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FLAMMABLE FABRICS ACT—PREMARKET TESTING

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HEARINGS

BEFORE THE

SUBCOMMITTEE ON COMMERCE AND FINANCE

OF THE

COMMITTEE ON

INTERSTATE AND FOREIGN COMMERCE

HOUSE OF REPRESENTATIVES

NINETY-SECOND CONGRESS

FIRST SESSION

ON

H.R. 5698

A BILL TO STRENGTHEN ENFORCEMENT OF THE FLAMMABLE
FABRICS ACT AND TO AUTHORIZE APPROPRIATIONS FOR FIS-
CAL YEARS 1971, 1972, AND SUCCEEDING FISCAL YEARS IN
ORDER TO CARRY OUT THE PURPOSES OF THE ACT

JUNE 30 AND JULY 6, 1971

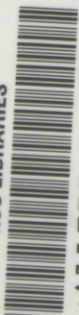
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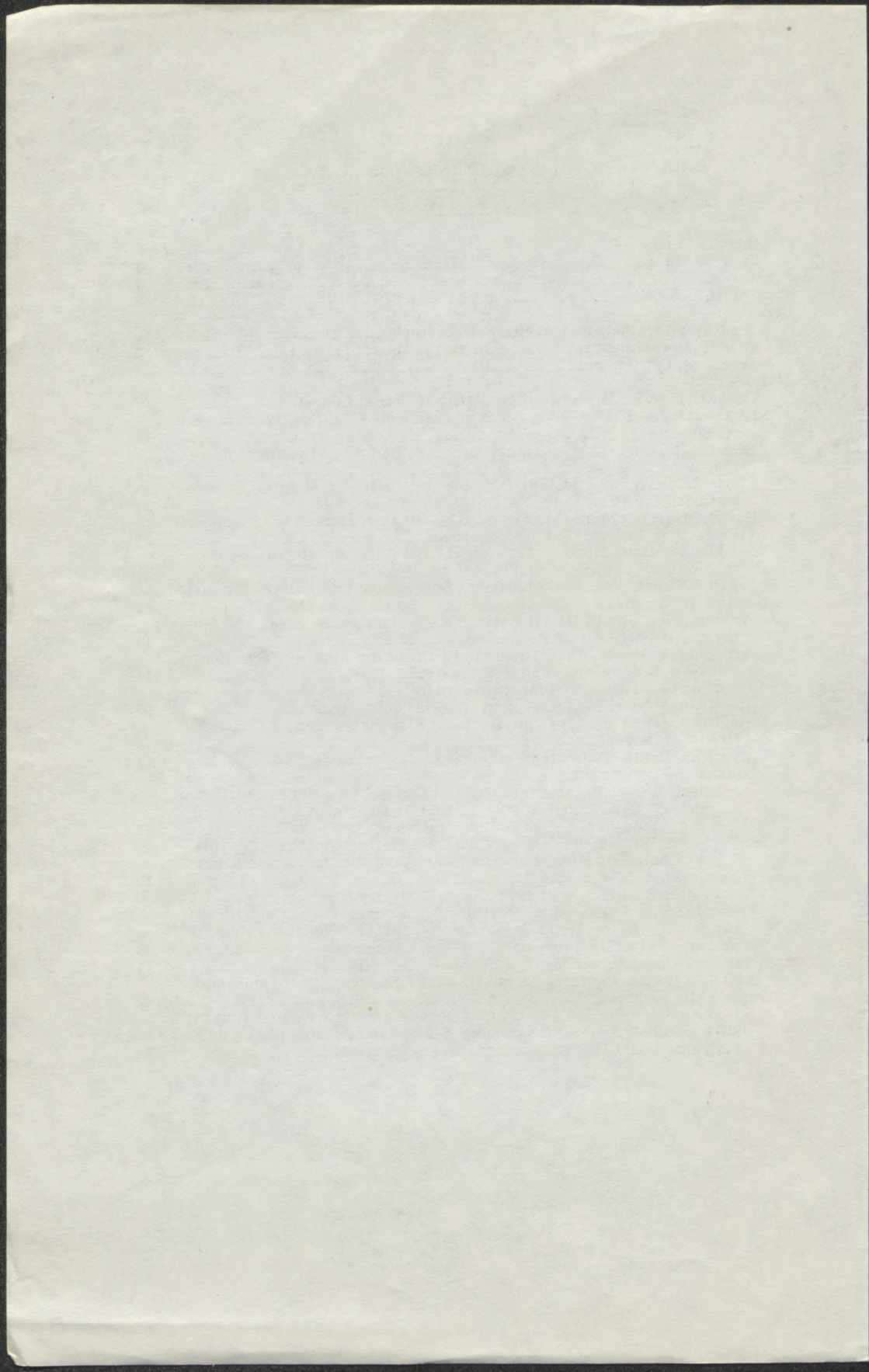
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FLAMMABLE FABRICS ACT—PREMARKET TESTING

WEDNESDAY, JUNE 30, 1971

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCE AND FINANCE,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2218, Rayburn House Office Building, Hon. John E. Moss (chairman) presiding.

Mr. Moss. The subcommittee will be in order.

This morning we begin hearings on H.R. 5698, which proposes to amend the Flammable Fabrics Act to significantly enhance enforcement of flammable standards by requiring manufacturer certification of compliance and by augmenting existing penalties for violation of applicable standards.

The Flammable Fabrics Act was originally passed by the Congress in 1953 in response to a series of tragic deaths involving children's apparel. In 1967, the Congress considered and enacted a set of far-reaching amendments to transform the limited terms of the original act into a comprehensive fire safety law for all household and personal fabrics. The amended act drew upon the combined facilities of the Departments of Commerce and Health, Education, and Welfare, and the Federal Trade Commission to provide a thorough regulatory system for the protection of the public against undue risk of injury, or death, or property damage arising out of the ignition of articles of wearing apparel and household furnishings.

This committee has received evidence as recently as in April of this year which spells out the need for this legislation in raw, statistical terms. We have been told that over 8,500 deaths occur in this Nation each year as a result of fires and burn injuries. Approximately 3,000 of these involve the ignition of clothing and occur predominantly among the aged, the disabled, the poor and the young. Moreover, a study prepared by the University of Michigan estimates that direct medical costs for burns involving flammable fabrics total \$172 million annually; and the Department of Health, Education, and Welfare projects that 1.5 million workdays will be lost this year because of injuries from burns.

These statistics, of course, do not begin to reflect the human suffering of burn victims and of their families. Despite the expectation of Congress and the general public that comprehensive measures would be taken to reduce this grievous loss of life and property, the law regulat-

ing flammability of fabrics has not been speedily implemented. Even in those areas where flammability standards have been set, there is substantial question of adherence to the law. For example, the Federal Trade Commission has recently reported that within a 6-month period its compliance program disclosed more than 100 violations of flammability standards. This is obviously a situation which demands correction.

On April 19 of this year our parent committee reported to the floor of the House a bill to authorize the appropriation of \$4 million for fiscal year 1972 to carry out the Flammable Fabrics Act. It was our hope that this law would be enacted in time to permit the appropriation of funds before the beginning of the fiscal year 1972. I regret to note that the Senate has failed to take action upon a similar proposal to date.

In extending the authorization for only 1 year (fiscal year 1972), it was this committee's announced intention to consider, at the earliest possible convenience, legislation to augment and enhance the enforcement mechanism of the act. Our proceedings here today are in fulfillment of that promise.

I should note parenthetically that I introduced H.R. 5698 before this committee took action to approve the authorization for fiscal year 1972. Accordingly, that part of this bill which pertains to authorizations will have to be amended to reflect the prior committee action.

(The text of H.R. 5698 and departmental reports thereon follow :)

[H.R. 5698, 92d Cong., 1st sess., introduced by Mr. Moss on March 8, 1971]

A BILL

To strengthen enforcement of the Flammable Fabrics Act and to authorize appropriations for fiscal years 1971, 1972, and succeeding fiscal years in order to carry out the purposes of the Act.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Flammable Fabrics Act
4 Amendments of 1971".

5 SEC. 2. Section 3 of the Flammable Fabrics Act (15
6 U.S.C. 1192) is amended by redesignating subsections (a)
7 and (b) as subsections (b) and (c), respectively, and in-
8 serting the following new subsection (a) immediately after
9 "SEC. 3.":

10 “(a) (1) The manufacture for sale, the sale, or offering
11 for sale, in commerce, or the importation into the United

1 States, or the introduction, delivery for introduction, transpor-
2 tation or causing to be transported, in commerce, or the sale or
3 delivery after a sale or shipment in commerce, of any product,
4 fabric, or related material, or any product made of fabric or
5 related material, as to any of which an applicable standard
6 of flammability has been issued or amended under the provi-
7 sions of section 4 of this Act, which product, fabric, or
8 related material has not been certified by the manufacturer
9 or importer thereof to meet the requirements of the applica-
10 ble standards or other regulations issued or amended under
11 the provisions of section 4 of this Act, shall be unlawful and
12 shall be an unfair method of competition and an unfair and
13 deceptive act or practice in commerce under the Federal
14 Trade Commission Act. Such certification shall be based
15 upon a reasonable testing program conducted by the manu-
16 facturer or importer which has been approved by the Secre-
17 tary of Commerce in accordance with procedures established
18 in section 4 of this Act.

19 “(2) This subsection and the penalties provided in
20 section 7 of this Act, insofar as they would prohibit sale
21 of a product without certification based upon an approved
22 testing program, shall not take effect as to any product for
23 which an application for approval of a testing program has
24 been timely filed with the Secretary of Commerce until thirty
25 days after such application has been finally acted upon by

1 the Secretary of Commerce, or in the case of a rule prescrib-
2 ing a testing program under section 4 (g) (6) of this Act,
3 until thirty days after such rules have become effective.

4 “(3) In approving or prescribing a testing program
5 under section 4 (g) of the Act, the Secretary of Commerce
6 may for good cause shown allow an applicant or person
7 required to perform such prescribed testing an additional
8 period of not more than six months within which to imple-
9 ment the approved or prescribed testing program. During
10 such period applicability of the certification requirement of
11 this section and the penalty provisions of section 7 of this
12 Act as they relate to the requirement of certification shall
13 be stayed.

14 “(4) Neither this subsection nor the penalties provided
15 in section 7, insofar as they relate to the requirement of cer-
16 tification shall apply to any product, fabric, or related mate-
17 rial, or any product made of fabric or related material which
18 has been exempted from this subsection by rule or regulation
19 issued by the Commission pursuant to the provisions of sec-
20 tion 5 (c) of this Act.”

21 SEC. 3. Section 4 of the Flammable Fabrics Act is
22 amended by inserting the following new subsection (g) :

23 “(g) (1) The Secretary of Commerce may approve any
24 testing program upon application by any manufacturer or
25 importer pursuant to the certification requirements of section

1 3 (a) of this Act (i) if such application is submitted in a
2 proper form under regulations established by the Secretary of
3 Commerce and published in the Federal Register, and (ii)
4 if the testing program is reasonably designed to prevent or
5 minimize the manufacture and introduction in commerce of
6 any product, fabric, or related material, or any product made
7 of fabric or related material, which is not in compliance with
8 an applicable standard of flammability established pursuant to
9 this section.

10 “(2) Unless the Secretary of Commerce has determined
11 to proceed under paragraph (6) of this subsection, then
12 upon promulgation of any new or amended standard of
13 flammability under the provisions of this section, the Secre-
14 tary of Commerce shall give notice that any person required
15 to make a certification under section 3 (a) of this Act and
16 desiring approval of a testing program must submit an ap-
17 plication for approval for such testing program within six
18 months after the date of promulgation of such standard or
19 amendment.

20 “(3) All applications for approval of testing programs
21 must be approved or denied within a reasonable time. The
22 Secretary of Commerce may consolidate similar applications
23 for joint consideration and joint approval or denial.

24 “(4) A denial of an application for approval of a testing

1 program shall set forth with particularity the reasons for
2 denial.

3 “(5) Any person who will be adversely affected by such
4 approval or denial may seek judicial review in accordance
5 with procedures set forth in subsection (e) of this section.

6 “(6) In lieu of approving or denying applications for
7 approval of testing programs, the Secretary of Commerce
8 may promulgate rules prescribing the testing program to be
9 used in the manufacture of any product, fabric, or related
10 material for which a standard of flammability has been
11 promulgated. Rules prescribing a testing program for fabrics,
12 products, or related materials for which a standard of flam-
13 mability has been promulgated prior to the effective date of
14 this subsection shall become effective within one year from
15 the effective date of this subsection, or six months after the
16 date of promulgation of such rules, whichever is later. Other-
17 wise, rules prescribing a testing program shall become effec-
18 tive on the effective date of any standard of flammability
19 promulgated, or six months after the date of promulgation of
20 such rules, whichever is later.”

21 SEC. 4. Section 7 of the Flammable Fabrics Act is
22 amended to read as follows:

23 “PENALTIES

24 “SEC. 7. (a) Whoever performs any act in violation of
25 section 3 or section 8(b) of this Act with knowledge that

1 such act is in violation of such sections shall be guilty of a
2 felony and upon conviction shall be fined not more than
3 \$10,000, imprisoned for not more than three years, or both,
4 in addition to any other penalties, civil or criminal, imposed
5 for such violation.

6 “(b) Whoever performs any act in violation of section
7 3 or section 8 (b) of this Act shall be guilty of a misdemeanor
8 and upon conviction shall be fined not more than \$1,000, im-
9 prisoned for not more than one year, or both, in addition
10 to any other penalties, civil or criminal, imposed for such
11 violation. However, no person shall be held in violation of
12 this subsection if such person establishes that he exercised
13 due care in the application of an approved testing program
14 required under section 3 (a) of this Act and that such appli-
15 cation disclosed that the product, fabric, or related material
16 was in conformity with applicable standards of flammability
17 established pursuant to section 4 of this Act.

18 “(c) (1) Whoever performs any act in violation of sec-
19 tion 3 or section 8 (b) of this Act, in addition to any other
20 penalties imposed for such violation, shall be subject to a
21 civil penalty imposed by the Commission of not to exceed
22 \$10,000 for each such violation. However, no person shall
23 be held in violation of this subsection if such person estab-
24 lishes that he exercised due care in the application of an
25 approved testing program required under section 3 (a) of

1 this Act and that such application disclosed that the product,
2 fabric, or related material was in conformity with applicable
3 standards of flammability established pursuant to section 4
4 of this Act.

5 “(2) Upon failure of the offending party to pay the
6 civil penalty, the Commission may request the Attorney Gen-
7 eral to commence an action in a court of the United States
8 for such relief as may be appropriate.

9 “(3) Prior to referral to the Attorney General for ap-
10 propriate action, the Commission may compromise such
11 civil penalty.

12 “(d) No person shall be subject to prosecution or
13 penalty under this section for a violation of section 3 of this
14 Act if such person establishes that he (1) has received in
15 good faith a fabric, related material, or product certified as
16 required by section 3 (a) of this Act signed by and contain-
17 ing the name and address of the person by whom the prod-
18 uct, fabric, or related material was certified, and (2) has not,
19 by further processing, affected the flammability of the fabric,
20 related material, or product covered by the certification which
21 he received.

22 “(e) Notwithstanding the provisions of subsection (d)
23 of this section and section 8 of this Act, an importer who
24 chooses to rely on the certification of a foreign manufacturer
25 under section 3 (a) of this Act shall be responsible as a

1 manufacturer under this section for any violation of section 3
2 of this Act."

3 SEC. 5. (a) Section 8 (a) of the Flammable Fabrics
4 Act is amended by adding after the word "prosecution" in
5 the first sentence the words "or penalty".

6 (b) Section 8 (b) of the Flammable Fabrics Act is
7 amended by adding after the word "guaranty", wherever it
8 appears, the phrase "or certification required under Section
9 3 (a) of this Act".

10 SEC. 6. Section 13 of the Flammable Fabrics Act is
11 amended to read as follows:

12 "AUTHORIZATION OF APPROPRIATIONS

13 "SEC. 13. There is authorized to be appropriated a sum
14 not to exceed \$9,000,000 for the period beginning July 1,
15 1970, and ending June 30, 1972, to carry out the provi-
16 sions of this Act."

17 SEC. 7. Sections 2, 4, and 5 of this Act shall become
18 effective one year after the date of enactment. All other
19 provisions of this Act shall be effective upon enactment.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
Washington, D.C., July 12, 1971.

HON. HARLEY O. STAGGERS,
Chairman, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This letter is in response to your request of March 10, 1971, for a report on H.R. 5698, a bill "To strengthen enforcement of the Flammable Fabrics Act and to authorize appropriations for fiscal years 1971, 1972, and succeeding fiscal years in order to carry out the purposes of the Act."

The bill would authorize to be appropriated a sum not to exceed \$9 million for the period beginning July 1, 1970, and ending June 30, 1972, to carry out the provisions of the Flammable Fabrics Act. (Contrary to what is stated in the title, the bill would not authorize appropriations for succeeding fiscal years beyond fiscal year 1972.) H.R. 5698 would also amend the Act to require manufacturers to certify that a product, fabric, or related material offered for sale meets the requirement of any applicable standard or other regulation. This certification would be based upon a reasonable testing program conducted by the manufacturer and approved by the Secretary of Commerce. Any failure to certify would be considered an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act. The bill would also permit the imposition of civil penalties for violations (not to exceed \$10,000 per violation) which could be sought directly by the Federal Trade Commission, and additional criminal penalties of a maximum of a \$1,000 fine and one year imprisonment, except that a person shall not be held in violation of the Act who establishes that he exercised due care in the application of an approved testing program and such application disclosed that the product, fabric, or related material was in conformity with applicable standards of flammability. In addition the bill increases the penalty for willful violation to a maximum of a fine of \$10,000 and imprisonment of three years.

