federal Register* document that would revise the terms of acceptance of children’s product certifications based on third party conformity assessment body testing of mattresses, mattress pads, or mattress sets pursuant to 16 C.F.R. parts 1632, “Standard for the Flammability of Mattresses and Mattress Pads (FF 4-72, amended),” and/or 1633, “Standard for the Flammability (Open Flame) of Mattress Sets,” before the Commission’s acceptance of accreditation.

Please indicate your vote on the following options.

- I. Approve publication of the draft document in the *Federal Register*.

 (Signature)

 (Date)

II. Approve publication of the draft document in the *Federal Register* with changes. (Please specify.)

(Signature)

(Date)

III. Do not approve publication of the draft document in the *Federal Register*.

(Signature)

(Date)

IV. Take other action. (Please specify.)

(Signature)

(Date)

Attachment: Draft *Federal Register* document titled, "Third Party Testing for Certain Children's Products; Mattresses, Mattress Pads, and/or Mattress Sets: Revision to Terms of Acceptance of Children's Product Certifications Based on Third Party Conformity Assessment Body Testing Prior to Commission's Acceptance of Accreditation"



UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

Memorandum

This document has been electronically
approved and signed.

Date: November 10, 2010

TO : The Commission
Todd Stevenson, Secretary

THROUGH: Cheryl A. Falvey, General Counsel
Kenneth R. Hinson, Executive Director

FROM : Patricia K. Adair
Director, Division of Combustion and Fire Sciences
Directorate for Engineering Sciences

Mary F. Toro
Director of Regulatory Enforcement
Office of Compliance and Field Operations

Robert J. Howell
Assistant Executive Director
Office of Hazard Identification and Reduction

SUBJECT : Accreditation Requirements for Third Party Conformity Assessment Bodies to
Test the Flammability of Crib and Youth Mattress Sets, Mattresses, and
Mattress Pads as Established by the Consumer Product Safety Improvement
Act of 2008; *Staff's Proposed Revision of Retrospective Testing Terms*

I. Introduction

Section 102 of the Consumer Product Safety Improvement Act (hereafter referred to as the "Act" or the "CPSIA") mandates that third party testing be conducted for certain children's products. Before importing for consumption or warehousing or distributing in commerce any children's product that is subject to a children's product safety rule, every manufacturer of such children's product (and the private labeler of such children's product if such product bears a private label) shall: (A) submit sufficient samples of the children's product, or samples that are identical in all material respects, to a third party conformity assessment body (hereafter referred to as a third party testing laboratory) accredited under requirements to be established by the Commission to be tested for compliance with such children's product safety rule; and (B) based on the assessment by the third party testing laboratory, issue a certificate that certifies that such

children's product complies with the children's product safety rule.¹ Section 235 of the Act defines "children's product" to mean a consumer product designed or intended primarily for children 12 years of age or younger.

The CPSIA defines a third party testing laboratory as one that is not owned by the manufacturer or private labeler of a product assessed by such testing laboratory. A laboratory that is so owned may nevertheless, in certain specified circumstances, be accredited as a third party testing laboratory. The Act specifies that a third party testing laboratory may also include a government owned or controlled laboratory under certain conditions.

Special provisions are established in the Act for laboratories that are owned by a manufacturer or private labeler. Such laboratories are commonly referred to as "proprietary laboratories" or "first party" laboratories. The Act stipulates that the Commission may accredit a proprietary laboratory as a third party testing laboratory if the Commission, by order, makes certain findings that the laboratory is protected from undue influence by the manufacturer, private labeler, or other interested party, and that procedures are in place for immediate and confidential reporting to the Commission of any attempts by the manufacturer, private labeler, or other interested party to hide or exert undue influence over test results. The Commission must also find that accrediting the proprietary laboratory would provide equal or greater consumer safety protection than the manufacturer's or private labeler's use of an independent third party conformity assessment body. A laboratory that satisfies these requirements is defined in the statute as a "firewalled" testing laboratory.

The Act provides that accreditation of third party testing laboratories may be conducted by either the Commission or an independent accreditation organization designated by the Commission, and requires that the Commission maintain on its website an up-to-date list of laboratories that have been accredited to assess conformity with children's product safety rules.

On August 18, 2010, the Commission published a notice of requirements in the Federal Register (75 FR 51020) providing the criteria and process for Commission acceptance of accreditation of third party conformity assessment bodies for testing pursuant to 16 C.F.R. parts 1632 "Standard for the Flammability of Mattresses and Mattress Pads (FF 4-72, Amended)," and/or C.F.R. part 1633, "Standard for the Flammability (Open-Flame) of Mattress Sets."² Mattress sets, mattresses, and mattress pads subject to third party testing under the CPSIA is any mattress set, mattress, or mattress pad designed or intended primarily for children 12 years of age or younger.