The Flammable Fabrics Act Amendments of 1967 extended the scope of coverage of the original Act and broadened the authority of the Secretary of Commerce with respect to the establishment of standards. Section 14(a) of the Amendments directed the Secretary of Health, Education, and Welfare in co-operation with the Secretary of Commerce to "conduct a continuing study and investigation of deaths, injuries, and economic losses resulting from accidental burning of products, fabrics, or related materials." The Secretary of Health, Education, and Welfare is required to submit annually a report to the President and to the Congress on the results of these studies and investigations. Authorization for appropriations for this Act expired June 30, 1970.

A Departmental reorganization in 1968 placed the Department's responsibilities under the Flammable Fabrics Act, as amended, in the Food and Drug Administration. Under the President's proposed plan for reorganization of the Executive Branch responsibility for the establishment of flammability standards for fabrics, related materials and products under sections 4, 14, and 17 of the Act would be transferred from the Department of Commerce to the new Department of Human Resources of which the Department of Health, Education, and Welfare is the core agency.

Although it is apparent that the enforcement of the Act should be strengthened we are not now in a position to recommend the advisability of any particular means of accomplishing the goal of greater enforcement and would defer to the Federal Trade Commission and the Department of Commerce concerning the appropriateness of the proposed certification and testing requirements and penalty provisions of H.R. 5698.

On March 4, 1971, a representative of the Department presented testimony on H.R. 5066, a bill to extend and increase authorization for activities under the Flammable Fabrics Act, before the Commerce and Finance Subcommittee of your Committee. For your convenience we are enclosing a copy of that testimony.

The Department of Health, Education, and Welfare strongly supports the extension of authorization of funds for administering the Flammable Fabrics Act beyond the fiscal year 1972 authorization provided by H.R. 5066 as passed by the House on April 28, 1971, and by the instant bill, H.R. 5698. The Department favors a continuing authorization of such sums as are necessary to carry out the Act.

We are advised by the Office of Management and Budget that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

ELLIOT L. RICHARDSON, *Secretary.*

DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C. August 27, 1971.

HON. HARLEY O. STAGGERS,
*Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice on H.R. 5698, a bill to strengthen enforcement of the Flammable Fabrics Act and to authorize appropriations for fiscal years 1971, 1972, and succeeding fiscal years in order to carry out the purposes of the Act.

The Flammable Fabrics Act as amended, codified in 15 U.S.C. §§ 1191-1204, prohibits the manufacture for sale, the sale, and the offering for sale, in commerce, of any fabric not in conformity with an applicable flammability standard or regulation issued by the Secretary of Commerce under the procedures specified in 15 U.S.C. § 1193. See 15 U.S.C. §§ 1192, 1193. The manufacture for sale, sale, or offering for sale of non-conforming fabric products is declared to be "an unfair method of competition, and an unfair and deceptive act or practice in commerce," and, hence, a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Pursuant to the enforcement provisions of Section 5, the Commission can issue an order requiring violators to cease and desist from violations of the Act, 15 U.S.C. § 45(b). Violations of a Commission cease and desist order can be punished by a civil penalty of not more than \$5,000 for each violation (15 U.S.C. § 45(l)) or by contempt proceedings, if the Commission's order has been ordered enforced by a Federal court in a proceeding for review (15 U.S.C. § 45(c)). In addition, the Flammable Fabrics Act can be enforced by a condemnation and forfeiture proceeding *in rem* against non-conforming products, 15 U.S.C. § 1195(b). Willful violators risk criminal penalties of up to one year's imprisonment, a \$5,000 fine, or both. 15 U.S.C. § 1196.

H.R. 5698 would require the manufacturer or importer of a fabric product to certify that the product meets the requirements of the applicable flammability standards before the product could lawfully be marketed. Section 2, H.R. 5698. The certification could be based only upon the results of a reasonable testing program conducted by the manufacturer or importer after the program's approval by the Secretary of Commerce under certain standards and procedures specified in the bill. *Id.* Both civil and criminal penalties for violations of the Act would be substantially increased. The maximum civil penalty that could be assessed would be doubled, from \$5,000 to \$10,000 per violation. Willful violation of the Act would be made a felony, punishable by imprisonment for up to three years, a fine up to \$10,000, or both. Other violations would remain misdemeanors, punishable by imprisonment for a year or less, or a fine not larger than \$1,000, or both. For any person who had not affected a product's flammability before selling it, good faith reliance upon the manufacturer's certificate would be a complete defense to any criminal prosecution or civil penalty action, except for an importer relying on a foreign manufacturer's certification. The manufacturer or importer would have a complete defense to either a misdemeanor prosecution or a civil penalty action if he could establish that he exercised due care in the application of an approved testing program and the test results indicated that the product in question complied with the governing flammability standards.

The Department of Justice supports the new approach proposed in H.R. 5698 towards more effective enforcement of the prohibitions of the Flammable Fabrics Act. Requiring manufacturers and importers to establish testing programs and certification procedures reasonably calculated to prevent dangerously flammable wearing apparel or fabrics from appearing on the market will properly focus enforcement efforts on manufacturers and importers, rather than on distributors and retailers for whom protecting consumers from unsafe apparel or fabrics would be much more difficult. The more severe penalty for those who willfully market wearing apparel or fabrics more dangerous than the applicable stand-

ards permit seems quite appropriate, as does the increase in the maximum civil penalty assessable. In the absence of any countervailing considerations, H.R. 5698 seems to be clearly in the public interest.

Accordingly, the Department of Justice favors enactment of the proposed legislation.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

RICHARD G. KLEINDIENST,
Deputy Attorney General.

DEPARTMENT OF THE TREASURY,
OFFICE OF THE GENERAL COUNSEL,
Washington, D.C., June 30, 1971.

HON. HARLEY O. STAGGERS,
Chairman, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for the views of this Department on H.R. 5698, "To strengthen enforcement of the Flammable Fabrics Act and to authorize appropriations for fiscal years 1971, 1972, and succeeding fiscal years in order to carry out the purposes of the Act."

The bill would amend section 3 of the Flammable Fabrics Act (15 U.S.C. 1192) by redesignating subsections (a) and (b) as subsections (b) and (c), respectively, and adding a new subsection (a) making it unlawful and an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act to manufacture for sale, sell, or offer for sale, in commerce, or to import into the United States, or to introduce, deliver for introduction, transport or cause to be transported, in commerce, or sell or deliver after a sale or shipment in commerce, any product, fabric, or related material, or any product made of fabric or related material, as to any of which an applicable standard of flammability has been issued or amended under section 4 of the Act, which product, fabric, or related material has not been certified by the manufacturer or importer thereof to meet the requirements of the applicable flammability standard or other regulations issued under section 4 of the Act. The certification would be required to be based on a reasonable testing program conducted by the manufacturer or importer which had been approved by the Secretary of Commerce in accordance with procedures established by section 4 of the Act.

The bill would also amend section 4 of the Flammable Fabrics Act by inserting a new subsection (g) to authorize the Secretary of Commerce to approve or deny testing programs upon application by any manufacturer or importer, or, in lieu of approving or denying such applications, to promulgate rules prescribing the testing program to be used in the manufacture of any product, fabric, or related material for which a standard of flammability has been promulgated.

The bill would amend section 7 of the Act to increase the penalties for violations of the act, and would provide that, notwithstanding section 8 of the Act, an importer who chose to rely on the certification of a foreign manufacturer would be responsible as a manufacturer for any violation of section 3 of the Act. Section 8 of the Act exempts from prosecution any person who establishes a guaranty (or certification if this bill is enacted) received in good faith from the manufacturer or other person from whom it was received that reasonable and representative tests had been made to show that the goods conformed to any applicable flammability standards which had been promulgated. Section 8(b) of the Flammable Fabrics Act would be amended by adding after the word "guaranty" wherever it appears, the phrase "or certification required under Section 3(a) of this Act."

The certification which would be required by this bill could take any of the forms currently provided for guaranties pursuant to section 8(a) of the Act, this is, a separate guaranty specifically designating the product, fabric, or related material to which it is applicable, in which case it may be on the invoice or other related paper; a continuing guaranty given by the seller to the buyer in a form prescribed by the Federal Trade Commission; or a continuing guaranty filed with the Commission applicable to any product, fabric, or related material handled by the guarantor.

Although the certification requirement would apply to importers and imported goods, there is no requirement that the goods themselves be labeled with a certification, or that a certification be presented to Customs at the time of entry of imported goods. Accordingly, as this Department construes the bill, it would not place any additional administrative responsibility on the Bureau of Customs, but would be enforced by the Federal Trade Commission. The Department defers to the views of other agencies regarding the merits of the proposed legislation.

The Department has been advised by the Office of Management and Budget that there is no objection from the standpoint of the Administration's program to the submission of this report to your Committee.

Sincerely yours,

SAMUEL R. PIERCE, JR.
General Counsel.

Mr. Moss. Before welcoming our first witness, Mr. Broyhill, do you have any comments?

Mr. BROYHILL. No comments, thank you.

Mr. Moss. Then we are pleased to welcome as our first witness Dr. James H. Wakelin, Assistant Secretary for Science and Technology, Department of Commerce.

STATEMENT OF JAMES H. WAKELIN, JR., ASSISTANT SECRETARY FOR SCIENCE AND TECHNOLOGY, DEPARTMENT OF COMMERCE; ACCOMPANIED BY ROBERT H. ELLERT, ASSISTANT GENERAL COUNSEL; DR. F. KARL WILLENBROCK, DIRECTOR, INSTITUTE FOR APPLIED TECHNOLOGY, NATIONAL BUREAU OF STANDARDS; AND DR. JOSEPH E. CLARK, CHIEF, OFFICE OF FLAMMABLE FABRICS

Mr. WAKELIN. Mr. Chairman and members of the subcommittee, my associates and I are very pleased to appear before you today. On my right is Dr. Karl Willenbrock, who is the Director of the Institute for Applied Technology. On his right is Dr. Joseph E. Clark, who is Chief of the Office of Flammable Fabrics, a part of Dr. Willenbrock's institute. And on my left is Mr. Robert Ellert, who is Assistant General Counsel for the Department of Commerce.

Mr. Chairman and members of the subcommittee, I am pleased to appear before you today to offer the comments of the Department of Commerce on H.R. 5698, a bill to strengthen enforcement of the Flammable Fabrics Act and to authorize appropriations for fiscal years 1971, 1972, and succeeding fiscal years in order to carry out the purposes of the act.

In March of this year the Department of Commerce testified before this subcommittee on H.R. 5066 which is similar to H.R. 5698 with respect to authorizing appropriations. As we noted at that time, we support legislation which would authorize appropriations to carry out the act. We would prefer, however, an authorization through fiscal year 1972 and of such sums as may be necessary for succeeding fiscal years. The enactment of such an authorization would give appropriate recognition to the continuing nature of this program and would minimize uncertainty in its fiscal management.

In addition to containing authority for appropriations, H.R. 5698 would authorize a major change in the enforcement procedures of the Flammable Fabrics Act. The Department of Commerce supports these

changes and urges enactment of H.R. 5698 with some amendments which we deem appropriate.

The provisions of H.R. 5698 would strengthen enforcement of the Flammable Fabrics Act in the following ways:

1. Section 3 of the act would be amended to establish a premarketing test procedure. This procedure would require the manufacturer to certify that a product, fabric or related material offered for sale meets the requirements of any applicable flammability standard or regulation. Such certification would be based on a reasonable testing program conducted by the manufacturer or importer which has been approved or prescribed by the Secretary of Commerce in accordance with procedures established by the Secretary.

2. Section 7 of the act dealing with penalties would be amended by deleting the present section 7 which provides that a willful violation of the act shall be a misdemeanor. It would substitute a three part penalty scheme providing for: (1) A felony, requiring only knowledge that an act is in violation of sections 3 or 8(b); (2) a misdemeanor, requiring no knowledge that an act is in violation of sections 3 or 8(b); and (3) a civil penalty also requiring no knowledge.

Last year Mr. Weinberger, then Chairman of the Federal Trade Commission, in his testimony before the Consumer Subcommittee of the Senate Commerce Committee spoke of the difficulty of enforcement under the Flammable Fabrics Act and pointed out that most fabrics not meeting a flammability standard are in wide distribution by the time they detected by the Commission.

Mr. Weinberger stated:

In sum, nowhere in the existing machinery is there an effective means of accomplishing the primary objectives of the act—detecting flammable fabrics before they are placed on the market and effectively deterring the future sales of flammable fabrics by the threat of meaningful criminal and civil sanctions.

We strongly support the concept of strengthening the detection of flammable fabrics before they reach the market place. Under the present act fabrics could be marketed without ever having been tested to determine if they met an existing flammability standard. We believe that this situation would be corrected by the certification and testing program contemplated by H.R. 5698. The certification of compliance with the provisions of proposed section 3 should be made to the Federal Trade Commission since the certification logically would be retained by the agency responsible for enforcement.

We also support giving the Secretary of Commerce authority to prescribe testing procedures. The Department of Commerce has the competence necessary to develop testing and sampling programs based on the application of well established principles of statistics, random sampling, and acceptable quality limits. The National Bureau of Standards has outstanding and widely recognized expertise in this field. Further, the Office of Textiles and the National Bureau of Standards both have excellent contact with management and technical personnel in the textiles industry. Consequently, this Department can design reasonable and effective technical sampling procedures as envisaged in this bill provided resources are made available.

In addition to meeting the requirement for detecting flammable fabrics before they are placed on the market, this premarketing test

procedure also has a technical advantage. The proper testing of fabrics for flame resistance involves the destruction of the fabrics which are tested. Obviously, it would be an unacceptable solution to test every piece of fabric offered for sale. Therefore, any test program designed to assure compliance with the standard must be based on statistical principles and quality control procedures that assure that most, but possibly less than 100 percent, of production is in compliance with any published flammability standard. If a well-designed sampling program is followed, we can confidently expect to achieve a high level of consumer protection by testing a small percentage of total production.

Such a sampling program might allow a very small percentage of noncomplying fabric to reach the marketplace. I wish to emphasize, however, that even those noncomplying fabrics would probably fall short of the prescribed standard by only a narrow margin thereby making these rejectables, in our opinion, considerably safer than non-treated fabrics.

The amendments to section 7 of the act provide an affirmative defense against the newly added civil penalty of 7(c) and the misdemeanor offense of 7(b) to a person who can show that he has followed in good faith an approved testing program. These exculpatory provisions require that the application of the testing program disclose that the fabric is in conformity with applicable standards. The words "in conformity" do not appropriately reflect the statistical nature of the quality control testing programs contemplated by the bill. We would therefore recommend that reference be made to section 7(b) and 7(c) to acceptable quality levels which typically would be prescribed in testing programs promulgated by this Department.

Further, our research indicates that in order to continue to provide the consumer with protection it will be increasingly necessary for manufacturers to treat existing fabrics to make them flame retardant. Consequently, in order to assure maximum protection for the consumer, without destroying 100 percent of production, we are giving thought to including sampling programs in our standards. We feel that by doing this we will be able to assure maximum protection for the consumer.

It is for these reasons that we view as particularly appropriate and timely the provisions of H.R. 5698 which would amend section 3 of the Flammable Fabrics Act to require premarket testing programs to assure the consumer the maximum safety which the manufacturer can provide in a technologically practical fabric treatment system. I am pleased with this emphasis on quality control. I believe that it will serve, in the long run, to increase the quality level of the flame retardant goods produced by focusing the attention of the manufacturer on those elements of his manufacturing program which are subject to variations which can lead to production of goods which fail applicable standards. Such goods could not be placed on the market without further treatment.

The proposed amendments to section 4 of the act provide two alternatives for approving these programs. The first alternative, contained in proposed sections 4(g) (1) through 4(g) (5), would allow the submission of individual sampling and testing programs to the Secretary by possibly thousands of manufacturers and importers of textiles, and would require detailed analysis and approval or rejection of each.

The second alternative contained in proposed section 4(g) (6) provides that, in lieu of approving or denying applications under section 4(g) (1) through 4(g) (5), the Secretary of Commerce may promulgate rules describing the program to be used. If this bill is enacted, we would choose this alternative as it provides for an orderly utilization of the competence of the Department. The Secretary could publish procedures for establishing sampling programs. These procedures would provide opportunity for all interested parties to participate and could include special provisions for exceptional cases.

As we believe the second alternative is administratively the more desirable, I would suggest that consideration be given to deleting the first alternative found in proposed section 4(g) (1) through 4(g) (5) so that one or more testing programs could be developed by the Secretary. This would provide needed flexibility in designing testing programs which would be more economical to develop and to enforce than a multitude of programs developed by individual manufacturers, reviewed by the Department of Commerce and policed by the Federal Trade Commission.

In view of the fact that the testing program promulgated under this act would have an impact of substantially the same magnitude as a standard promulgated under the act, I believe judicial review should be available with respect to testing programs promulgated under the act in much the same manner as they now apply to published flammability standards. In many instances, the testing program would be developed as part of the development of the standard and thus clearly would be subject to judicial review. However, in those cases where such programs are developed separately, the legislation should specifically allow for judicial review.

I should also point out that, in our view H.R. 5698 provides a solution to the problem of foreign manufactured fabrics or products. It permits the importer to test such items himself, thereby insuring compliance with the act or, if he is convinced that the foreign manufacturer has adequately tested the goods, to rely on this testing. If he chooses the latter course, he is responsible should there be some violation. Thus, the importer may avoid the expense and time of needless retesting. At the same time, the bill would assure that the importer responsible for compliance with the act is subject to the jurisdiction of the Federal Trade Commission.

In summary, we believe the pretesting procedures contained in H.R. 5698 are conceptually sound. With the amendments along the lines I have mentioned I have no doubt that the bill will give added protection to the consumer by requiring that goods are tested for flammability before they come on the market.

We will submit in a separate letter suggested language designed to carry the amendments we recommend.

My colleagues and I will be pleased to attempt to answer any questions which you may ask.

Mr. Moss. Thank you, Mr. Secretary.

I want to assure you that the committee will give very careful consideration to the suggested amendments.

And at this point in the record, if there is no objection, we will reserve space to receive the letter containing the amendatory language.

Mr. WAKELIN. Thank you, sir.

(The following letter was received for the record:)

DEPARTMENT OF COMMERCE,
OFFICE OF THE GENERAL COUNSEL,
Washington, D.C., August 26, 1971.

Hon. JOHN E. MOSS,
Chairman, Subcommittee on Commerce and Finance, Committee on Interstate
and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: During the testimony of Assistant Secretary James H. Wakelin, Jr. on June 30, 1971, before your Subcommittee on H.R. 5698 relating to the Flammable Fabrics Act, he stated the Department's view that certain changes should be made in the bill. Under the terms of this bill, manufacturers and importers would be required to certify that a product, fabric or related material offered for sale meets the requirement of any applicable flammability standard or regulation. This pre-marketing certification would be based on a reasonable testing program conducted by the manufacturer or importer.

As the bill presently reads, the testing program to be used would alternatively be one submitted by the manufacturer or importer to the Secretary of Commerce for his approval, or one prescribed by the Secretary of Commerce to be used by the manufacturer or importer. To avoid the possibility of the submission of thousands of individual testing programs to the Secretary of Commerce, we recommend the deletion in section 3 of this bill of the proposed requirement whereby the Secretary would have to approve or deny individual testing programs. We urge that the section be revised so as to retain only the authority of the Secretary of Commerce to prescribe testing programs which manufacturers and importers would have to use.

Set out below are the specific changes which we feel should be made in this bill.

It is suggested that section 3 of H.R. 5698 be revised by deleting that portion of the proposed subsection (g) commencing on line 23 on page 3 of the bill through the first sentence of subparagraph (6) on page 5 of the bill. Revise subparagraph (g) to read as follows:

"The Secretary of Commerce shall promulgate rules prescribing the testing program to be used in the manufacture of any product, fabric or related material for which a standard of flammability has been promulgated. Rules prescribing a testing program for fabrics, products, or related materials for which a standard of flammability has been promulgated prior to the effective date of this subsection shall become effective within one year from the effective date of this subsection, or six months after the date of promulgation of such rules, whichever is later. Otherwise, rules prescribing a testing program shall become effective on the effective date of any standard of flammability promulgated, or six months after the date of promulgation of such rules, whichever is later."

Other changes which would be needed in the bill consonant with the changes suggested for subparagraph (g) include the following:

1. Substitute "prescribed" for "approved" in line 16 on page 2 of the bill;
2. Revise subparagraph (2) commencing at line 19 on page 2 of the bill and ending on line 3 on page 3 to read

"(2) This subsection and the penalties provided in section 7 of this Act, insofar as they apply to the sale of a product, fabric or related material without certification based upon rules promulgated by the Secretary of Commerce under section 4(g) of this Act prescribing a testing program and the penalties provided in subsections 7(b) and (c) shall not take effect until thirty days after such rules have become effective."

3. Delete "approving or" in line 4 on page 3 of the bill and "approved or" in line 9 on that page; and

4. Substitute "a prescribed" for "an approved" in line 13 and in lines 24 and 25 on page 6 of the bill.

We appreciate the opportunity which has been afforded us to testify on this bill and to submit to you our suggested changes to it.

Sincerely,

WILLIAM N. LETSON.

Mr. Moss. Mr. Broyhill.

MR. BROYHILL. Thank you, Mr. Chairman.

Doctor, I, of course, have been as concerned as others with the weakness in the present act, the fact that fabrics can be marketed without

prior testing. Now, the key to this is this testing program that will be established by the Department. And the success of it will of course be determined on how these testing programs are established.

Let's look at it from the beginning. You have, for instance, a new fabric or a new suiting material, or shirt material, or any other type of material that has been produced, and it is going to be put on the market. Now, will this be tested by the manufacturer, or will it be tested initially by an independent test agency?

Mr. WAKELIN. I believe the responsibility is with the manufacturer. The testing should be done by an adequately staffed and equipped laboratory. There might be other people involved in determining just what is adequate laboratory competence.

Mr. BROYHILL. Are you talking about an independent test agency, or will this testing be carried out by the manufacturers' own staff?

Mr. WAKELIN. It could be done either way, Mr. Broyhill. I would suppose, though, that if the manufacturer had the proper laboratory equipment and the proper staff, he would be able to determine his compliance with the standards. It would be up to the Federal Trade Commission to decide if such in-house testing is to be accepted as the basis for certification.

Mr. BROYHILL. And it is your intention to issue a regulation which will require all manufacturers to establish a process quality control on the flammability of fabrics and a testing procedure?

Mr. WAKELIN. Yes. A testing program is necessary for quality control.

Mr. BROYHILL. On a statistical basis?

Mr. WAKELIN. Right. This would be a small sampling technique by which, out of a run of manufacture, or a lot, or a unit, he would test certain samples along the way.

Mr. BROYHILL. How would you determine that he was maintaining this testing program?

Mr. WAKELIN. Well, in terms of quality control, he would test certain parts of his production lot as he goes along, and accept those portions that passed.

Mr. BROYHILL. Most manufacturers will go along with this, and I am sure will do a good job. But how do you determine that the manufacturer is in fact maintaining an adequate testing program?

Mr. WAKELIN. Of course, this is under the enforcement, monitoring, and policing functions of the Federal Trade Commission.

Mr. BROYHILL. So the Federal Trade Commission will have to have roving inspectors?

Mr. WAKELIN. Yes; in order to monitor and police such standard adherence. The Federal Trade Commission would obviously have to be the body to determine whether these standards were being met.

Mr. BROYHILL. On page 4, you have indicated that the Department can provide reasonable procedures provided resources are made available. Can you provide the committee with the costs of running this program for the next 3 fiscal years?

Mr. WAKELIN. I can give you an estimate of the coming fiscal year, 1972, which starts tomorrow. Our current budget as submitted to the House and yesterday to the Senate includes a figure of \$953,000 for Dr. Clark's current program. And we have requested an additional \$416,000 for needed growth, making a total of \$1,369,000 for that part

of the fabric flammability program which would be the technical back-up for future standard developments.

If H.R. 5698 is passed, we estimate that approximately \$150,000 more will be needed the first year. I can not now project this into 1973 and 1974, but if you would like, sir, I could submit these figures to you for the record.

Mr. BROYHILL. I would like to have it for the record.

Mr. Moss. Without objection the record will be held open at this point to receive it.

(The following material was received for the record:)

PROJECTED ESTIMATES OF 1973 AND 1974 BUDGET REQUIREMENTS

The estimated costs for developing sampling plans for flammability standards for fiscal years 1973 and 1974 are as follows: 1973—\$160,000; 1974—\$175,600.

These estimates represent simple projections of cost expressed in constant dollars at prices existing at the time the estimates are prepared. They are not intended to predict future economic conditions, and do not reflect possible changes in the scope or quality of the proposal which might result from experience gained at actual practice. Further, the resources which might appropriately be applied in later years will require a reexamination of the relative priorities of this and other Government programs, in light of economic and other circumstances then prevailing. Thus, the estimates do not represent a commitment as to amounts to be included in future budgets.

Mr. BROYHILL. No other questions at this time.

Mr. Moss. Mr. McCollister.

Mr. McCOLLISTER. Relating to the business of setting up standards and testing procedures, the Department really doesn't care who does it, do they, as long as the testing procedures are submitted, whether by the manufacturer or by an independent test agency or a group of manufacturers that test together?

Mr. WAKELIN. As long as we are assured that the standards and test programs are clearly understood and can be carried out correctly, then it is out of our domain, sir, and in the domain of FTC.

Mr. McCOLLISTER. But you issue a certificate that prescribes what those standards are.

Mr. WAKELIN. We publish the standard, but we do not certify laboratories.

Mr. McCOLLISTER. In the Federal Trade Commission's supervision of it, isn't a manufacturer likely to make these test procedures and these statistical samplings of his production just to keep himself out of trouble because of the FTC supervision of what is on the market?

Mr. WAKELIN. Yes, sir.

Mr. McCOLLISTER. Is it assumed that the FTC's primary thrust will be with manufacturers, or a surveillance of what is on the marketplace? That is, retail and wholesale distribution?

Mr. WAKELIN. I cannot speak for the Federal Trade Commission, but I understand their current activities are in the marketplace and in the manufacturers' plants also.

Mr. McCOLLISTER. Thank you.

Dr. WILLENBROCK. If I may, Mr. Chairman—

Mr. Moss. Yes, indeed.

Dr. WILLENBROCK. The FTC certainly has the capability and responsibility to examine both the marketplace, the distributor, and the retailer, as well as the manufacturer. And I believe that is part of

their present program. There are FTC representatives here who I am sure can give you more detail.

Mr. Moss. There are two items that I want to comment on, Mr. Secretary. On the first page, you state:

However, an authorization through fiscal year 1972, and of such sums as may be necessary for succeeding fiscal years.

I would like to re-emphasize the fact that for many years now, the Committee on Interstate and Foreign Commerce has confined its authorizations to 3 years in order to retain jurisdiction. We find that the jurisdiction is a very elusive thing, and that if we give you an open-ended authorization, the substantive law tends to be written by other committees of the House. And those of us who serve on Commerce take a certain pride in the fact that we think we know a little more about the subject matter than some of our colleagues who serve on other committees.

I doubt very much, in view of the strong bipartisan support of that policy, that it would be modified at any time in the foreseeable future. I know that I would resist such modification.

Mr. WAKELIN. Thank you, sir.

Mr. Moss. I know that Mr. Springer, the ranking minority member, has consistently resisted any departure from it.

We have, since last amending the Flammable Fabrics Act as to the material covered, the fabrics, had a new phenomenon. And I am not certain as to whether we cover under flammable fabrics hair pieces and wigs. There is a tremendous import market developing for such items of apparel.

Mr. WAKELIN. May I defer to Mr. Ellert, sir?

Mr. Moss. Yes, indeed.

Mr. ELLERT. The question has come up from time to time, and what I would like to do is give you a considered opinion for the record, sir, because there has been quite a bit going back and forth on it.

Mr. Moss. I think it would be very helpful to the committee. And without objection we will hold the record open to receive the opinion. But we might discuss it, because it would be my purpose, if it is the opinion of counsel that they are not covered, to consider covering them, because they are manufactured from artificial fibers, many of them of new types of artificial fibers. And the degree of flammability is certainly unknown at the moment. But being faced, as we are, with the wide practice of smoking, particularly among women who wear them on many occasions, they could pose a real danger for the wearer. Do you have any comment?

Mr. WAKELIN. I think that is absolutely right. And I think it is a focal point for a lot of injuries.

(The following letter was received for the record:)

DEPARTMENT OF COMMERCE,
OFFICE OF THE GENERAL COUNSEL,
Washington, D.C., August 26, 1971.

Hon. JOHN E. MOSS,
Chairman, Subcommittee on Commerce and Finance, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: During the testimony of Assistant Secretary Wakelin on H.R. 5698 before your Subcommittee on June 30, you requested my legal opinion whether hair pieces and wigs are covered under the Flammable Fabrics Act.

Section 4 of the Flammable Fabrics Act (as amended) provides for the issuance of standards or other regulations for "a fabric, related material, or product", as needed to protect the public against unreasonable risk of fires leading to death, personal injury, or significant property damage.

Section 2(h) of the Act defines product to include wearing apparel. The term "wearing apparel" is defined in section 2(d) as "any costume or article of clothing worn or intended to be worn by individuals".

It is my opinion that hair pieces and wigs fall within the statutory definition of wearing apparel contained in the amended Act as they are considered to be a costume or article of clothing. Therefore hair pieces and wigs would be subject to regulation under the Act.

Sincerely yours,

ROBERT B. ELLERT,
*Assistant General Counsel
for Science and Technology.*

Mr. MOSS. I now want to recognize Mr. Curtis, counsel, for some questions.

Mr. CURTIS. The committee has often asked you to explain the complexity of the standardization process. But because we are tacking certification of the testing program to the standardization process, I believe it would be helpful to review again for the record the procedures followed in the promulgation of the fabric standards, with particular emphasis on the time required for each step. I note in this respect that it took nearly 3 years to produce the first standard under the 1967 amendments to the act.

Mr. WAKELIN. May I comment, and then ask Dr. Willenbrock if he will answer this question, with your permission, Mr. Chairman.

Mr. MOSS. Certainly.

Mr. WAKELIN. When I came into the Department, some of my textile associates who had been with me at the Textile Research Institute, and were connected with me in Princeton when I was director of research there—many of whom are right here now in this room—said: One of the most perplexing problems you are going to face is the problem of establishing the correct approach to probability with regard to textile materials. And Mr. von Bergen, who had been director of research in the Forstmann Co. for many years, and with whom I worked very closely at the Textile Institute on wool processing, offered his condolences to me in that regard.

Mr. Chairman, I know it is complex. I was never really associated with research on flammability. I always considered this field much more complicated than the classical physical and chemical approaches that I was invited to supervise. I am only saying, sir, that I appreciate, in great depth, the complications, not only of the processing technology, but also our ability to arrive at a fair and reasonable group of standards for the various kinds of textile materials, both in fabrics and in finished form.

With that as a prelude, may I ask Dr. Willenbrock to comment on that with respect to the procedures.

Mr. MOSS. Yes. Dr. Willenbrock.

Dr. WILLENBROCK. Thank you very much, Mr. Chairman.

I would like to make my comments along the line of what our procedures are, as published in the Federal Register.

We essentially have a three-step procedure. And the first step is a

determination that there may be a need for a standard, and that is published in the Federal Register for public comment.

Our second step is a determination that there is indeed a need, and at that time, a proposed standard is published.

Mr. CURTIS. Excuse me, doctor. If I may interrupt. Can you give us time frames for each of these steps, please?

Dr. WILLENBROCK. I would like to indicate the steps, if I may, Mr. Curtis, and then have Mr. Ellert—the timing is a little bit tricky, and he is the expert on the timing. I will include some times scales, though.

So the second step is that there is a need and a proposed standard is published at that time. Again we invite comments from all concerned. We typically have our national advisory committee meet with us and discuss the issue.

The third and last step would be refinement of the proposed standard and promulgation of a mandatory standard.

Normally that last step would have a 1-year effective date beyond promulgation of the standard. As you have indicated, this is a lengthy procedure. It does involve contributions from manufacturers, from consumers, from the medical profession, and from the entire community.

If I may, I would like to ask Mr. Ellert to fill in the exact time schedule.

Mr. ELLERT. As Dr. Willenbrock mentioned, we do have a three-step procedure right now. There are 30 days minimum for public comment after each of the first two steps which Dr. Willenbrock mentioned. In asking about our procedures I believe you are referring to a critical analysis of our procedures made by Mr. Heffron at the request of the National Product Safety Commission. At this time Mr. Heffron brought up the question as to whether we need these three procedures, that is, the initial notice of a need for a standard, the second step of a proposed standard, and the final step, the promulgation of a mandatory standard, with 30 days as a minimum between the first two steps. In response to congressional inquiries we stated that we would study this matter. First, we determined that legally we do not need the three steps, that we could have a two-step process by eliminating the first step and coming out with a proposed standard combined with the finding of need. And after reviewing comments we could issue the final standard. However, at the same time, in studying our record in this area, we found that our delay was not caused by the procedures. The procedures themselves would theoretically allow a standard to be published in about 60 days. The problem of delay, as the department has mentioned before, is establishing an adequate technical base in the flammability and combustibility area and the development of test methods necessary to proceed to the standard. And we believe that this base has now been established, and we should be getting forward at a much more accelerated pace than in the past.

We have reviewed the procedures carefully, and, I think, our feeling right now in regard to the three-step procedure is that for the moment it serves as a good vehicle for due process to all interested parties in this new area. Everyone gets a chance to know what the Department

is going to do and has two chances to comment. We believe the first step has been very helpful to us in securing technical input for the proposed standard.

As soon as we get into this accelerated pace and start getting into the amendment of existing standards, we could consider the use of alternative procedures which would allow us to choose between the three steps and the two steps.

Mr. CURTIS. In hearings in the last session of Congress before the Consumer Subcommittee of the Senate Committee on Commerce, the Department indicated that it would review the procedures presently employed and streamline them where appropriate. Am I understanding your previous questions correctly to say that you have reviewed these procedures, and you have found them appropriate to your needs at this time?

Mr. ELLERT. Yes, we have reviewed them with the idea of possibly eliminating one of the steps. At this time we find they are appropriate. However, as I say, I think that as we get to the point of where we will be doing more standards and amending standards, that we might well consider a plan giving us the choice of going to the two-step or the three-step procedure. The three-step is useful especially when we get into a new area. The two-step would be more useful for a minor change in an existing standard. But, we have not made any final decision on this as yet.

Mr. CURTIS. You have indicated that the cause of the delay is not so much in the statutorily required procedure that you use, but in consideration of the comments that have been received. What has been your experience in setting the standards? What is the shortest period of time that this process has taken?

Mr. ELLERT. Dr. Clark, do you have a chronology of standards?

Dr. CLARK. We have developed a chronology of the time that it has taken us to complete the various steps.