The notice of requirements addressed testing performed by a third party conformity assessment body prior to the Commission's acceptance of its accreditation, or "retrospective" testing, in section IV. It stated that the CPSC would accept a certificate of compliance with the Standard included in 16 C.F.R. parts 1632 and/or 1633, based on testing performed by an accredited third party conformity assessment body (including a government-owned or -controlled conformity assessment body, and a firewalled conformity assessment body) prior to the Commission's acceptance of its accreditation if:

¹ CPSC regulations at 16 C.F.R part 1110 limits the parties who must certify to the U.S. importer and, in the case of domestically produced products, the U.S. manufacturer.

² <http://www.cpsc.gov/BUSINFO/frnotices/fr10/mattress.pdf>.

- At the time of product testing, the product was tested by a third party conformity assessment body that was ISO/IEC 17025 accredited by an ILAC-MRA signatory accreditation body at the time of the test. For firewalled conformity assessment bodies, the firewalled conformity assessment body must be one that the Commission accredited by order at or before the time the product was tested, even though the order will not have included the test methods in the regulations specified in this notice. If the third party conformity assessment body has not been accredited by a Commission order as a firewalled conformity assessment body, the Commission will not accept a certificate of compliance based on testing performed by the third party conformity assessment body before it is accredited, by Commission order, as a firewalled conformity assessment body;
- The third party conformity assessment body's application for testing using the test methods in 16 C.F.R. part 1632 and/or 1633 is accepted by the CPSC on or before October 18, 2010;
- The product was tested under 16 C.F.R. part 1632 and/or 1633 on or after August 18, 2010;
- The accreditation scope in effect for the third party conformity assessment body at the time of testing expressly included testing to 16 C.F.R. part 1632 and/or 1633;
- The test results show compliance with the applicable current standards and/or regulations; and
- The third party conformity assessment body's accreditation, including inclusion in its scope of 16 C.F.R. part 1632 and/or 1633, remains in effect through the effective date for mandatory third party testing and manufacturer certification for conformity with 16 C.F.R. parts 1632 and/or 1633.

This memorandum presents CPSC staff's recommendation for revising the conditions for "Limited Acceptance of Children's Product Certifications Based on Third Party Conformity Assessment Body Testing Prior to the Commission's Acceptance of Accreditation."

Background on the Requirements of 16 C.F.R. parts 1632 and 1633

16 C.F.R part 1632

The *Standard for the Flammability of Mattresses and Mattress Pads*, 16 C.F.R. part 1632, sets forth a test to determine the ignition resistance of a mattress or mattress pad when exposed to a lighted cigarette. The regulation requires pre-market prototype testing for each new mattress design. In addition, prototype testing must be performed when there is a change in materials of an existing prototype design that could influence cigarette ignition resistance. Six mattress surfaces must be tested for each prototype. The prototype test consists of exposing each surface to a minimum of 18 lighted cigarettes. The prototype is accepted if the char length of each cigarette location on all six mattress surfaces is not more than two inches in any direction from the nearest point of the cigarette and no ignitions occur.³ Currently, the Standard specifies the

³ On May 15, 2006 the Office of Compliance and Field Operations issued an "Interim Enforcement Policy for Mattresses Subject to 16 C.F.R. parts 1632 and 1633" to permit manufacturers to reduce testing from six mattress surfaces to two mattress surfaces for each new prototype created to comply with 16 C.F.R. part 1633. The policy

ignition source for these tests by its physical properties. These properties originally were selected to represent an unfiltered (non-reduced ignition propensity) Pall Mall cigarette, which was identified as the most severe smoldering ignition source. Recently, however, the Commission published a proposed rule to amend the mattress standard 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.⁴

16 C.F.R. part 1633

The *Standard for the Flammability (Open Flame) of Mattress Sets*, 16 C.F.R. part 1633 became effective on July 1, 2007. The Standard has a full-scale test method using a pair of T-shaped gas burners designed to represent burning bedclothes to determine the flammability of mattress sets. The Standard has two performance criteria that limit fire growth. The mattress sets must not exceed a 200 kilowatts (kW) peak heat release rate within the 30 minute test; and the total energy released must be no more than 15 megajoules (MJ) for the first 10 minutes of the test. This minimizes or delays “flashover,” thus increasing the time available for occupants to escape a fire.⁵ All mattresses produced after the effective date must comply with these test criteria.

The Standard allows the test to be conducted in either an open calorimeter or test room configuration. The Standard requires, with certain exceptions, prototype testing of mattress sets (§ 1633.4). The specimen tested is to be no smaller than twin size, unless the largest size mattress or set produced of that type is smaller than twin size, in which case the largest size must be tested. Mattress manufacturers must have three specimens of each prototype tested in accordance with the test method, and meet the requirements set forth in the Standard, before introducing a mattress set into commerce, unless the manufacturer complies with the prototype pooling and confirmation testing criteria. The prototype is a specific design of a mattress set that serves as the model for production units. The production mattress set must be the same as the prototype with respect to materials, components, design, and method of assembly. Each of the three specimens must meet both requirements of the specified test criteria. For purposes of the Standard, a “manufacturer” is an individual plant or factory where mattress sets are manufactured or assembled. Importers and renovators are considered manufacturers.

There are three circumstances in which a manufacturer may sell or introduce into commerce a mattress set that is based on a prototype that has not been tested. Production mattresses may differ from a qualified prototype (i.e. one that has been tested and meets the test criteria) only with respect to: (1) mattress/foundation length and width (but not depth, unless the manufacturer makes the demonstration required in the last exception); (2) the ticking, unless the ticking of the qualified prototype has characteristics designed to improve performance of the flammability test; and/or (3) any component, material, or method of assembly, provided that the manufacturer can demonstrate, on a reasonably objective basis, that such change will not cause the prototype to exceed the specified test criteria.

went into effect on May 1, 2006, and remains in effect until further notice.
<https://www.cpsc.gov/businfo/InterimMattress.pdf>

⁴ 75 FR 67047; Nov. 1, 2010.

⁵ Flashover occurs when a fire becomes so intense that all exposed surfaces in a room ignite nearly simultaneously.

Due to the complexity of the test, nearly all mattress manufacturers use third party laboratories to conduct prototype qualification.⁶

In July 2007, CPSC staff conducted onsite reviews of the facilities that were performing testing to 16 C.F.R. part 1633. During these reviews, staff met with laboratory technical staff, toured the laboratory facility, and observed the laboratory staff performing the test procedures. The purpose of the onsite review was to observe and gather information, because staff had concerns about the performance of the test. Following is a list of the items staff reviewed:

- (1) Laboratory Staff Qualifications,
- (2) Test Area and Equipment,
- (3) Calibration of Equipment,
- (4) Testing, Data Collection, and Storage of samples, and
- (5) Sample Handling.

At the time that CPSC staff did the onsite reviews, there were approximately 11 laboratories (nine within the United States and two in foreign countries) with the capability to perform the required test. Staff visited the following laboratories:

- (1) Underwriters Laboratories (UL) – Northbrook, IL 60062
- (2) Stork Twin City Testing Corporation – St. Paul, MN 55114
- (3) Govmark Organization – Farmingdale, NY 11735
- (4) SGS US Testing – Tulsa, OK 74116
- (5) Southwest Research Institute – San Antonio, TX 78254
- (6) Intertek – Elmendorf, TX 78112
- (7) Chilworth – Kelso, WA 98626

Resources limited staff's ability to review the remaining domestic and foreign laboratories prior to the implementation of the Consumer Product Safety Improvement Act.

The staff has confidence that these laboratories can conduct the tests required by the Standard properly because of these field visits, and also on the basis of their review of test results submitted to the agency since 2007, and, in some instances, verification of the test results by our own independent testing of mattresses built from prototypes tested by these laboratories.

At the time of the staff onsite reviews, two of the nine laboratories indicated that they were ISO 17025 accredited by an ILAC-MRA Signatory accreditation body. Since 2007, additional laboratories have indicated their ability to perform the tests. The list of testing facilities has expanded to six international labs and nine domestic laboratories. The staff did not note any major difficulties with the performance of the laboratories and did not request any corrections to the procedures in place at the time.

⁶ Letter from the International Sleep Products Association (ISPA) to the CPSC: Docket No. CPSC-2010-0085, Third Party Testing for Certain Children's Products; Mattresses, Mattress Pads, and/or Mattress Sets: Requirements for Accreditation of Third Party Conformity Assessment Bodies; September 17, 2010.

Comments on the Notice of Requirements

In response to the publication of the notice of requirements, the Commission received comments from the International Sleep Products Association (ISPA) and Springs Creative Products Group, LLC (“Springs”).⁷ In addition, ISPA representatives met with individual Commissioners and CPSC staff to discuss their comments on September 15, October 22, October 26, and November 9, 2010.⁸

Briefly, ISPA requested that:

1. The Commission conclude that 16 C.F.R. parts 1632 and 1633 are not considered “children’s product safety rule(s)” for purposes of Section 102, and rescind the requirements for third party testing;
2. The Commission adopt longer implementation periods and “grandfather” in product tests that previously complied with 16 C.F.R. part 1632 and 1633 and apply the “grandfather” provision to all 1633 testing conducted by third party laboratories; and
3. For purposes of part 1632, the Commission allow a one-year implementation period for mattress prototypes and ticking substitutes currently in use.

In a letter to Chairman Tenenbaum, dated October 26, 2010,⁹ Springs Creative Products Group, LLC (“Springs”) asked the Commission to:

1. “Grandfather” in all part 1633 qualification and confirmation testing performed since 2006, by all test laboratories that are accredited by the Commission;
2. “Grandfather” in all part 1632 tests performed by accredited laboratories since 2006; and
3. For all part 1632 prototypes and ticking substitutes that were not tested by accredited labs, allow a one year compliance period.

Staff’s Response to Comments on the Notice of Requirements

Comment: The Commission should conclude that 16 C.F.R. parts 1632 and 1633 are not considered “children’s product safety rule(s)” for purposes of Section 102, and should rescind the requirements for third party testing (ISPA).

Response: Staff notes that this is a policy matter that the Commission has addressed previously, which is outside of the scope of this discussion.