The time that has been taken, I believe, was detailed in the step-by-step analysis in earlier testimony before this committee and before the Senate in which we looked at every step that was required to establish the technical basis for these standards. And this detailed analysis does show that essentially the slow steps in the process are not due to the Federal Register findings, nor to the 30-day period of comment. They are due to the fact that this is really a technically complicated area and a new area for consideration of the technical bases for standards.

Mr. CURTIS. Would you say that in practice it usually takes in excess of 1 year?

Dr. CLARK. In practice, in the past, it has taken us that long to reach a final standard. We would hope that in the future, now that we are coming to a better and better understanding of the technical problems involved, the process could be accelerated.

Mr. CURTIS. Commenting on legislation in the last session, which is identical to the bill presently before the committee, the Department suggested that the power to approve testing programs be vested in the Federal Trade Commission and not in the Secretary of Commerce. Your comments today indicated that the testing powers should more

properly be lodged in the Secretary of Commerce. Could you please explain why the Department has altered its position in this case. I have in mind especially the comments of the Federal Trade Commission, which also suggested that it be given the powers to prescribe the testing program as a necessary addition to its enforcement responsibilities under the act.

Dr. WILLENBROCK. If I may, Mr. Chairman, I would like to comment on that, because I think that as we have developed an increased understanding of what the problems are, that we have reached the position which was outlined in Mr. Wakelin's testimony.

In essence, there is a complex industrial process, first, in the making of fabrics from fibers, and then making garments from fabrics. We feel that in order to develop an appropriate testing schedule we ought to have certain objectives. One objective would be to give maximum assurance that the end product certainly does not meet the flammability requirements, while recognizing that the test method that has been developed is a destructive test method. Therefore, it is essential for us to have a statistical basis for approaching that.

It is also essential that we develop a testing schedule which results in reasonable cost to the fabric producer and the garment manufacturer, so that the net effect of the standard would not be to price the manufacturers out of the business. A poorly designed testing program could lead to an experience similar to what they had in England. They just improved the home sewing market rather than reduce the flammability of night wear or apparel in general.

We do feel that in order to do this properly, a detailed knowledge of the industrial process is needed. Textile chemistry is needed, and state of art process control is needed. In addition to that detailed knowledge of the process carried on by the industry, it is also essential to have a statistical capability. These are capabilities which presently exist within the Department, and particularly in the National Bureau of Standards. And we feel it is most desirable to use those capabilities.

I would point out, though, that we feel that our role is to develop the testing program. We feel that the compliance functions, the testing of products, the police function is certainly the Federal Trade Commission's responsibility, and we will help them in any way in carrying out that responsibility.

Mr. CURTIS. I would like to ask just two more questions on the statement itself.

On page 6 of the statement, Mr. Secretary, you indicate that you are giving thought to including sampling of programs in your standards. Does this mean that only one out of a certain product group of 1,000 need comply with the standard as opposed to approving a testing program which would test that one out of every thousand in a production group?

Mr. WAKELIN. We are interested in small sample statistics in this case, not in testing to destruction 100 percent, because the later obviously puts people out of business and reduces customer choice. We have to establish a number of samples to test, for example, per hundred thousand yards of production. The number of samples to be

chosen out of units, or even out of lots, has to be established statistically in order to assure ourselves at least of a level of compliance with respect to what is rejected and what is accepted.

We regard the statistical determination of the number of samples to be measured in a given production run to be essential to the whole testing program; as essential to it, in a sense, as the standard. We have to be sure, however, that the number of individual and small samples that we are concerned with at least represents an acceptable level for consumer protection.

For example let us assume a standard requires test of 10 samples from each unit of production, which might be a lot of a thousand yards. If there are some units in which I test 10 samples and too many of those fail, I will reject the lot. If in other units that are being tested in the same production run, I find that all the samples pass the tests, I would accept those.

Now, the question which I think is essential to this is the following: What level of consumer protection or acceptability am I taking when I accept lots in the small scale testing that passed the test when other lots in the same run do not? That is the essential thrust of our statistics here. We are trying to get as near perfection as we can in the small sample testing without testing a whole run. So it is central to the testing program, and as central to it, in consumer protection as the standard established itself.

Does that in part answer your question?

Mr. CURTIS. It does. I have some confusion as to whether a product will enter the marketplace which could be defective according to a standard, but pass because a sampling system would allow a high margin of error in the marketing of the product.

Mr. WAKELIN. I understand.

Mr. CURTIS. The question that I am trying to highlight is the difference between a standard requirement and an appropriate testing procedure to determine whether the products in question comply with that standard.

Mr. WAKELIN. Right. This would have to be answered statistically in the sense that if a certain number of samples were to be tested through destruction, then one has to ask oneself, of those lots which the test says pass, what is the risk that some pieces would have failed if those particular ones had been tested. That is why it is central to the test program to have the statistics correctly represented.

It is awfully hard to say in Anglo Saxon, sir, what the people say in statistical sampling. I am only too aware of this. Do you want to add anything to that?

Dr. WILLENBROCK. If I may, I would like to make this comment.

In essence, you have put your finger on why we think the Department, and particularly the National Bureau of Standards, should have this responsibility, because it is a very difficult one, and you already are alluding to the mathematical and statistical basis for it.

It also seems to me that an appropriate quality assurance program appropriately set can be designed so that the manufacturer is encouraged to improve his quality control procedures so that he has fewer tests to make. If effectively directed, it has the net effect that you want, which is to make sure that as high a percentage of material as possible are flame retardant and meet the test.

Mr. CURTIS. Thank you.

I have no further questions, Mr. Chairman.

Mr. MOSS. Are there further questions?

(No response.)

Gentlemen, we want to thank you for your statements, and we will ask that you expedite supplying to the committee the information for the record so that we can complete it.

I would like to announce that the committee had hoped to conclude hearings today, but the House changed its mind yesterday and determined to meet at 11 o'clock instead of 12 o'clock. Obviously, we will not be able to finish today. Members do want to be present on the floor, hearing debate.

So we will now hear from the Honorable Morton Needelman, Assistant to the Director, Bureau of Consumer Protection, Federal Trade Commission—and we will take Mr. Buck and Mr. Segall on Tuesday next. We will notify you as to the hearing room in which the committee will meet.

Mr. WAKELIN. Thank you, Mr. Chairman.

Mr. MOSS. Mr. Needelman.

STATEMENT OF HON. MORTON NEEDELMAN, ASSISTANT TO THE DIRECTOR, BUREAU OF CONSUMER PROTECTION, FEDERAL TRADE COMMISSION; ACCOMPANIED BY EDWARD B. FINCH, ASSISTANT DIRECTOR FOR TEXTILES AND FURS; AND HARRY GARBER, FLAMMABLE FABRICS COORDINATOR

Mr. MOSS. Gentlemen, you may proceed.

Mr. NEEDELMAN. Thank you, Mr. Chairman, and members of the committee.

I am Morton Needelman, Assistant to the Director of the Federal Trade Commission's Bureau of Consumer Protection. With me on my right is Mr. Edward B. Finch, our Assistant Director for Textiles and Furs. On my left is Mr. Harry Garber, our Flammable Fabrics Coordinator. Mr. Kirkpatrick regrets that an urgent prior commitment prevents his appearance here today.

The statement I am about to deliver, Mr. Chairman, has been sent to OMB, but has not been cleared.

Mr. MOSS. Let the record show that the Chair is pleased that it has not been cleared. He regards the independent regulatory commissions as being independent, and likes to have their independent judgment.

Mr. NEEDELMAN. Thank you, Mr. Chairman.

Mr. Chairman, in the interests of saving some time, while I would like our entire statement to appear in the record, I would just like to highlight parts of it.

Mr. MOSS. Without objection, the statement will be placed in the record, and you may summarize.

Mr. NEEDELMAN. Thank you, Mr. Chairman.

Mr. Chairman, you will recall that Mr. Kirkpatrick appeared before the subcommittee on March 5, 1971, and submitted into the record the Commission's views on S. 3765, which is identical to H.R. 5698. While the Commission believes that its position on this legislation has been

made clear, it considers this matter of such extreme importance that it would like to review some of the points that it has made earlier.

Mr. Chairman, I think I would like to skip right now to our basic problem with H.R. 5698, and the reason we are here today. I would like to cover and emphasize that.

The principal change in H.R. 5698 which the Commission recommends pertains to enforcement responsibility. On the question of enforcement responsibility, the final report of the National Commission on Product Safety said that the division of powers under the Flammable Fabrics Act among various agencies creates difficulties. These were enumerated by the National Commission.

The Federal Trade Commission believes the difficulty cited by the Product Safety Commission will be compounded by a further fragmentation of enforcement responsibility with the introduction of the Department of Commerce into the enforcement scheme. Up to this point, the Department of Commerce, through its Bureau of Standards, has not played a role in enforcement, but has been confined to the area of its expertise, the promulgation of flammability standards such as commercial standard 191-33, which covers such technical considerations as the physical design of the device to be used to determine flammability. However, under H.R. 5698, the Secretary of Commerce's powers have been substantially expanded beyond the promulgation of flammability standards, and it is proposed that Commerce will be given authority to either approve or prescribe the testing program which is to be the basis of the premarketing participation.

This testing program contemplated by H.R. 5698 should not be confused with the development of technical flammability standards, but relates instead to the question of the frequency of testing to insure that a high standard of quality control is being maintained. In other words, certification by the manufacturer of nonflammability involves two separate and distinct considerations: (1) the test to determine if the product has met a flammability standard; (2) the manufacturer's program in carrying out flammability tests in such a manner that they are truly representative of his entire production.

The Commission strongly urges that the powers given to the Secretary of Commerce to approve or prescribe the testing program be transferred instead to the Federal Trade Commission. We make this recommendation for the following reasons:

1. The Commission has had considerable experience in establishing reasonable and representative testing programs similar to those contemplated by H.R. 5698. Under section 8 of the Flammable Fabrics Act, where the filing of a continuing guarantee is permitted, the Commission has promulgated detailed regulations covering testing programs for various types of fabrics. The Commission has already on file approximately 10,000 guarantees filed under the Flammable Fabrics Act and this existing program can be easily expanded to become an effective premarketing certification program. The Department of Commerce under the Flammable Fabrics Act has had no comparable experience or responsibility in either promulgating or administering a standard for reasonable and representative tests.

2. The testing programs under H.R. 5698 will have an obvious impact on the Commission's enforcement capability. Since the bill makes

the manufacturer's due care in following an approved testing program a defense to civil and criminal misdemeanor penalty actions, it is essential that supervision of the testing program itself be placed with the agency which has primary enforcement responsibility. The effectiveness of enforcement is so intricately intertwined with the promulgation of the testing program that any fragmentation of responsibility between enforcement and supervision of the testing program will invite the familiar bureaucratic evils of buck passing, duplication of effort, and delay, all of which are particularly distressing in an area where swift and effective enforcement is necessary to avoid irreparable harm to consumers. Moreover, this dilution and distribution of authority may well make it impossible for the consuming public and their representatives to find the regulatory body which is properly accountable for any shortcomings in enforcement of the act which may later become apparent. In terms of cost and convenience of manufacturers, it will be to their advantage to have a single agency responsible for enforcement. It will mean that there will be less of a chance that the manufacturers will be subjected to inconsistent interpretations and different enforcement philosophies.

3. The Commission has an existing trained staff of investigators who can immediately be assigned to check compliance with premarketing testing programs. These investigators have had experience in checking the records which we require to be maintained by those furnishing guarantees to determine whether tests are reasonable and representative. In addition, it is our intention to conduct an educational program for our newly recruited consumer specialists whereby these investigators, who are being trained to enforce all of the special labeling statutes administered by the Commission, will develop a high degree of professional competence in determining the adequacy of testing programs. The training program has already begun.

4. In the historical development of the Flammable Fabrics Act, the Department of Commerce has not sought any enforcement responsibility, nor does Commerce have the investigative capabilities for carrying out such responsibilities.

In short, the Commission believes that historically, logically and in terms of effectiveness of enforcement, the responsibility for the premarketing certification program should be assigned to the Federal Trade Commission.

Mr. Chairman, I would like to make one additional comment.

Mr. Moss. Certainly.

Mr. NEEDELMAN. In our statement, we have commented on the provision in the bill for a due care defense to both the civil penalty and the criminal provisions.

In addition to the comments which we have already made about our interpretation of what this would mean as a matter of Federal Trade Commission policy, I would respectfully call the committee's attention to the comments made in the Heffron report about similar language which appears now in the National Traffic and Motor Vehicle Safety Act. I have a draft copy of the Heffron report. I don't know if my pagination is correct or not, but it appears at pages 89 and 90. In the printed version of the Heffron report these comments appear at pages 102-105. Mr. Heffron indicates the problems which must inevitably arise with that kind of a standard.

I must also point out, Mr. Chairman, that at the time former Chairman Weinberger submitted to the Senate committee the draft legislation which was the origin of this concept of premarketing certification as well as increased criminal and civil penalties, we did not include a concept of due care. We say in our prepared statement that with the interpretation that the Commission would place on such a term, we would not object to it.

In sum, Mr. Chairman, the Commission supports the objectives of H.R. 5698, but urges the modifications we have proposed. As modified, it believes this legislation would provide substantial protection to consumers.

Thank you very much, Mr. Chairman.

(Mr. Needelman's prepared statement follows:)

STATEMENT OF HON. MORTON NEEDELMAN, ASSISTANT TO DIRECTOR, BUREAU OF CONSUMER PROTECTION, FEDERAL TRADE COMMISSION

Thank you, Mr. Chairman, I am Morton Needelman, Assistant to the Director of the Federal Trade Commission's Bureau of Consumer Protection. With me is Mr. Edward B. Finch, our Assistant Director for Textiles and Furs. Mr. Kirkpatrick regrets that an urgent prior commitment prevents his appearance here today.

You will recall that Mr. Kirkpatrick appeared before this Subcommittee on March 5, 1971, and submitted into the record the Commission's views on S. 3765, which is identical to H.R. 5698. While the Commission believes that its position on this legislation has been made clear, it considers this matter of such extreme importance that it would like to review briefly some of the points it has made earlier.

It is the Commission's view that the public expects (and the Commission fully supports this expectation) that steps be taken immediately to stop dangerous fabrics from reaching the marketplace. Under the existing statute there is nothing to prevent untested fabrics from being placed in retail distribution, and it would require a virtual army of federal inspectors to canvass distributors throughout the country in an attempt to uncover products which never should have been sold in the first place. Furthermore, the Commission has no way of knowing if this needle-in-the-haystack search is ever really successful. Accordingly, the Commission has recommended that Section 3 of the Flammable Fabrics Act be amended to require compulsory pre-marketing tests of fabric for the purpose of excluding products which do not conform to flammability standards.

The Commission has also asked for meaningful criminal and civil sanctions to deter future sales of flammable fabrics. Specifically, it has urged that any violation, willful or not, should be at least a misdemeanor. In addition, the Commission has recommended the creation of a new civil penalty provision which would empower the Commission to seek \$10,000 for each violation.

The Commission asked Congress to pass this legislation before another life is lost, another child is horribly disfigured, and more unnecessary pain is caused from dangerous fabrics. And while the Commission is indeed gratified by the speed with which members of Congress have responded to its plea for additional protection for the consuming public, the Commission strongly urges a major change in H.R. 5698, a change which it believes is essential. Before discussing that proposed change, it should be noted that at least in one respect H.R. 5698 has improved on the Commission recommendation. There has been added a "certification" requirement. The Commission believes that the concept of certification adds a significant measure of protection for consumers, and it endorses it. As it reads the provisions of the bill, the certification provisions would require manufacturers to submit sworn statements attesting to the fact (1) that their fabrics had been tested pursuant to a quality control program prescribed or approved under Section 4 of the Act and (2) that these tests showed that the fabrics had passed the flammability standards established by the Department of Commerce.

The Commission notes, however, that H.R. 5698 is silent as to whom certification is to be made. It recommends that the bill expressly provide that certifica-

tion be made to the Federal Trade Commission. It believes that a certification filed with the Federal Trade Commission would provide an inexpensive yet highly effective check of manufacturers' compliance with all parts of the Flammable Fabrics Act and particularly the pre-marketing testing requirements. Filing a false statement would be a serious violation of the Act. Moreover, the fact that the manufacturers must file sworn statements with the government should, in itself, encourage honest and accurate pre-marketing tests. Of course, by filing such certifications with the Commission a manufacturer would not receive immunity from any of the provisions of the Act.

The principal change in H.R. 5698 which the Commission recommends pertains to enforcement responsibility. On the question of enforcement responsibility, the Final Report of the National Commission on Products Safety said that the division of powers under the Flammable Fabrics Act among various agencies creates difficulties. The National Commission said:

"The Flammable Fabrics Act gives rulemaking authority to the Commerce Department, domestic enforcement to the Federal Trade Commission, enforcement over imports to the Treasury Department, and investigative duties both to Commerce and to Health, Education, and Welfare. When extensive interagency liaison and cooperation are required one agency sometimes forestalls actions by the others" (Final Report, p. 97).

The Commission believes the difficulties cited by the Product Safety Commission will be compounded by further fragmentation of enforcement responsibility with the introduction of the Department of Commerce into the enforcement scheme. Up to this point, the Department of Commerce, through its Bureau of Standards, has not played a role in enforcement but has been confined to the area of its expertise—the promulgation of flammability standards such as Commercial Standard 191-53 which covers such technical considerations as the physical design of the device to be used to determine flammability. However, under the Senate bill the Secretary of Commerce's powers have been substantially expanded beyond the promulgation of flammability standards, and it is proposed that Commerce will be given authority to either approve or prescribe the testing program which is to be the basis of the pre-marketing certification.