Comment: The Commission should adopt longer implementation periods and “grandfather” in product tests that previously complied with 16 C.F.R. part 1632 and/or 1633 and apply the “grandfather” provision to all 1633 testing conducted by third party laboratories (ISPA); “Grandfather” in all part 1633 qualification and confirmation testing performed since 2006, by all test laboratories that are accredited by the Commission (Springs).

⁷www.regulations.gov; docket number CPSC-2010-0085.

⁸ Summaries of those meetings can be found at: <http://www.cpsc.gov/library/foia/meetings/meetings.html>

⁹ Letter from Mr. Derick Close, Springs Creative Products Group, LLC, to Hon. Inez Tenenbaum, October 26, 2010. The letter can be viewed at: www.regulations.gov in the docket folder for docket number CPSC-2010-0085.

Response: Staff is aware that, because of the complexity of the test, nearly all 16 C.F.R. part 1633 testing is conducted by third party laboratories. Staff had the opportunity to visit many of these third party labs when 16 C.F.R. part 1633 went into effect.

Staff does not agree that 16 C.F.R. part 1632 and 1633 testing should be “grandfathered” back to 2006. Prior to the effective date of part 1633, the Office of Compliance and Field Operations allowed test results based on California Technical Bulletin 603 (TB-603) which was not equivalent to part 1633. In addition, prior to the advent of 16 C.F.R. part 1633, part 1632 testing historically was performed at the plant level, and not by an independent third party laboratory.

Staff agrees that “grandfathering” third party testing of 16 C.F.R. part 1633 and 1632 prototypes back to July 1, 2007, the effective date for 16 C.F.R. part 1633, is appropriate under certain conditions, as noted below.

Comment: For purposes of part 1632, the Commission should allow a one-year implementation period for mattress prototypes and ticking substitutes currently in use (ISPA, Springs).

Response: Neither commenter presented data regarding the number of 16 C.F.R. part 1632 mattress prototypes and tickings that would need to be tested for crib and youth mattresses; nor did they argue that a lack of laboratory capacity existed for mattress testing. For these reasons, staff does not agree that an extension of the implementation period of one year is warranted. In addition, the CPSIA does not allow for extending the deadline for one year.

Staff’s Revised Recommendation

After careful consideration of the comments submitted on the notice of requirements, as well as discussion with trade association representatives on behalf of the mattress industry, staff recommends revising the recommendation for “Limited Acceptance of Children’s Product Certifications Based on Third Party Conformity Assessment Body Testing Prior to the Commission’s Acceptance of Accreditation” to amend the terms under which the Commission will accept youth mattress, mattress set, and mattress pad children’s product certifications based on third party conformity assessment body testing, prior to our acceptance of accreditation, under two different scenarios.

1. For Testing Performed by Certain Accredited Third Party Conformity Assessment Bodies on or After July 1, 2007:
 - If at the time of product testing, the product was tested by a third party conformity assessment body that was ISO/IEC 17025 accredited by an ILAC-MRA Signatory accreditation body at the time of the test;
 - The third party conformity assessment body’s application for testing using the test methods in 16 C.F.R. part 1632 and/or 1633 is accepted by the CPSC on or before November 16, 2010;
 - The product was tested under 16 C.F.R. part 1632 and/or 1633 on or after July 1, 2007. The date on which the requirements in 16 C.F.R. part 1633 became effective is July 1,

2007; and, in an “Interim Enforcement Policy for Mattresses Subject to 16 C.F.R. Parts 1632 and 1633,” dated May 15, 2006, the CPSC anticipated that 16 C.F.R. part 1633 could prompt manufacturers to redesign mattress prototypes and use new materials to meet the then-new flammability requirements in 16 C.F.R. part 1633, and that the new prototypes also would have to be tested to demonstrate compliance with 16 C.F.R. part 1632. Therefore, provided that the other conditions set forth in part III.B.1 of this document are met, we will accept testing that was done on or after July 1, 2007. We decline to accept testing results for tests conducted in 2006, because such tests were not equivalent to the tests required in 16 C.F.R. part 1633;

- The accreditation scope in effect for the third party conformity assessment body at the time of testing expressly included testing to 16 C.F.R. part 1632 and/or 1633;
- The test results show compliance with the applicable current standards and/or regulations; and
- The third party conformity assessment body’s accreditation, including inclusion in its scope of 16 C.F.R. part 1632 and/or part 1633, remains in effect through the effective date for mandatory third party testing and manufacturer certification for conformity with 16 C.F.R. part 1632 and/or part 1633.

2. For Testing Performed by the Seven Testing Laboratories Reviewed by the CPSC, staff recommends that the Commission accept children’s product certifications based on third party conformity assessment body testing by any of the seven laboratories listed above as reviewed by CPSC staff in July 2007, provided that:

- The laboratory will be ISO/IEC 17025 accredited by an ILAC-MRA Signatory accreditation body and the accreditation scope will expressly include testing to 16 C.F.R. part 1632 and/or 1633 by November 16, 2010;
- Testing must show the product to be in compliance with 16 C.F.R. part 1632 and/or part 1633 as appropriate; and
- Testing was conducted on or after July 1, 2007, but not later than November 16, 2010.

VI. Environmental Considerations

Generally, mandatory CPSC requirements are considered to “have little or no potential for affecting the human environment,” and environmental assessments are not usually prepared for such actions (see 16 C.F.R. §1021.5(c)(1)). Nothing in these revisions to the recommended accreditation requirements alters that expectation. Therefore, the staff does not expect the revision to have any negative environmental impact.

VII. Recommended Effective Date

The staff recommends that the revised recommendation for “Limited Acceptance of Children’s Product Certifications Based on Third Party Conformity Assessment Body Testing Prior to the Commission’s Acceptance of Accreditation” become effective upon publication of notice thereof in the Federal Register.

VIII. Staff Recommendation for Accreditation Requirements for Third Party Laboratories to Test the Flammability of Youth and Crib Mattress Sets, Mattresses, and Mattress Pads

The staff recommends that the Commission approve the staff's proposed revised approach for accepting accreditation of laboratories to test for compliance with the regulations for the flammability of youth and crib mattress sets, mattresses, and mattress pads. The staff recommends that the Commission approve publishing the revision in a Federal Register (FR) notice as drafted by the Office of the General Counsel.

Billing Code CPSC-6355-01-P

CONSUMER PRODUCT SAFETY COMMISSION

CPSC Docket No. CPSC-2010-0085

16 CFR Parts 1632 and/or 1633

Third Party Testing for Certain Children's Products; Mattresses, Mattress Pads, and/or Mattress Sets: Revisions to Terms of Acceptance of Children's Product Certifications Based on Third Party Conformity Assessment Body Testing Prior to Commission's Acceptance of Accreditation

AGENCY: Consumer Product Safety Commission.

ACTION: Notice of requirements; revision of retrospective testing terms.

SUMMARY: The Consumer Product Safety Commission ("CPSC," "Commission," or "we") is issuing a notice amending the terms under which it will accept certifications for children's products based on third party conformity assessment body (laboratory) testing to the flammability regulations at 16 CFR parts 1632 and/or 1633 that occurred before the Commission's acceptance of the accreditation of the third party conformity assessment body. We are taking this action in response to requests from certain mattress manufacturers to reduce unnecessary retesting of mattresses, mattress pads, and/or mattress sets that have already been tested and found to be in compliance with CPSC regulations.

DATES: Effective Date: The revision announced in this notice is effective upon publication in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Robert “Jay” Howell, Assistant Executive Director for The Office of Hazard Identification and Reduction, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; e-mail: rhowell@cpsc.gov.

SUPPLEMENTARY INFORMATION:

I. Background

Section 14(a)(3)(B)(vi) of the CPSA, as added by section 102(a)(2) of the Consumer Product Safety Improvement Act of 2008 (CPSIA), Public Law 110-314, directs the CPSC to publish a notice of requirements for accreditation of third party conformity assessment bodies to assess children’s products for conformity with “other children's product safety rules.” Section 14(f)(1) of the CPSA defines “children’s product safety rule” as “a consumer product safety rule under [the CPSA] or similar rule, regulation, standard, or ban under any other Act enforced by the Commission, including a rule declaring a consumer product to be a banned hazardous product or substance.” Under section 14(a)(3)(A) of the CPSA, each manufacturer (including the importer) or private labeler of products subject to those regulations must have products that are manufactured more than 90 days after the Commission has established and published notice of the requirements for accreditation tested by a third party conformity assessment body accredited to do so, and must issue a certificate of compliance with the applicable regulations based on that testing. Section 14(a)(2) of the CPSA, as added by section 102(a)(2) of the CPSIA, requires that certification be based on testing of sufficient samples of the product, or samples that

are identical in all material respects to the product. The Commission also emphasizes that, irrespective of certification, the product in question must comply with applicable CPSC requirements (see, e.g., section 14(h) of the CPSA, as added by section 102(b) of the CPSIA).

In the *Federal Register* of August 18, 2010 (75 FR 51020), we published a notice of requirements providing the criteria and process for Commission acceptance of accreditation of third party conformity assessment bodies for testing pursuant to 16 CFR parts 1632, “Standard for the Flammability of Mattresses and Mattress Pads (FF 4-72, amended),” and/or 1633, “Standard for the Flammability (Open Flame) of Mattress Sets,” which set minimum standards for flammability of mattresses, mattress pads, and/or mattress sets under the Flammable Fabrics Act (15 U.S.C. 1191 et seq.) (FFA). The notice of requirements stated that the publication had the effect of lifting the stay of enforcement with regard to testing and certification of children’s products under 16 CFR parts 1632 and/or 1633, such that each manufacturer of such a product must have any such product manufactured after November 16, 2010, tested by a third party conformity assessment body accredited to do so, and must issue a certificate of compliance based on that testing (75 FR at 51021 through 51022).