This testing program contemplated by H.R. 5698 should not be confused with the development of technical flammability standards but relates instead to the question of the frequency of testing to insure that a high standard of quality control is being maintained. In other words, certification by a manufacturer of non-flammability involves two separate and distinct considerations: (1) the test to determine if the product has met a flammability standard and (2) the manufacturer's program in carrying out flammability tests in such a manner that they are truly representative of his entire production.

The Commission strongly urges that the powers given to the Secretary of Commerce to approve or prescribe the testing program be transferred instead to the Federal Trade Commission. We make this recommendation for the following reasons:

1. The Commission has had considerable experience in establishing reasonable and representative testing programs similar to those contemplated by H.R. 5698. Under Section 8 of the Flammable Fabrics Act, where the filing of a continuing guarantee is permitted, the Commission has promulgated detailed regulations covering testing programs for various types of fabrics. The Commission has already on file approximately 10,000 guarantees filed under the Flammable Fabrics Act and this existing program can be easily expanded to become an effective pre-marketing certification program. The Department of Commerce under the Flammable Fabrics Act has had no comparable experience or responsibility in either promulgating or administering a standard for reasonable and representative tests.

2. The testing programs under H.R. 5698 will have an obvious impact on the Commission's enforcement capability. Since the bill makes the manufacturer's due care in following an approved testing program a defense to civil and criminal misdemeanor penalty actions, it is essential that supervision of the testing program itself be placed with the agency which has primary enforcement responsibility. The effectiveness of enforcement is so intricately intertwined with the promulgation of the testing program that any fragmentation of responsibility between enforcement and supervision of the testing program will invite the familiar bureaucratic evils of buck passing, duplication of effort, and delay, all

of which are particularly distressing in an area where swift and effective enforcement is necessary to avoid irreparable harm to consumers. Moreover, this dilution and distribution of authority may well make it impossible for the consuming public and their representatives to find the regulatory body which is properly accountable for any shortcomings in enforcement of the Act which may later become apparent. In terms of cost and convenience of manufacturers, it will be to their advantage to have a single agency responsible for enforcement. It will mean that there will be less of a chance that the manufacturers will be subjected to inconsistent interpretations and different enforcement philosophies.

3. The Commission has an existing trained staff of investigators who can immediately be assigned to check compliance with pre-marketing testing programs. These investigators have had experience in checking the records which we require to be maintained by those furnishing guarantees to determine whether tests are reasonable and representative. It is our intention to conduct an educational program for our newly recruited Consumer Specialists whereby these investigators, who are being trained to enforce all of the special labeling statutes administered by the Commission, will develop a high degree of professional competence in determining the adequacy of testing programs.

4. In the historical development of the Flammable Fabrics Act, the Department of Commerce has not sought enforcement responsibility, nor does Commerce have the investigative capabilities for carrying out such responsibilities.

In short, the Commission believes that historically, logically and in terms of effectiveness of enforcement, the responsibility for administering the testing program aspect of the pre-marketing certification program should be assigned to the Federal Trade Commission.

With respect to Section 7 of H.R. 5698 which creates additional criminal and civil sanctions for violation of the Act, the Commission is concerned with the possible weakening effect through misinterpretation, of the provision creating a defense of "due care". The phrase "due care" must not become a loophole through which the intent of Congress will be subverted. It is the Commission's understanding that this provision is intended to provide a defense for only those individuals who can demonstrate a total lack of negligence in the application and administration of an approved testing program, in that such individual has taken every reasonable precaution to maintain the efficacy of his testing program. In this regard, the Commission takes note of the generally accepted meaning of the phrase "due care":

"Just, proper, and sufficient care, so far as the circumstances demand it; the absence of negligence. That care which an ordinarily prudent person would have exercised under the circumstances. "Due care" is care proportioned to any given situation, its surroundings, peculiarities, and hazards. It may and often does require extraordinary care. . . ." Black's Law Dictionary 589 (4th ed. 1957). (emphasis added).

In applying this standard in a criminal or civil prosecution for violation of the Flammable Fabrics Act, the most relevant "circumstance" is the fact that a dangerously flammable fabric entails a not insignificant risk to human life, for which the manufacturer must be responsible. In view of this circumstance, the Commission believes due care will generally require "extraordinary" care in the application and administration of any approved testing program. With this interpretation of the "due care" phrase in Section 7, the Commission endorses this section as a significant potential deterrent.

Finally, the Commission believes that Section 4(e) of H.R. 5698 is unnecessarily rigid in imposing the flat rule that importers who rely on foreign certification are liable as though they were manufacturers. This section precludes administrative exploration of potentially less costly alternatives such as approval of designated foreign laboratories as suitable testing facilities. If a program of this nature proved feasible, it would not only result in lower costs to the importer and consequent savings to the consumer but also would avoid creation of a non-tariff barrier in foreign commerce.

In sum, the Commission supports the objectives of H.R. 5698 but urges the modifications proposed above. As modified, it believes this legislation would provide substantial protection to consumers.

Thank you Mr. Chairman and members of the Committee for allowing me to present these views.

Mr. Moss. Thank you. I assure you that the committee will give most careful consideration to the recommendations of the Commission and the request of the Commission for the changes proposed.

Mr. McCollister.

Mr. McCOLLISTER. I have no questions, Mr. Chairman.

Mr. Moss. Mr. Curtis.

Mr. CURTIS. I have no questions, Mr. Chairman.

Mr. Moss. Does the Commission have available additional copies of the Heffron report?

Mr. NEEDELMAN. I don't know, Mr. Chairman. If we do we will send them to you. I have a draft copy which I would be glad to lend to Mr. Curtis, or if I can't find another copy, I will photostat the pages dealing with the due care question.

Mr. Moss. We will search the committee files. We should have it some place.

Very well. Thank you very much for your appearance.

The committee will stand adjourned until next Tuesday morning at 10 a.m. And the room number will be made available to the witnesses as promptly as possible.

(The following letter was received for the record:)

FEDERAL TRADE COMMISSION,
BUREAU OF CONSUMER PROTECTION,
Washington, D.C., July 14, 1971.

Hon. JOHN E. MOSS,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN MOSS: In response to your request for additional comments from the Commission respecting the statements made before your Committee by the industry and the Department of Commerce in support of the proposal in H.R. 5698 that the Secretary of Commerce be given authority to prescribe reasonable and representative pre-marketing testing programs, the following is submitted. Because of the press of time, these comments could not be submitted to the full Commission but represent instead only the views of the Bureau of Consumer Protection.

1. Section 4 of H.R. 5698 which creates new criminal and civil sanctions under the Flammable Fabrics Act contains a proviso for the manufacturer who has exercised "due care" in the application of an approved pre-marketing testing program. As the Commission has indicated on several occasions before your Committee we would interpret the phrase "due care" in the context of dangerously flammable fabrics as requiring extraordinary care in the administration and application of such a testing program.

2. In our view the concept of "due care" should be limited, as it now is in H.R. 5698, to the Section 4 criminal and civil sanctions and should not be extended to other aspects of enforcement. Certainly, compliance with a testing program, irrespective of how that compliance is measured, should in no way affect the Commission's power to order the immediate removal of flammable fabrics from the marketplace. Once we discover a product has failed a flammability test, the manufacturer's pre-marketing testing program (which presumably did not detect the failure) should be completely irrelevant. In such a case, the only issue, as far as the Commission is concerned, is the speed with which the dangerous fabric is removed from the market.

3. Assistant Secretary Wakelin testified before your Committee on June 30, 1971, that if the Secretary of Commerce is given the power to prescribe reasonable and representative tests, the Department "might allow a very small percentage of noncomplying fabrics to reach the marketplace". It was suggested that this is justified because any testing program must be based on statistical principles and quality control procedures that assure that most but possibly less than 100% of production is in compliance with any published flammability standard. Irrespective of the Department's view on how to design tests, in terms of enforce-

ment policy, it is of no consequence to us that a product which failed a flammability standard may represent only 5% of the manufacturer's production and we would, nevertheless, use all of our powers to seek removal of such a product from the channels of distribution.

4. We are deeply concerned that the Department of Commerce may intend to use the powers proposed in H.R. 5698, not only to prescribe reasonable and representative tests for purposes of the pre-certification program but also to incorporate the tests themselves into future standards. Mr. Wakelin said during his testimony "we are giving thought to including sampling programs in our standards". While we are not exactly sure what the Department had in mind, in the context of the entire statement it would seem that Commerce may include in any flammability standard, *as part of the standard*, a testing program which adopts the concept of an "acceptable quality level". As indicated throughout the Department's presentation before your Committee this "acceptable quality level" may be less than 100%. If this should happen, it could dramatically affect our enforcement efforts.

Presently, as I have indicated above, whenever the Commission finds that products have not met a flammability standard, it requires that all items in that class be removed from the market. We consider this to be the absolute minimum level of protection that the consuming public requires. However, should concepts of statistical probability be incorporated into standards, we can anticipate that the Commission's demand for recall of dangerous fabrics, which we are now able to achieve in almost all of our cases, will be sharply challenged because the issue of flammability will not be determined simply by showing that the product failed a flammability test but, in addition, the legal significance of that failure as a violation of law will be determined by how statistically sound the pre-making tests were.

In the enforcement of the Flammable Fabrics Act, it has been our experience that speed is of the essence, and we believe that by injecting the extraneous issue of the testing program into standards our basic objective of quickly removing dangerous fabrics from the marketplace will be severely hampered. That the Department of Commerce is contemplating expanding the test concept beyond the pre-certification program to the flammability standard itself represents still another reason why the Commission believes that the power to prescribe reasonable and representative tests must be placed with the Federal Trade Commission. Enforcement of flammability standards may be completely frustrated and an intolerable hazard to the consuming public would be created if permissive testing programs were used not for the stated purpose of preventing dangerous products from reaching the consumer, but rather as a defense for any manufacturer whose flammable fabrics happen to pass into commerce.

5. You have raised a question about the delay encountered by the Commission in promulgating a reasonable and representative testing program for the purpose of issuing guarantees under Section 8 of the Flammable Fabrics Act. The final guarantee rules were adopted on July 2, 1971. It should be noted that this testing program relates only to those instances where the manufacturer or importer *desires* to issue a guarantee covering the flammability of large carpets. The Commission is not authorized at this time to write a guarantee testing program for any other product since this is the only final standard promulgated by the Department of Commerce.

Whatever delay occurred in promulgating these final standards was occasioned by difficulties inherent in the standard of flammability itself. For example, one provision of the Carpet Standard deals with the washing procedure to be used in determining whether or not a fire retardant finish is of such durability so as to remain effective for the life of the carpet. It was generally recognized that the procedure contained in the Standard is impracticable as applied to certain constructions of carpet. The Department of Commerce realized this and provided in the Standard that the Commission would have the authority to approve an alternative washing procedure upon application to the Commission.

Many meetings and discussions were held between industry representatives and Commission representatives in an attempt to meet this washability problem. It was the desire of the Commission to have it resolved prior to the effective date of the guarantee tests, since the question of the frequency of testing was closely related to the difficulty of complying with the washing procedures. In short, while the Commission was prepared to proceed with the issuance

of the testing program at a very early stage a substantial cause of delay was the lack of agreement on an approved washing procedure. Moreover, industry members who might have been prejudiced by any delay in the adoption of this program have been in contact with the Commission's staff and provision was made for temporary guarantees.

6. You have asked whether or not the Commission has proceeded against so-called technical violations of the Flammable Fabrics Act. The Commission is unaware of any so-called technical violations of the Flammable Fabrics Act. It is the view of the Commission that we have an absolute obligation to enforce the Act in every instance where there is a failure to comply with the existing standard. As a matter of fact, there have been cases where there is some question as to whether the standard is meant to apply to particular products, and in those cases the Commission believed the public interest required the use of its general powers under Section 5 of the Federal Trade Commission Act to reach dangerous situations.

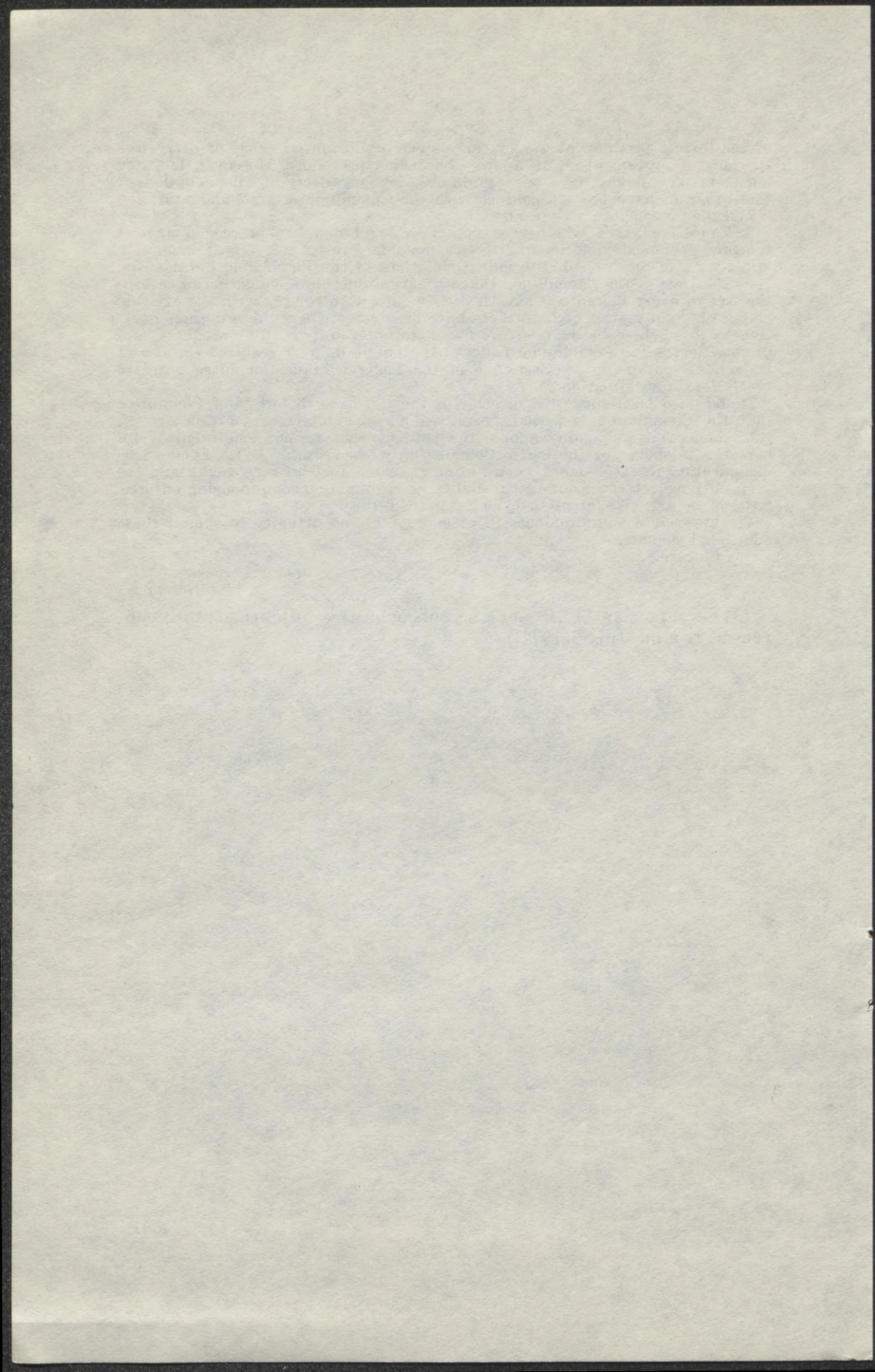
It has also been suggested in some of the testimony before your Committee that the Commission is perhaps over zealous in enforcement of this Act. In this connection we again endorse the statement of former Chairman Weinberger who spoke for the entire Commission when he said, "With human life, disfiguration in the balance (more often than not for the very young and the very old) we interpret our responsibility as requiring uncompromising enforcement of the Act." We intend to do no less in the future.

We appreciate your kindness in extending this opportunity to submit these additional comments.

Sincerely,

ROBERT PITOFSKY,
Director.

(Whereupon at 11:10 a.m. the subcommittee adjourned, to reconvene at 10 a.m., July 6, 1971.)



FLAMMABLE FABRICS ACT—PREMARKET TESTING

TUESDAY, JULY 6, 1971

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCE AND FINANCE,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to notice, in room 2123, Rayburn House Office Building, Hon. John E. Moss (chairman) presiding.

Mr. Moss. The subcommittee will be in order.

Today we resume hearings on the proposed legislation on flammable fabrics. Our first witness is Mr. George S. Buck, Jr., consultant, National Cotton Council.

Mr. Buck.

STATEMENT OF GEORGE S. BUCK, JR., CONSULTANT, NATIONAL COTTON COUNCIL

Mr. BUCK. Mr. Chairman, I am George S. Buck, Jr., technical consultant to the National Cotton Council of America, whose headquarters are in Memphis, Tenn. The Council is the central organization of the raw cotton industry and represents cotton producers, ginner, warehousemen, merchants, cooperatives, cottonseed crushers, and cotton spinners. This statement is made for and on behalf of the National Cotton Council.

I am also consultant to the American Textile Manufacturers Institute, the principal organization of the U.S. textile industry, and a member of the National Advisory Committee for the Flammable Fabrics Act.

I appear today in support of H.R. 5698. During the course of my testimony I will suggest certain improvements in language which would make the purpose of these amendments more clear, make their provisions more practicable for industry, and their benefits more significant for consumers.