We addressed testing performed by a third party conformity assessment body prior to the Commission’s acceptance of its accreditation, or “retrospective” testing, in section IV of the notice of requirements. We stated that we would accept a certificate of compliance with the standard included in 16 CFR parts 1632 and/or 1633, based on testing performed by an accredited third party conformity assessment body (including a government-owned or -controlled conformity assessment body, and a firewalled conformity assessment body), prior to the Commission’s acceptance of its accreditation if:

- At the time of product testing, the product was tested by a third party conformity assessment body that was ISO/IEC 17025 accredited by an ILAC-MRA member at the time of the test. For firewalled conformity assessment bodies, the firewalled conformity assessment body must be one that the Commission accredited by order at or before the time the product was tested, even though the order will not have included the test methods in the regulations specified in this notice. If the third party conformity assessment body has not been accredited by a Commission order as a firewalled conformity assessment body, the Commission will not accept a certificate of compliance based on testing performed by the third party conformity assessment body before it is accredited, by Commission order, as a firewalled conformity assessment body;
- The third party conformity assessment body's application for testing using the test methods in 16 CFR part 1632 and/or 1633 is accepted by the CPSC on or before October 18, 2010;
- The product was tested under 16 CFR part 1632 and/or 1633 on or after August 18, 2010;
- The accreditation scope in effect for the third party conformity assessment body at the time of testing expressly included testing to 16 CFR part 1632 and/or 1633;
- The test results show compliance with the applicable current standards and/or regulations; and
- The third party conformity assessment body's accreditation, including inclusion in its scope of 16 CFR part 1632 and/or 1633, remains in effect through the effective date for mandatory third party testing and manufacturer certification for conformity with 16 CFR parts 1632 and/or 1633.

75 FR at 51022.

II. Requests for Revision

In response to the notice of requirements, the International Sleep Products Association (ISPA) submitted a letter to the Commission arguing that the CPSIA's third party testing requirements do not apply to part 1632 or 1633. In the alternative, the ISPA urged that we adopt a longer implementation period for third party testing under 16 CFR part 1632, and to "grandfather in all previously conducted 1632 and 1633 testing performed by third party labs accredited by the CPSC, regardless of whether those tests occurred before or after August 18, 2010." (The ISPA letter may be viewed at www.regulations.gov in the docket folder for docket number CPSC-2010-0085.) The ISPA met with individual Commissioners and CPSC staff to discuss the requests on September 15, October 22, October 26, and November 9, 2010.

Summaries of those meetings may be found at:

<http://www.cpsc.gov/library/foia/meetings/meetings.html>.

With regard to the request for a longer implementation period for third party testing for 16 CFR part 1632, the ISPA requested an additional year "[f]or those prototype and ticking substitutes that were not tested by a third party lab and that are being used in children's mattresses sold today ... to allow manufacturers of children's mattresses 12 months to retest all of the applicable prototypes and ticking substitutes." The ISPA presented two main arguments in support of this request. First, it noted that "using a third party to perform the required 1632 tests will involve substantial time and costs." Second, it asserted that "changes in how 1632 tests are to be performed make it difficult to conduct those tests at this moment." The standard for the flammability of mattresses and mattress pads at 16 CFR part 1632 sets forth a test to determine the ignition resistance of a mattress or mattress pad when exposed to a smoldering cigarette.

Lighted cigarettes are placed at specified locations on the surface of a mattress (or mattress pad). The ignition source is specified in 16 CFR part 1632 by physical properties that were originally selected to represent an unfiltered Pall Mall cigarette, but those cigarettes are no longer available. ISPA stated a concern that there may be substantial confusion about what ignition source will be required for part 1632 tests “[f]or at least the short term.”

With regard to the request that we accept, for children’s product certification purposes, all tests pursuant to 16 CFR parts 1632 and 1633 previously conducted by accredited third party laboratories, regardless of when the test occurred, the ISPA presented three main arguments, all of which focused on the testing conducted under 16 CFR part 1633. First, the ISPA noted that because the mattress flammability test required by 16 CFR part 1633 since 2007 is a complex, open-flame test that involves the destruction of a mattress, most manufacturers have been using third party laboratories for this testing. According to the ISPA, many of the laboratories that have done the testing since the standard was revised substantially in 2007 meet the baseline requirements for acceptance by the CPSC. Second, there have been no changes to the test method required under 16 CFR part 1633 since 2007. Third, the ISPA notes that testing under 16 CFR part 1633 is expensive and time-consuming. It argued that accepting only those third party tests of children’s mattresses under 16 CFR part 1633 that have occurred since August 18, 2010, would be “arbitrary and wasteful” because requiring the mattress industry to retest all mattress prototypes used in making children’s mattress sets “would take months to perform and cost the industry hundreds of thousands—if not millions—of dollars and would provide no discernable safety benefit.”

Similarly, on November 2, 2010, the Commission received a letter from the Springs Creative Products Group, LLC, claiming that the notice of requirements would “put an extreme

burden on mattress manufacturers to complete additional and redundant testing by accredited labs ... by November 16, 2010,” and asking that we:

- “Grandfather in all Part 1633 qualification and confirmation testing performed since 2006 by all test labs that are accredited by the CPSC;”
- “Grandfather in all Part 1632 tests performed by accredited labs since 2006;” and
- grant a one year compliance period “for all Part 1632 prototypes and ticking substitutes that were not tested by accredited labs.”

Letter from Derick S. Close, CEO, Springs Creative Products Group, LLC, to Inez Tenenbaum, Chairman, Consumer Product Safety Commission (October 26, 2010). (The Springs Creative Products Group letter may be viewed at www.regulations.gov in the docket folder for docket number CPSC-2010-0085.) The letter asserted that “[r]equiring manufacturers to have the same labs retest the same Part 1633 prototypes following the same exact test method as was done since 2006 would impose wasted costs on an industry recovering from the worst recession in 70 years” and that “the industry needs more time to retest materials [in] an orderly manner because the CPSC is in the midst of changing the cigarettes used for testing.” *Id.* at pages 1 through 2.

III. The Response to the Requests

A. A Brief Description of Testing Under 16 CFR parts 1632 and 1633

We have considered the requests and, through this notice, are revising our position regarding “Limited Acceptance of Children’s Product Certifications Based on Third Party Conformity Assessment Body Testing Prior to the Commission’s Acceptance of Accreditation.” To help interested parties understand our reasons for revising our position, we begin by

explaining what prototype testing pursuant to 16 CFR parts 1632 and 1633 involves and the relevance of the letters' reference to cigarettes.

The Standard for the Flammability of Mattresses and Mattress Pads, 16 CFR part 1632, sets forth a test to determine the ignition resistance of a mattress or mattress pad when exposed to a lighted cigarette. In brief, the regulations require pre-market prototype testing for each new mattress design and also require prototype testing when there has been a change in materials of an existing prototype design that could influence cigarette ignition resistance. Six mattress surfaces must be tested for each prototype. Lighted cigarettes are placed at specified locations on the surface of a mattress (or mattress pad). The Standard establishes pass/fail criteria for the tests. Currently, the Standard specifies the ignition source for these tests by its physical properties. These properties originally were selected to represent an unfiltered Pall Mall cigarette, which was identified as the most severe smoldering ignition source. Recently, however, the Commission published a proposed rule (75 FR 67047 (Nov. 1, 2010)), to amend the mattress standard 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.

The Standard for the Flammability (Open Flame) of Mattress Sets, 16 CFR part 1633, is intended to minimize or delay “flashover” when a mattress is ignited in a typical bedroom fire. (“Flashover” is the point at which the entire contents of a room are ignited simultaneously by radiant heat, making conditions in the room untenable and a safe exit from the room impossible. At flashover, room temperatures typically exceed 600–800 degrees Celsius (approximately 1100–1470 degrees Fahrenheit).) In general, the Standard requires manufacturers to test specimens of each of their mattress prototypes (designs) before mattresses of that prototype may

be introduced into commerce. The specimen is to be no smaller than twin size, unless the largest size mattress or set produced of that type is smaller than twin size, in which case the largest size must be tested.

The Standard prescribes a full-scale test using a pair of T-shaped gas burners designed to represent burning bedclothes. The mattress set must not exceed a peak heat release rate of 200 kilowatts (kW) at any time during a 30 minute test, and the total heat release for the first 10 minutes of the test must not exceed 15 megajoules (“MJ”). Mattresses that meet the Standard’s criteria will make only a limited contribution to a fire, especially in the fire’s early stages. This will allow occupants more time to discover the fire and escape.

Thus, both 16 CFR parts 1632 and 1633 contemplate testing of prototypes rather than testing mattresses, mattress sets, or mattress pads that are already in production. The prototype itself does not have to be a children’s mattress, mattress set, or mattress pad for purposes of section 14(a)(2) of the CPSA; however, to support the issuance of a certificate for a children’s product, the prototype testing must be conducted by a CPSC-accepted third party conformity assessment body.

B. The Revised “Limited Acceptance of Children’s Product Certifications Based on Third Party Conformity Assessment Body Testing Prior to the Commission’s Acceptance of Accreditation”

Given the nature of prototype testing under 16 CFR parts 1632 and 1633, we agree that revising our position on our “Limited Acceptance of Children’s Product Certifications Based on Third Party Conformity Assessment Body Testing Prior to the Commission’s Acceptance of Accreditation” is appropriate. The revised position will reduce further the need for redundant

testing. We will accept children's product certifications based on third party conformity assessment body testing, prior to our acceptance of accreditation, under two different scenarios.