From the testimony presented before this committee last week, and particularly from the statement presented on behalf of the Federal Trade Commission, it is apparent that there is considerable misunderstanding of these amendments, of the Flammable Fabrics Act itself, and of the subject of textile flammability. It is particularly disturbing to us that this misunderstanding extends to the agency authorized to enforce the Flammable Fabrics Act, the Federal Trade Commission. We think that it is vitally important that these misunderstandings and

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misconceptions about textile flammability, the Flammable Fabrics Act, and these amendments, be clarified here and now. We hope that you and your committee, Mr. Chairman, will make the intent of the Congress clear in the record of these hearings. Not only is it important that flammability standards be developed and their enforcement be carried out in accordance with the intent of Congress, but it is also imperative that textile and apparel manufacturers understand the requirements being placed upon them and the risks to which they are exposed when they market products covered by new flammability standards.

To put this whole matter in perspective, Mr. Chairman, we must start with the Flammable Fabrics Act of 1953. That act proscribed the marketing of apparel and apparel fabrics which are "so highly flammable as to be dangerous when worn by individuals."

In other words, the 1953 act ruled out dangerous fabrics. It eliminated from the market the brushed rayon torch sweaters, the high pile rayon cowboy chaps for children, certain shaggy chenilles, and some very sheer fabrics. All of these products were considered by both industry and Government to be highly flammable and to be dangerous.

The act of 1953 has, in fact, worked very well. These products are no longer made or sold in this country. The references by the Federal Trade Commission to violations of the 1953 standard concern technicalities and trivialities, for the most part. I will be happy to amplify on this matter later if the committee desires.

In spite of the effectiveness of the 1953 act and its standards, flammability accidents continued to occur. This was to be expected, since almost all textiles are inherently combustible to some degree, and when carelessness and fire are combined, there is a potential for an accident.

In an effort to reduce the number of flammability accidents involving textiles, the Congress amended the Flammable Fabrics Act in 1967. These amendments were supported by the cotton and textile industries, as was the original act in 1953.

Please note that the 1967 amendments said nothing about fabrics or garments "which are so highly flammable as to be dangerous when worn by individuals." The thrust of the 1967 amendments was toward products, fabrics, or related material which present an "unreasonable risk of the occurrence of fire leading to death or personal injury, or significant property damage." The "dangerously flammable" fabrics and garments had already been eliminated by the act of 1953.

Since practically all textiles burn, and can under certain circumstances be involved in injury, death, or significant property loss, what constitutes "unreasonable risk"? There are at least three situations in which an unreasonable risk might be deemed to exist.

The first is that in which the risk is small but can be eliminated or reduced without adversely affecting the general public or industry in a major way. Carpets and rugs are an example. In spite of the Marietta fire and one or two other isolated instances, all of which involved other products as well as carpeting, carpets and rugs present a very low-risk potential for personal injury, death, or property damage. However, it was believed that even this degree of risk could be further reduced at relatively modest cost by changes in carpet construction and finish,

and that this could be done without depriving consumers of a reasonably wide choice of materials.

The point is this: The carpeting standards came about not because carpeting is a high-risk use, but because it was thought the existing risk could easily be reduced. The carpeting standards effectively eliminate those unusual constructions having shaggy combustible pile which are deemed to be an unreasonable risk.

This all seemed relatively simple to both Government and industry in the beginning. It has turned out to be quite the opposite. The big problems arise from the uncertainties of the test method, the inherent variability of quality in textile products, and the apparently inflexible enforcement attitude of the Federal Trade Commission.

Last year Dr. Tribus, then Assistant Secretary for Science and Technology in the Department of Commerce, testified that it is almost a statistical certainty that some products will not be in compliance. Last week Dr. Wakelin, the present Assistant Secretary for Science and Technology, said essentially the same thing before this committee. Our own experience bears this out; namely, that manufacturers who observe the most careful manufacturing and quality control practices will occasionally find carpeting which fails to comply fully with the provisions of the new standard. These may be the result of unavoidable variations in raw material or manufacturing, they may be the result of operator differences in conducting the test, or they may be the consequence of inherent variability in the test method itself.

In these circumstances, when a relatively low-risk product is being made, when every effort has been made to comply with the standard, but when some failures are inevitable, we think it is unfair, unjust, and unwise to impose criminal sanctions, heavy economic penalties, and damaging publicity upon such manufacturers.

H.R. 5698 amends the Flammable Fabrics Act in such a way as to provide relief from some of these unfair consequences of the rare and unavoidable, but inevitable, failures to meet new standards. It would be most helpful, however, Mr. Chairman, if this committee made it clear in the records of this hearing that it is not the intent of the Congress to persecute those manufacturers who are making an honest effort to comply with new standards nor is it the intent to damage their business or reputation.

The second situation is the opposite of the first. It is a high-risk situation in which the likelihood of fire is relatively great, or the consequences of fire, in terms of injury, death, and property loss, are considerable. These uses include firefighters' clothing, many military applications, steelworkers' coveralls, and the interior furnishings of buildings such as hotels, nightclubs, et cetera. Most of these applications are currently covered by industrial or military specifications and by State or municipal regulations. It may be appropriate and desirable, however, for these regulations eventually to be unified through Federal standards established under the authority of this act.

These high-risk uses call for specialized types of fabrics which are relatively heavy and which have less need for the style, comfort, hand, absorbency, and appearance factors so important in consumer products. That is why the textile industry has had no particular difficulty in meeting these requirements. The appreciably higher cost of these products is also less of a problem.

The third situation is perhaps the most difficult to deal with. This is the case in which accidents are relatively infrequent but in which the effects of such accidents can be personally devastating. Children's sleepwear has been declared to be this kind of situation. Here we are dealing with the very small chance—perhaps one in 100,000 or less—that a child's sleepwear garment will be ignited and result in serious injury or death.

We all want to do whatever we can to prevent or minimize these accidents. It is clear from the records, however, that any normally combustible fabric could be involved in such an accident, and that injury or death could result. The National Advisory Committee and the National Bureau of Standards therefore concluded that to prevent or minimize such accidents, clothing which is actually protective against fire should be prescribed.

The test method established by the children's sleepwear flammability standard soon to issue is so severe that it is unlikely any apparel item which anyone in this room is wearing would pass. We estimate the 99 percent of all fabrics made in this country and around the world would fail this standard. The standard calls for fabrics and garments which are essentially fire resistant.

I said this third situation is much more difficult than either of the first two. Here is why:

In the first situation—the low risk case characterized by carpets in which standards can be met at relatively low cost—neither industry nor the consumer is affected very much if the standards are administered reasonably.

In the second situation—the high risk cases—relatively few people are involved, and they will accept the high cost and other shortcomings of protective clothing or furnishings simply because the risk justifies that.

The third situation—children's sleepwear—requires the same degree of protection as the high risk situations, but now millions of individuals are involved. Moreover, the variety and styles of fabrics and garments used in sleepwear is vastly greater than in protective uniforms or furnishings. The problems of applying fire-resistant finishes, of selecting relatively fire-resistant fibers, of processing and apparel manufacturing, and of testing and of certification are enormously more complex. The requirements for comfort, absorbency, color, hand, and appearance are far more demanding.

We are quite certain that consumers will not be able to obtain many of the types of sleepwear products they desire for their children. Lightweight, absorbent, comfortable garments will disappear from the market. Durable press blends will be out. The wear life and performance of those products which are available will in some cases be sharply reduced. And, in every case, cost will be considerably higher.

Those manufacturers who do produce sleepwear fabrics and sleepwear garments which conform with the new standards take on all kinds of risks. They are exposed to various types of criminal and civil penalties. They are required to assume new and almost unbelievable burdens of testing for compliance. They may expose themselves to whole new areas of civil liability. They will have to cope with entirely new technology, much of it untested in production or service,

and they will have to install new equipment, some of which is still to be developed.

Any way you look at it, those textile and apparel firms willing to supply the children's sleepwear market under these circumstances must be regarded as pioneers. I am not at all sure we will have enough to supply this market. I think that everything possible should be done to encourage those manufacturers who go into this new area of consumer protection, rather than to discourage them. It is incredible to me that the FTC appears poised to pounce on any manufacturer for the slightest technical deviation from these very difficult new standards.

Mr. Chairman, I know that you and your committee sincerely desire to advance the safety of consumers. I suggest that more attention should be given to encouraging manufacturers to explore the necessary areas of new technology rather than to devising new pitfalls and penalties in which to trap them.

There are many things about the home which are inherently dangerous. These include knives, chemicals, and medicines, electric wires and appliances, stairs and ladders, bathtubs, flammable fluids, et cetera. Textiles are not among these. Textile products actually protect against cold, against heat and sunlight, against rain, against dirt and germs, against insects, and against abrasion. Now we are asking them also to protect against fire and carelessness. This is very much like asking for knives that can't cut, chemicals that can't poison, electricity that can't shock, stairs which no one can fall down, and gasoline which won't explode. Nevertheless, the textile and chemical industry are spending about \$20 million annually on research to develop new fire-resistant products. Cotton interests alone are spending more than \$2 million. But this is a very difficult technological area and progress by all of us is necessarily slow.

If we want to encourage the development of fabrics and garments which protect against carelessness with fire, and if we want to give consumers a wide range of comfortable, attractive, serviceable clothing and household textile products at reasonable prices, then we need a new attitude and understanding to make the Flammable Fabrics Act succeed.

We need to stop talking about dangerous fabrics and to stop treating manufacturers as criminals. We need to recognize that the textile industry is going further than almost any other industry to protect its customers. The industry is attempting to change the very nature of fibers and textiles to make them essentially nonburning. This is an extremely difficult technological undertaking. It is by no means solved yet. Those who are making the effort should certainly not be harassed, should not be exposed to new risks and penalties, but instead should have all the help and support their Government can give them.

Mr. Chairman, the language improvements we are recommending are outlined in an attachment to my statement. I will be happy to discuss them now if you wish me to do so.

Mr. Moss. I think that would be a matter, Doctor, for your judgment as to whether you want to discuss them at this point or merely submit them for the consideration of the committee.

Mr. Buck. I think they are self-explanatory, Mr. Chairman. I will be happy to submit them for consideration, unless you have questions.

Mr. Moss. Without objection, the recommended changes will be included in the record at this point.

(The attachment referred to follows:)

CHANGES RECOMMENDED IN H.R. 5698

On page 2, line 18, change the period after the word Act to a comma and add the following: *and which prescribes an acceptable quality level within which the product must fall.*

On page 6, line 16, strike the words *in conformity with* and substitute therefor the following: *within the acceptable quality level prescribed for such.*

On page 7, line 2, strike the words *in conformity with* and substitute therefor: *within the acceptable quality level prescribed for such.*

These three changes clarify the intent of the amendments to establish testing programs "reasonably designed to prevent or minimize the manufacture and introduction in commerce etc." (see language starting on line 4 of page 4).

On page 2, line 20, after the word Act, strike the following: *insofar as they would prohibit sale of a product without certification based upon an approved testing program.*

This phrase should be deleted since otherwise manufacturers would be subject to several increased penalties provided by section 7 before testing programs have been prescribed. For example, more than 15 months after the flammability standards for carpets was published, FTC still has not published rules on the tests required for guaranties. New penalties should not be imposed before industry is able to establish testing programs which ensure that their production meets acceptable quality levels.

Mr. Moss. I find the tenor of your statement rather disturbing in that there are repeated references to harassment, to being treated as criminals, and to having the Government impose rigid and unreasonable requirements upon the industry.

I think for the purposes of the committee, it might be helpful if you could give us some examples of the types of instances or happenings which led you to employ the language you do in your statement.

Mr. BUCK. Mr. Chairman, I can give you some examples and show you perhaps a sample, if I might just pick my briefcase up here.

Let me say for the record that while I may appear critical of the FTC in some of my comments, I understand that the agency has an enforcement responsibility under the act and feels that it must carry this out to the letter of the law. That is why, in my statement, I said that it would be highly desirable if this committee and the Congress could in some way explain or put on the record the fact that we are trying to improve safety for consumers but we are also trying to be reasonable about how we do it.

The only new standard on the books is one that involves carpeting. This was issued in April 1970 and became effective on April 15, 1971. A test called the pill test is prescribed. This rules out carpeting which is the more combustible type, but there are many types which will pass the pill test about 95 percent of the time, but then occasionally you will get a sample which burns just a little longer, a little further, than prescribed.

Mr. BROYHILL. Would you describe what you are talking about when you say pill test?

Mr. BUCK. This is a sample of carpeting that has been subjected to the pill. A pill is placed in the middle and ignited, a methanamine pill. The sample is covered by a metal ring. The pill burns for standard number of seconds, so it gives a standard ignition time. The ring placed

around the pill has a 4-inch radius, and the carpeting may not burn more than within 1 inch of that ring. In other words, it can burn 3 inches.

Mr. BROYHILL. In any length of time?

Mr. BUCK. No length of time is specified. Now, some carpeting, for example, carpeting with a shaggy, combustible pile, will burn rapidly, almost flash, and that is clearly ruled out.

The specification allows seven out of eight strips to pass. One may fail. Here is a carpeting that, 95 percent of the time, shows seven out of eight or eight out of nine strips passing, but here you see one case where it wasn't aflame but a slow glow which slowly burned out past the 3-inch mark. It took 45 minutes for that slow glow to move about three and a half inches. Under no circumstances could that, I think, be called an "unreasonable hazard" carpet. I don't see how it could be called that. But it is a technical failure.

The Commission says under the act they have no choice, if they find that sort of circumstance. As the act is now written, if they find that thing, they publish the manufacturer's name in the paper, insist on a recall of all of the carpeting that has been shipped, go to their cease and desist regulations and perhaps the other penalties under the act.

We had Secretary Wakelin——

Mr. Moss. Doctor, let's get down here, because this is not accurate. The Commission is under a mandate from the Congress to adopt reasonable and feasible, technically feasible, standards. After those standards are adopted, then "the sale or offering for sale any product made of fabric or related material which fails to conform to applicable standard or regulation issued or amended under section 4 of this act and which has been shipped or received in commerce, shall be unlawful." But we do not prescribe the standard in the statute. We grant flexibility so that the Commission can develop standards which are reasonable and technically feasible.

Under 4(b) of the act, "each standard, regulation, or amendment thereto promulgated pursuant to this section shall be based on findings that such standard or amendment thereto is needed to adequately protect the public against the unreasonable risk of the occurrence of fire leading to death, injury, or significant property damage" is reasonable, technologically practicable, and appropriate. This is not the language of extremism. I don't know how the Congress could draft language which has a more reasoned tenor to it than the language contained in the present act.

Mr. BUCK. Mr. Chairman, I agree with you completely, and when we supported this amendment in 1967, we felt the language was reasonable in every way. Now, it doesn't always work out that way in practice.

Mr. Moss. We gave you relief through the courts if you feel that the standards—first, you have an opportunity to comment upon the standards, and I assume you have done that.

Mr. BUCK. We have.

Mr. Moss. And you say they are about to issue—you still regard them as being unreasonable. There is still the opportunity to go into a court and have them reviewed.

Mr. BUCK. Mr. Chairman, some of these standards have already been issued and been on the books now for a year, the one in the case of the carpeting.

I think the thrust of what I am saying is that we have a very difficult job, a very difficult job in providing consumers with greater safety, which all of us want, and it makes that job even more difficult, if not almost impossible, if there is a feeling that there is someone there waiting to pounce on you if any technical deviation occurs.

Now, the Department of Commerce fully recognizes this. The Department of Commerce, two Assistant Secretaries, have testified to the fact that these variabilities are inevitable, and they have recommended that provision be made for these variabilities.

Mr. Moss. I was just checking with counsel, but as I look at this, your complaint goes to the enforcement by the Federal Trade Commission of the standards developed by the Department of Commerce; is that correct?

Mr. BUCK. Mr. Chairman, I want to follow exactly what you said. Could you just repeat that so I get the gist of it?

Mr. Moss. The reporter will read back the statement of the chairman.

(The reporter read from the record as requested.)

Mr. BUCK. I think essentially that is it, Mr. Chairman. The Department of Commerce, which develops the standards, says that these are not perfect, that the raw materials will have variability, that there will be inconsistency.

Mr. Moss. Do they say this in the standard?

Mr. BUCK. They have said that in testimony and they have said that they intend in future standards to add a clause which provides for this variability, what they call an AQL provision.

Mr. Moss. The question I think is, is your characterization of the activities of the Federal Trade Commission justified on the record? If it is merely enforcing, as it is required by law to do, the standards which have been promulgated by the Department of Commerce, as they were worded, then why is there criticism of the Federal Trade Commission? I think the record at this point on that is rather ambiguous.

Mr. BUCK. Mr. Chairman, this is a matter of attitude and understanding and past performance.

Mr. Moss. You know we can never legislate attitude here.

Mr. BUCK. Well, I think that—I am sure the Commission is most interested in following the will of Congress, and if the intent of Congress is made clear, I think the Commission will follow that line.

Mr. Moss. Well, when you say “the intent of Congress,” the Congress can’t draft a statute and then say that it does not intend that the statute be enforced.

Mr. BUCK. I understand that.

Mr. Moss. We created in the statute a maximum flexibility. We have imposed requirement of reasonableness and technological feasibility, and these standards are only imposed when there are unreasonable risks being dealt with. Short of saying that we don’t really mean it at all, I don’t see how we could express an intent consistent with the duties imposed upon either of the agencies.

Mr. BUCK. Mr. Chairman, I think that you have recognized the problems much better than heretofore in the bill which you introduced and sponsored, H.R. 5698, because that bill does take into account the fact that there will be variability, and it does provide that a manufacturer who observes good quality control procedures and who has some small fraction of production that differs from the standard beyond his control, he is considered a good manufacturer.