1. Testing Performed by Certain Accredited Third Party Conformity Assessment Bodies on or After July 1, 2007

The notice of requirements that appeared in the Federal Register on August 18, 2010 described the circumstances under which the Commission would accept a certificate of compliance with the standard included in 16 CFR parts 1632 and/or 1633 based on testing performed by an accredited third party conformity assessment body (75 FR at 51023). Due to the nature of prototype testing under 16 CFR parts 1632 and 1633 and the date on which the requirements in 16 CFR part 1633 became effective, we are modifying section IV of the notice of requirements as follows:

- At the time of product testing, the product was tested by a third party conformity assessment body that was ISO/IEC 17025 accredited by an accreditation body that is a signatory to the ILAC-MRA;
- The third party conformity assessment body's application for testing using the test methods in 16 CFR part 1632 and/or 1633 is accepted by the CPSC on or before November 16, 2010;
- The product was tested under 16 CFR part 1632 and/or 1633 on or after July 1, 2007. The date on which the requirements in 16 CFR part 1633 became effective is July 1, 2007, and, in an "Interim Enforcement Policy for Mattresses Subject to 16 CFR Parts 1632 and 1633," dated May 15, 2006, the CPSC anticipated that 16 CFR part 1633 could prompt manufacturers to redesign mattress prototypes and use new materials to meet the

then-new flammability requirements in 16 CFR part 1633, and that the new prototypes also would have to be tested to demonstrate compliance with 16 CFR part 1632.

Therefore, provided that the other conditions set forth in part III.B.1 of this document are met, we will accept testing that was done on or after July 1, 2007. We decline to accept results for tests conducted in 2006, because such tests were not equivalent to the tests required in 16 CFR part 1633;

- The accreditation scope in effect for the third party conformity assessment body at the time of testing expressly included testing to 16 CFR part 1632 and/or 1633;
- The test results show compliance with the applicable current standards and/or regulations; and
- The third party conformity assessment body's accreditation, including inclusion in its scope of 16 CFR part 1632 and/or 1633, remains in effect through the effective date for mandatory third party testing and manufacturer certification for conformity with 16 CFR parts 1632 and/or 1633.

2. Testing Performed by Seven Testing Laboratories

In July 2007, CPSC staff conducted onsite reviews of the facilities that were performing testing to 16 CFR part 1633. During these reviews, we met with laboratory technical staff, toured the laboratory facilities, and observed the laboratory staff performing the test procedures. The purpose of the onsite reviews was to observe and gather information because the CPSC had concerns about test performance. The CPSC staff reviews examined:

- Laboratory staff qualifications;
- Test area and equipment;

- Calibration of equipment;
- Testing, data collection, and storage of samples; and
- Sample handling.

At the time that CPSC staff did the onsite reviews, there were 11 laboratories (nine within the United States and two in foreign countries) with the capability to perform the required test.

(Resources limited the CPSC staff's ability to review the remaining foreign and domestic laboratories prior to the implementation of the Consumer Product Safety Improvement Act.)

CPSC staff visited the following laboratories:

- 1) Underwriters Laboratories (UL), in Northbrook, IL;
- 2) Stork Twin City Testing Corporation, in St. Paul, MN;
- 3) Govmark Organization, in Farmingdale, NY;
- 4) SGS US Testing, in Tulsa, OK;
- 5) Southwest Research Institute, in San Antonio, TX;
- 6) Intertek, in Elmendorf, TX; and
- 7) Chilworth, in Kelso, WA.

CPSC staff has confidence that these laboratories can conduct the tests required by the mattress Standard properly because of these field visits and also on the basis of our review of test results submitted to the CPSC since 2007, and, in some instances, verification of the test results by our own independent testing of mattresses built from prototypes tested by these laboratories.

Therefore, we will accept children's product certifications based on third party conformity assessment body testing by any of the seven laboratories listed above provided that:

- The laboratory will be ISO/IEC 17025 accredited by an accreditation body that is a signatory to the ILAC-MRA, and the accreditation scope will expressly include testing to 16 CFR part 1632 and/or 1633 by November 16, 2010;
- Testing was conducted on or after July 1, 2007, but not later than November 16, 2010;
and
- The test results show compliance with the applicable current standards and/or regulations.

C. The Request for an Extended Compliance Period

Both the ISPA and the Springs Creative Products Group sought an additional one year for manufacturers to comply with the third party testing requirement. Both referred to costs and to the cigarettes to be used in the tests.

We decline to extend the time by which manufacturers must engage in third party testing. We believe that our revised position regarding our “Limited Acceptance of Children’s Product Certifications Based on Third Party Conformity Assessment Body Testing Prior to the Commission’s Acceptance of Accreditation” substantially reduces or eliminates the need to retest products. More importantly, however, we note that section 14(a)(3)(F) of the CPSA expressly declares that:

If the Commission determines that an insufficient number of third party conformity assessment bodies have been accredited to permit certification for a children’s product safety rule ... the Commission may extend the deadline for certification to such rule by not more than 60 days.

Thus, the conditions set forth in section 14(a)(3)(F) of the CPSA have not been met. We do not have information suggesting that there are an insufficient number of third party conformity

assessment bodies to conduct tests pursuant to 16 CFR parts 1632 and/or 1633. While we recognize that third party testing may present economic issues for certain manufacturers as described in the ISPA submissions and subsequent meetings, section 14 (a)(3)(F) of the CPSA does not authorize us to consider cost or the past or present state of the national economy as reasons for extending the deadline for certification. Additionally, the statute specifically allows for extension “not more than 60 days”; therefore, the one-year extension sought by the ISPA and Springs Creative Product Group would not be possible under section 14(a)(3)(F) of the CPSA.

Dated: _____.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.