That is the essence of this, and the amendments or the changed wording that I suggest on page 11 of my statement just clarifies that a little further, where we suggest adding the words "and which prescribes an acceptable quality level within which the product shall fall." Now, this type of thing is a necessary adjunct to any standard which has any element of variability in it, and the addition of this language to the act, I think, makes the intent of Congress clear that Congress is interested in safety but wants it done reasonably.

Mr. MOSS. Can you give me some cases where you have experienced this problem after a proper quality control was consistent with the standard imposed for manufacture or achieving flame resistance and then the manufacturer was penalized because of some slight or insignificant variation?

Mr. BUCK. Mr. Chairman, we have not had this kind of a standard on the books for a long while. I can cite you some examples which are now pending before the Commission—I can't give you all of the details—in which scarves were involved. These are very small silk-type scarves.

The Commission has moved against some of these manufacturers because, they—technically, according to the Commission tests—are in violation of the act. According to many tests made by manufacturers, they are not, so you have a difference, you see.

Mr. MOSS. Is there a standard for testing of the scarves?

Mr. BUCK. There is a standard.

Mr. MOSS. Is the standard being employed by the Federal Trade Commission?

Mr. BUCK. The manufacturers of any of these products must use the same standard to evaluate their production, you see.

Mr. MOSS. I think the thing that troubles me is that I read frequently criticism of the Federal Trade Commission as being sort of a gutless organization that doesn't appear to give proper cognizance to the welfare of the consumer. They are criticized for not doing enough. Yet your statement would leave the impression that they are very arbitrary, that they are almost capricious in their enforcement patterns.

Mr. BUCK. Mr. Chairman, quite frankly we think that the Commission has reacted to some of this criticism and is attempting to set itself up as the protector of the consumers. That may be their position.

Mr. MOSS. Isn't that what the law requires them to do, to be the protector of the consumer consistent with reasonableness?

Mr. BUCK. Consistent with reasonableness, I agree.

Mr. MOSS. If they are not reasonable, have you taken them into court at any time? That is provided for in the act.

Mr. BUCK. I understand. Down in Memphis we say, "You can't beat city hall," and perhaps we think this is the same type of thing here.

Mr. Moss. We have seen too many cases that would not support that. I recognize that the law is not repealed. I yield to the gentleman from Texas.

Mr. ECKHARDT. You apparently can in Memphis now.

Mr. Moss. Mr. Broyhill?

Mr. BROYHILL. Sorry, I was a little bit late. I have been on the road trying to get here, Dr. Buck.

Your statement indicates that you are technical consultant to the National Cotton Council. What is your technical background, Dr. Buck? He has been using the term "Doctor" here. Is that a degree or what?

Mr. BUCK. Yes, Mr. Broyhill. I am a chemical engineer by training and some years ago was given the degree of doctor of textile science.

Mr. BROYHILL. So you do have some technical competence in this area of manufacturing as well as in knowing fabrics, and have some knowledge of how fabrics are tested and how they would react if placed together and manufactured in a certain way?

Mr. BUCK. Yes, I have been directly concerned with fire resistance and flammability problems for over 35 years, including the manufacturing of fire-resistant textile products, testing, and working with all aspects of the Flammable Fabrics Act.

Mr. BROYHILL. I know that I, as one member of the committee, have concern over any law that is passed by the Congress, that it does not discriminate unduly against any section of business. We have to make sure that the law is enforced, but we want to make sure that it is enforced fairly, that it is not enforced capriciously, and that we are not having "Big Brother" look over the shoulders of our businessmen who, I feel, for the vast majority, want to do the right thing.

In this bill on page 6, H.R. 5698, in small section (b), there is a statement that says that "However, no person shall be held in violation of this subsection if such person establishes that he exercised due care in the application of improved testing program." And then, of course, the sentence goes on.

I feel that this is, at least in this particular act, a recognition on the part of the drafters of this bill, the sponsors on this bill, that manufacturers will be exercising due care and it is not the intention of the Congress to arbitrarily go out and tap someone on the shoulder and say, "You are a criminal."

As I say, I am concerned about this in every act we pass, not only this but others that we pass, because they all have some application to business and you will find these criminal and civil penalties in many of them. Don't you feel that manufacturers have an incentive just in the marketplace itself to try to do the right thing?

Mr. BUCK. Certainly I do do, Mr. Broyhill, and I think that the great majority of manufacturers lean over backwards to do the right thing.

Now these words you quoted from the bill I think are very much in order and constitute a major improvement in the Flammable Fabrics Act, and that is why we support it. I might call your attention to some language on page 4, the top of page 4, starting about line 4, which says that "the testing program is reasonably designed to prevent or minimize the manufacture of any of these products that might be in question."

This recognizes, as has been testified to by experts here last year, that you cannot get 100 percent elimination of some failing products. So we are trying to prevent or minimize, and I think H.R. 5698 is a major improvement in the Flammable Fabrics Act in spite of the fact that it prescribes additional penalties.

Mr. BROYHILL. If we pass legislation like this, we do expect it to be enforced, and it falls to the duty of the Federal Trade Commission in this particular case to enforce the act. And so you can understand the concern of the chairman and members when you indicate that they are enforcing the act too harshly, so to speak, and at the same time we hear that they are not enforcing the act enough.

At the bottom of page 2, you refer to technicalities and trivialities and say you will be happy to amplify on this. What do you mean here? Is this the subject you were discussing with the chairman or is there something else that you have in mind here?

Mr. BUCK. Mr. Broyhill, we have over the years been troubled by things we felt were unjustified. Some years ago, we had a big hassle with the Commission on baby blankets. The Commission felt that baby blankets should be brought under the existing test for apparel fabrics. Now, we didn't think so, and we didn't think so because nobody could come forward and cite a single case, a single documented case, of an infant being burned in a baby blanket.

A baby blanket sounds like it is something that ought to be made of asbestos. Actually, it needs to be soft, absorbent, comfortable, and washable, and durable so it can be sterilized. We thought it was unreasonable that the Commission try to bring these blankets under the act simply in response to some kind of statement, I think, on the floor of the Senate, with no record of hazard.

Then a few years later—and this is purely a technicality—the Commission moved on sweatshirts. Sweatshirts have a fleeced interior. This interior, being the inside of a garment, not exposed, is exempt from the act. It is fleeced to make it warm and absorbent. The Commission found some youngsters were wearing sweatshirts inside out, and therefore felt these products should be brought under the act. The Commission did prevail and brought the sweatshirts under the act, again in spite of not one single instance of someone being burned. That meant that the composition of these materials had to be changed, and from the cotton standpoint, some of the cotton fiber had to be substituted with another fiber, and in some cases, a chemical treatment had to be used. Maybe this is what the Commission has the authority to do under the act, but it seems to be straining at a gnat to us. There are other instances.

Mr. BROYHILL. You have mentioned research in the last part of your statement. You said that the textile and chemical industry is spending about \$20 million annually in research to develop new fire-resistant products. Are you indicating here that the Federal Government should be investing in this area?

Mr. BUCK. Well, I think it would be perfectly appropriate for the Federal Government to invest in this area. I think that up to this time the decision has been made that this should be done outside of Government, although some branches do support this type of research—the

Department of Agriculture, and the Defense Department—from time to time.

I said this is a difficult problem, Mr. Broyhill, and then I referred to the combustibility of gasoline and other products like that. Most of these textiles, almost all of them, are hydrocarbons, and gasoline is a hydrocarbon. They are somewhat similar in their nature.

I think we would be laughed out of here if we said, "Why don't you make gasoline fire-resistant?" But making a textile product, the nature of which is to burn, making it fire-resistant and at the same time preserving those qualities which consumers consider so desirable, like comfort and absorbency, it is not an easy problem. I directed one of the major research problems on this for several years, and I thought that we would have come up with the answer before this time. We are making progress. The products are being improved, but we think they are a long way from what will fully satisfy the consumer.

Mr. BROYHILL. Thank you, Mr. Chairman.

Mr. Moss. Mr. Eckhardt?

Mr. ECKHARDT. I am a little troubled about your examples of gasoline and knives. After all, gasoline is made to burn and knives to cut, but baby garments are not made to burn. It would seem to me your analogy would be more apt if the Federal Trade Commission required nonflammable lantern wicks, but certainly not baby garments.

Mr. BUCK. Mr. Eckhardt, I used a couple of additional analogies. Stepladders are not made to fall off, but people do fall off of them, and people slip in bathtubs. What I am trying to say is that there are things around the home which can cause accidents if you are careless, and textiles cannot cause an accident unless you are grossly careless with fire.

Mr. ECKHARDT. Approximately what percentage of the entire textile industry's manufacture of garments is related to baby sleeping garments?

Mr. BUCK. Mr. Eckhardt, this standard will not have a major impact, would not have a major impact on the textile industry as a whole, even if it could not be met. It accounts for one-half of 1 percent of total textile production. Of course, we think it is the fore-runner of other standards. But this standard can have a major impact on the manufacturers of fabrics for these markets and for the apparel manufacturers themselves.

Mr. ECKHARDT. I understand that witnesses and sometimes lawyers do what Mr. Justice Holmes called "produce the parade of the horrible," that is, if this is done, it will be extended to other areas; but it seems to me that if you have got various fabrics, some of which are quite flame-resistant, and you have got an area of manufacture that constitutes only about a half of 1 percent of the market, and in that area you have baby sleeping garments, that is the best place to use these nonflammable fabrics. Why necessarily compromise on this proposition? What great harm is done?

Mr. BUCK. Let me answer you in two different ways; I would say three different ways.

One is that our industry is doing everything it can to go along with these standards and to develop and provide the materials that are needed there. But if this standard is put into effect, and the prod-

ucts are fully effective, we estimate only 1 percent of the flammability accidents which happen in the country each year will be prevented, that is, flammability accidents will only be reduced 1 percent.

We know that is not going to satisfy the chairman, or this committee, or the Congress. You will want to do something more to take care of the other accidents, and we think you should, as this becomes possible. We know the Bureau of Standards is looking at draperies, is looking at mattresses, which, incidentally, we support. We support the promulgation of standards on mattresses. It is looking at blankets. You are going to have to look at other clothing fabrics.

Mr. ECKHARDT. If I understand you correctly, you are saying this might conceivably reduce accidents by 1 percent, and you have also stated that these fabrics or these garments constitute only one-half of 1 percent, I believe, was that correct?

Mr. BUCK. That is correct.

Mr. ECKHARDT. Of the total manufactured. It would seem to me that would be placing a considerable small burden on the manufacturing industry.

Mr. BUCK. Mr. Eckhardt, there will be no burden on the manufacturer if we are able to make products that will satisfy the test requirements. Manufacturers won't lose money by making fire-resistant products. They won't object to that. I think consumers—

Mr. ECKHARDT. Where is the rub, then?

Mr. BUCK. The rub comes back to the wording of the act and administration of the standards. These things are imperfect at best, and if we write this act and administer it in a reasonable fashion that doesn't drive people out of this, but encourages manufacturers to get in here and produce the goods that are wanted, then I think everybody will benefit. We just don't like to see good manufacturers put on the spot for things that are beyond their control.

Mr. ECKHARDT. Let me get to the language that you are suggesting. It doesn't seem to me that this touches the examples that you have given unless I fail to understand them.

You have mentioned baby sleeping garments, and you have mentioned the desirability of some degree of flexibility in that area. And you have mentioned sweatshirts and you have said that it was rather extreme for the Federal Trade Commission to treat the exceptional situation of wearing one inside out as a danger which needed to be regulated with respect to goods going into the sweatshirt.

Mr. MOSS. Will the gentleman yield?

Mr. ECKHARDT. Yes.

Mr. MOSS. I haven't had the opportunity of reviewing the hearing record of 1967, but if I recall correctly, the committee rejected an amendment that was proposed to require that wearing apparel be worn in a manner consistent with the intent for which it was manufactured, and I believe there was considerable discussion that, at that time, 1967, it was the custom among many young people to wear the sweatshirt with the nap, the fleecy nap, outside.

The committee, as I recall, and I have quickly gone through the act as it was amended in 1967, did not adopt the proposed amendment which would have placed the burden of wearing the article consistent with the manner for which it was manufactured. So if my recollection

is correct, and I think it is, as I recall, I was chairing the hearing at that time, then the Federal Trade Commission would not appear to be reaching way out. Their action would be rather consistent with the legislative history of the act. Do you recall the discussions that went on in 1967?

Mr. BUCK. Mr. Chairman, I recall the record. I don't believe I was at that particular hearing, but, if my memory serves me correctly, the actual change in the rule or the inclusion of sweatshirts under the act came prior to your hearings, and the amendment which was proposed in 1967 was an effort by industry to correct the change that had been made.

Mr. Moss. Then the Congress, not having agreed to the change, would certainly not now be justified in rebuffing the Federal Trade Commission for an action that seemed consistent with the action that Congress itself took, would it?

Mr. BUCK. Mr. Chairman, I have said in the beginning that I think that the bill which you have introduced and which we are discussing today is a good bill, a beneficial bill, and one that improves the operation of the act.

Mr. Moss. I understand. The thing that continues to concern me, again, as I stated when I first directed the question to you, is the tenor of your statement, that is highly critical, but the absence of documentation of any substance to support the position taken in your statement—and I don't think I am unique among the members of the committee in expressing that view. I want to thank the gentleman from Texas for yielding.

Mr. ECKHARDT. Let me ask you this question.

You have given these examples, but it is very difficult for me to see how your suggested changes really meet them. Your suggested changes, it seems to me, are directed at the situation you were describing with respect to the carpet rather than with these examples.

Let me read how this language would change the act on pages 6 and 7. There is an exception there that "no person shall be held in violation of this subsection if, among other things, such application disclosed that the product, fabric, or related material was in conformity with applicable standards of flammability. "That is the present exception. And you would change that to read that "such application disclosed that the product, fabric, or related material was within the acceptable quality level prescribed for such applicable standards of applicability."

Mr. BUCK. That is correct.

Mr. ECKHARDT. I really don't understand the language. It doesn't seem to me to be grammatically correct. If you are trying to do what you seem to be trying to do, it seems to me you would say something like this, "that such application discloses that the product, fabric, or related material was manufactured under acceptable quality control levels prescribed under the standards of flammability standards established pursuant to this Act." Is that what you mean?

Mr. BUCK. I would certainly accept your language improvement, Mr. Eckhardt.

Mr. ECKHARDT. I am not sure I would accept it. I just want to be sure that I understand what you are trying to do.

Mr. BUCK. I think this is essentially that we are trying to do. I don't have any great pride in this particular wording. In manufacturing goods that vary in quality, it is customary for good manufacturers who observe good manufacturing practices to establish quality levels.

Mr. ECKHARDT. Do you want quality control methods?

Mr. BUCK. It is a quality control method we are talking about.

Mr. ECKHARDT. You don't mean by "quality," the inclusion of a lot of things like the question of its flammability or its quality otherwise. You are not throwing into the question, for instance, in the baby garment case, a consideration that might outweigh flammability which had to do with, for instance, airiness or coolness or absorption qualities, et cetera?

Mr. BUCK. No, Mr. Eckhardt. These quality control programs and quality levels would apply only to the flammability test which is developed and promulgated by the Department of Commerce. In other words, the product—in regard to flammability—would have to be at an acceptable quality level.

Mr. ECKHARDT. Then you would have no objection to defining "quality level" as meaning quality of the product with respect to the product's flammability?

Mr. BUCK. No objection.

Mr. ECKHARDT. It would only be that type of quality that you are concerned with; is that right?

Mr. BUCK. That is correct.

Mr. ECKHARDT. I don't have any particular quarrel with the proposition you are making except that it seems to me that is what is being done now. You mention that these tests were made in which, I believe you said, that eight out of 10 of the carpets met the test?

Mr. BUCK. Seven out of eight.

Mr. ECKHARDT. Or seven out of eight, or whatever percentage it is, it would pass, so it seems to me what they are doing there is measuring basic quality under the processes of manufacture involved in the case.

Mr. BUCK. That is partially true, Mr. Eckhardt, but a statistician will tell you that if you are making a test and you get eight strips out of eight to pass 90 percent of the time, and 10 percent of the time, more or less, you get seven out of eight to pass, there will be a certain number of cases in which only six out of eight will pass. This is a statistical certainty.

Mr. ECKHARDT. You are just asking for more tests, aren't you?

Mr. BUCK. No, we are asking for something like this—

Mr. ECKHARDT. Or you are asking for, say, 70 out of 80 instead of seven out of eight aren't you?

Mr. BUCK. No, not quite. Well, that gets close to it. We are saying that if you have a testing program which shows that in 95 percent of the time you are within this limit and 5 percent of the time you get one that is a little below that, you weigh the whole thing together, as you say, the 70 out of 80 type of thing, and decide that you are in control.

Mr. ECKHARDT. Now if you had this different language that you suggest, how would that change the seven out of eight test in your view?

Mr. BUCK. Well, I would say it would change it in this way: If a manufacturer is making a product, be it carpet, or children's sleep-

wear, or what have you, and his requirements were seven out of eight, and he makes this test 20 times and gets seven out of eight or eight out of eight, and he comes along and gets one test that has six out of eight, then he can weigh that against the production that went before and the production that goes after, and he can say: "Well, on the basis of what I have been doing, it is obvious that we had a fluke here. My test level shows I am in the acceptable range of compliance, I can ship it, it is not a concern."

Mr. ECKHARDT. The only thing I am saying is that it seems to me that under either your language or under the present language, the Federal Trade Commission could either be strict or could be perhaps a little more lenient, as in the example you gave, but I don't see how the language changes that, and if it does I would like to know now how it changes, because I would like to know whether I want to include the language.

Mr. BUCK. I will try to explain it this way. The language as it presently is written says: "is in conformity with". Now, does "in conformity with" mean that you have to have exactly seven out of eight or better every time, or not? The Department of Commerce experts have testified that this isn't going to happen, it is not practicable.

Mr. ECKHARDT. Well, you obviously recognize that this does not mean eight out of eight. It doesn't mean that it must meet the test every time, so it is bound to be directed, at least to a certain extent, to the nature of the manufacturing. Of course, you point that out in pointing out the language on page 4 where it says that if the testing program is "reasonably designed to prevent or minimize the manufacture and introduction in commerce." The only thing I am concerned about in changing the language is that if it doesn't meet a clearly needed hardship, it seems to me whenever we change the language in the direction of leniency, we are telling the Commission, "Don't be quite as careful with respect to testing the inherent danger of fabrics under certain manufacturing conditions."

You have not told me to the present why this language would change the Federal Trade Commission standard in any way, except to sort of imply to them, "We want you to be a little more lenient" and I don't want to do that. I think if you have got some real hardship on industry that ought to be met by change in language, I would be inclined to go along, but I really can't understand that you have presented that to this committee.

Mr. BUCK. Well, Mr. Eckhardt, I am afraid I am somewhat inadequate. Last week when Dr. Wakelin was here, he said the English language seems to be itself inadequate to explain statistics, and I am not a statistician. But I have discussed this with the experts in the field, and this type of language would make it more clear that these professionally approved statistical quality control programs would apply.

We are not asking for leniency, because we don't think that we are—we are not criminals or anything like that; industry is operating properly and trying to do a good job. I think this would assist the Federal Trade Commission. Now the Commission says to us—and I have got many good friends there, and they are very understanding of the problems, but they are up against a brick wall—they say to us: "The stand-

ard says seven out of eight or eight out of eight. If we get six out of eight—

Mr. ECKHARDT. The statutory standard doesn't say that.

Mr. BUCK. The standard prescribed by Commerce is made a part of the statute, and then the Commission says, "If we get six out of eight, we can't do anything. We are stuck. We have to go after that manufacturer."

Mr. ECKHARDT. I really can't understand how anybody comes to that conclusion or how anybody would come to another conclusion by the mere change you suggest. Let me read this just once again. You want it to read that the fabric was within the acceptable quality level prescribed for such applicable standards of flammability. That sounds like gobbledygook to me. It seems much clearer to me to say that fabric was in conformity with applicable standards of flammability.

The standards of flammability can take into account the fact that there may be a perfectly acceptable method of manufacture in which in certain situations the standard of flammability is not met because something went wrong, some accident occurred or some fortuitous circumstance of the pile of the carpet made the flame glow down a line in the carpet as you described. But it doesn't seem to me that your language changes anything except to muddy it up.

Mr. BUCK. Well, of course, I have to think it does change it, but I will agree with you on this point: That the standard itself when prescribed by the Department of Commerce, really should include wording on the quality level that should be associated with the test and with the product being manufactured.

Commerce has indicated to us that they think these things ought to be added to future standards and maybe even those that have been issued. One of the things that H.R. 5698 does is give Commerce the authority to add these essential and integral parts of standards.

Mr. ECKHARDT. Do they recommend this language?

Mr. BUCK. I haven't seen their recommendation, but I have talked with various people in Commerce and they support this idea that this is the way a standard should properly be written.

Mr. ECKHARDT. But you are not representing that this language is approved by them?

Mr. BUCK. I am not; no.

Mr. ECKHARDT. Thank you.

Mr. MOSS. Mr. McCollister?

Mr. MCCOLLISTER. Would it help you, Dr. Buck, if you could provide for the record some examples of the more exact stringent inflexible interpretation by FTC in enforcement of these Commerce standards?

Mr. BUCK. Mr. McCollister, I will be happy to supply some examples for the record which, let me say, either from industry viewpoint or from my viewpoint appear to be unreasonable.

I would like to add something, though. I have worked with many people in the Commission over the years. I find them understanding and helpful and desirous of making this thing work. When they are bound by what I referred to as a brick wall or a rigid wording that does not give them any leeway, then they say, "We have got to stand on this line; this is the way it reads." And if the thing reads wrong, if the statute that guides them doesn't recognize some of these prob-

lems, then that is what we are up against and that is what we feel should be corrected. You are calling on industry to go out and do something entirely new, something that is extremely difficult, and when you call on industry to do that and take on these added burdens, I think it should be done in a reasonable way.

Mr. Moss. Mr. McCollister, would you like the record held at this point to receive the examples?

Mr. McCOLLISTER. If there are some, Mr. Chairman, I would like that.

Mr. BUCK. I will be happy to do this if you like, but I don't want to do it in the sense that we are criticizing FTC or suggesting that they have done anything improper.

Mr. McCOLLISTER. I think your language already does that, Dr. Buck.

(Note.—At the time the record was printed Mr. Buck had not provided the committee with any supporting documentation of stringent and inflexible interpretation by the FTC of Department of Commerce standards.)

Mr. Moss. I am going to instruct counsel to contact the Federal Trade Commission for any examples of instances where they have had to resort to a rigid pattern of enforcement because of any denial in the statute of the opportunity to utilize a reasonable course in the standards under which the testing took place.

(See letter dated July 14, 1971, from Robert Pitofsky, Director, Bureau of Consumer Protection, Federal Trade Commission, to Chairman Moss, p. 33.)

Mr. Moss. I think that the nature of the allegations contained in your statement are such that the committee must have available for its guidance instances, if instances do in fact exist, of this kind of enforcement.

The act certainly does not—in the first place, if you are going to be subjected to punishment, there is a requirement of willfulness, a proof of willfulness. That is a great burden for any prosecutor to take on, to prove willfulness. I just can't see here this straitjacket that is conjured up in the statement you have filed with this committee.

Mr. BUCK. Mr. Chairman, there are other penalties that can be quite damaging to industry that don't require proof of willfulness. There can be publication, cease and desist, and that sort of thing.

Let me give you another example, and again, if I might take a moment, and this is just to explain what the Commission is up against. Under the act of 1953, there is a burning rate prescribed for smooth surface fabrics.

Mr. Moss. That is the flare test?

Mr. BUCK. That is the 45 degree test. There are some small scarves that women sometimes wear on their heads. Some of these are silk. There are some of these that are lightweight that will have a small low-intensity flame that still burns faster than the prescribed time of 3½ seconds.

I have had people in and out of the Commission tell me that they know this isn't a hazard, it is a small flame, it is a small article, there aren't cases where this has caused trouble, but they say just the same, "The act says we have to do thus and so," and so they do it. And I

don't fault them for doing that. I don't fault them for doing that at all. But this is the consequence of having a rigid standard which we had in 1953. That allows for no reason or no understanding of the other factors involved, once you set a mechanical device up and say this is our test.

Mr. MOSS. Other than the flare test under the 1953 act, I can't think of any other standard that is imposed specifically by the statute.

Mr. ECKHARDT. Will the chairman yield?

Mr. MOSS. Yes; I yield to the gentleman from Texas.

Mr. ECKHARDT. There is one point, Doctor, that I didn't get into in my questioning with respect to suggested changes. That is, with respect to the change on page 2, in which you would strike out "insofar as they would prohibit sale of a product without certification based upon an approved testing program."

As I understand that exception as it is now written, it would let you put a product on the market without the certification based upon an approved testing program until that 30 days had run when the certification could be granted. Is that the way you understand the proposal as written?

Mr. BUCK. Yes. There are two or three time-period delays that are permitted here.

Mr. ECKHARDT. For instance, if you manufactured a sleeping garment for babies which you felt was entirely safe and would pass the program, you could put it on the market immediately under the language as written here and, of course, assuming that it was ultimately in fact safe and you got your approval, you would not be under any violation because you put that garment on the market before it was certified; is that correct, under this language?

Mr. BUCK. Well, the problem here is that this amendment provides certain relief for necessary minor variations that are still within quality control limits, but that the act would apply a number of new penalties before it was possible to get this program established. Let me give you one example.

Mr. ECKHARDT. Wait a minute. That is not exactly what this is doing. This is an exception stating that you don't fall under the penalties provided under section 7 of the act if you in fact produce an article which has not been certified, and you are not under penalty just because it has not been certified for that 30 days before certification. That is what it says; isn't it?

Mr. BUCK. Well, no. This section on page 2 says this subsection of the penalties provided in section 7 of the act "insofar as they would prohibit sale of a product without certification."

Mr. ECKHARDT. That is right.

Mr. BUCK (continuing). Shall not take effect.

Mr. ECKHARDT. So not being certified for that 30 days, assuming the garment was in fact safe and was ultimately certified, would not result in the penalty. But what you are asking for is that this be an absolute protection, even though the garment was extremely unsafe, there would be no violation during the 30 days, regardless of how unsafe the product was, because you have got the 30-day grace period. Isn't that what you are saying?

Mr. BUCK. No; we are not asking that. This act does several things.

It increases the penalties that were in the Flammable Fabrics Act as amended in 1967, increases them in a couple of different ways. All of the penalties that were under the act of 1967 would still apply to the manufacture of a product that did not comply.

Mr. ECKHARDT. That is correct. But as far as this act applies those penalties or applies additional penalties, as long as you made your application for approval during this first 30 days, you would be absolutely exempt from any penalties provided in this subsection or provided in section 7 of this act, would you not?

Mr. BUCK. The new penalties, and here is the reason——

Mr. ECKHARDT. That is right, but why should you be exempt from that if you are producing an article during that period of time which is in fact unsafe and which ultimately is not certified?

Mr. BUCK. Mr. Eckhardt, as I said, you are subject to the penalties under the act itself. Now, this act does two things. This amendment adds some new penalties and provides for reasonable administration.

We don't think you ought to add the new penalties before you have done something about the reasonable administration. Suppose you have a manufacturer who has to operate under this act and doesn't know what his testing requirements are going to be, and I can give you a specific case.

We have had 15 months to get rules and regulations issued on the testing of carpeting. If we get a children's sleepwear standard and have to wait 15 months or 18 months or 2 years after it is in effect before we know what the certification requirements are and how we will have to test and so forth, and before we have a provision to take care of these inherent variabilities, then we don't think it is fair to impose additional penalties in the meantime. This does not mean that we aren't still subject to all of the provisions of the act as of 1967.

Mr. ECKHARDT. I am a little troubled by this language: "This subsection and the penalties provided in section 7 of this act." I guess what you are saying here is that this act would not be applicable unless and until its testing program had been put into effect, but limitations which now exist irrespective of this act would.

Mr. BUCK. That is right.

Mr. ECKHARDT. You feel that is enough in this case.

Mr. BUCK. I am sure that no manufacturer is going to risk running afoul of the act as it was in 1967.

Mr. ECKHARDT. Well, I think you may have a good point there. What you are saying is that standards added by this act and only the standards added by this act should not be in effect retroactive so as to increase existing standards——

Mr. BUCK. That is correct.

Mr. ECKHARDT (continuing). During the period for certification. Now, if that were all, I think I would agree with you, but there could be general standards put into effect and a person could, under section 7 of the act, avoid any standards.

For instance, one type of sleeping garment might be prohibited and no certification given, and then another manufacturer produces the same kind that he knows a certification will not be given for, and then he would still be protected against the additional penalties provided under section 7, would he not, for the 30 days?

Mr. BUCK. No; I don't think so, Mr. Eckhardt. Let me say this. I can assure you that this is no attempt to evade any responsibility, that we are not trying to create loopholes. The last thing we want to do is that. It is the industry's desire to abide by any regulation it can do reasonably, and of course one manufacturer is not going to be very happy if somebody down the road has a loophole through which he can evade it.

Mr. ECKHARDT. Let me say this. I agree with the proposition that until standards are established which may increase existing standards so that they are generally known to all manufacturers, that perhaps the additional levels of care might not be applicable to persons involved, but I am a little bit concerned as to whether or not your language may go a little further than that.

Mr. BUCK. I don't think it does, Mr. Eckhardt, but if you understand what we mean, I am sure we will be happy with the language which you will provide to take care of that.

Mr. ECKHARDT. I am just suggesting that as soon as certification, as standards for certification under this act are generally established, perhaps we had better leave the language here alone, but I do agree with you that until the particular problem has been considered and some action has been taken, that to make an ultimate determination retroactive would have a bad effect.

Mr. BUCK. This is one reason we feel that testing requirements really ought to issue either with the standard or be a part of it, or be a part of the agency which issues the standard, so that we won't have a standard put out by one agency and then have to wait a long period of time before we learn how to apply the test.

Mr. ECKHARDT. Thank you.

Thank you, Mr. Chairman.

Mr. Moss. Are there further questions?

If not, I want to express the appreciation of the committee for your appearance here this morning.

Mr. BUCK. Thank you, Mr. Chairman. I appreciate your time and patience.

Mr. Moss. We will now hear from William M. Segall, vice president, Government affairs, Carpet and Rug Institute.

STATEMENT OF WILLIAM M. SEGALL, VICE PRESIDENT, GOVERNMENT AFFAIRS, CARPET AND RUG INSTITUTE

Mr. SEGALL. Mr. Chairman, my name is William M. Segall, and I am a vice president of the Carpet and Rug Institute, whose members account for approximately 95 percent of all American production of carpet and rugs. As part of my qualifications to speak on the subject of flammable fabrics, I might add that I have served in recent years as chairman of the Committee on Clothing Flammability of the American Association of Textile Chemists and Colorists, as chairman of the Testing Committee of the Information Council on Fabric Flammability, a member of the Department of Commerce Standing Committee on CS-191 (the current flammability standard for clothing fabrics), and that I served for 2 years as executive secretary of the National Advisory Committee for the Flammable Fabrics Act.

H.R. 5698 is a new bill, but it deals with a relatively old subject. An essentially identical bill, S. 3765, was passed by the Senate during the previous Congress on September 23, 1970. Its genesis and history is a matter of public record. Some points in this record, however, bear repeating for purposes of emphasis.

On June 10, 1970, Casper Weinberger, then chairman of the Federal Trade Commission, testified before the Consumer Subcommittee of the Senate Commerce Committee, in connection with S. 3765, a one-page bill whose purpose was to authorize funds for the administration of the Flammable Fabrics Act. In his testimony, however, Chairman Weinberger went beyond the subject of authorization, and requested certain substantive amendments to the act.

First, he recommended that the act be amended to require premarket testing by the manufacturer. Second, he asked for a strengthening of the criminal and civil penalties under the act. These concepts were embodied in S. 3765 prior to its passage by the Senate.

In comments to the Senate subcommittee, and to this subcommittee, which are matters of public record, we have endorsed the concept of premarket testing, since no reputable manufacturer would market a product without assuring himself that it met the requirements of the applicable flammability standard.

We had misgivings, however, about the changes suggested in section 7 of the act dealing with penalties. Our apprehension was shared by the Department of Commerce, who pointed out that amending the law to make any violation subject to criminal prosecution would work an injustice on the manufacturer. Mr. Richard O. Simpson, Deputy Assistant Secretary of Commerce for Product Standards, testifying before the Senate subcommittee, stated that a manufacturer, even following the highest level of quality control program, would run the danger of placing "on the market a statistically inevitable percentage of rejectables." The Department of Commerce proposed additional language for section 7 that would recognize the statistical variability that is inherent in manufacturing processes, and would permit a person who exercises due care in following an approved testing program to establish that fact as a defense against the charge that he has violated the provisions of the act.

It is this recognition given to statistical variation—in S. 3765 as passed in the last Congress, in S. 364, the current Senate bill, and in H.R. 5698, which is under consideration today—that I think is the most significant portion of the legislation. To the best of my knowledge, this may be the first time that such cognizance has been given to the concept of statistical variability in a Federal law. And it should have far-ranging implications not only for flammable fabrics, but for legislation on other manufactured products.

You can tell, I think, from the tone of my comments that I am urging the passage of H.R. 5698. My reason, of course, is that it promises to offer some immediate benefits to our industry.

We are unique in that we are the first industry to come under the provisions of the Flammable Fabrics Act as amended in 1967. On April 16 of this year, the first flammability standard developed and promulgated by the Department of Commerce went into effect, covering carpets and rugs with a surface area greater than 24 square feet.

The standard is based on a test involving eight specimens, of which not more than one can fail the test criterion in order for that carpet to be acceptable.

The normal statistical variability of test results on carpet is such that if it is possible for a particular carpet to fail one specimen out of eight, which is acceptable, it is a mathematical certainty that at some time it will fail two out of eight, which is unacceptable.

Now, what does that mean with respect to enforcement under the act? I asked the staff of the Federal Trade Commission whether it was their intention to proceed against a manufacturer on the basis of one eight-specimen test in which two specimens failed. Their answer was yes, on the basis that the law offered them no other alternative.

We could, therefore, have a situation in which a manufacturer in good faith has tested his production, and has gotten results that satisfied him that the product complied with the standard, but when the Federal Trade Commission picks up a single sample on the market and performs one eight-specimen test, the manufacturer finds himself subject to the present enforcement procedures of the act—injunction, seizure, and condemnation, or cease and desist order. I have not even mentioned the Commission's present proclivities towards enforcement by press release, but I can assure you that this kind of adverse publicity is far more damaging than some of the other enforcement procedures available to the Commission.

Therefore, passage of H.R. 5698 would, by giving formal recognition to the normal statistical variation inherent in manufactured products, offer protection to the manufacturer against unreasonable enforcement by the Commission.

There are, however, some faults with H.R. 5698 as presently written—not with the concept, but with the specific wording. These faults can be remedied by a few small changes in wording.

First, we should make certain that the bill says what we think it says. And the best way to ensure this is to use technically accurate language. When we recognize the fact that even the most thorough quality control program will allow some portion of unacceptable products to reach the market, we are talking about a mathematical concept known as "acceptable quality level." An acceptable quality level, usually referred to as AQL, is the percentage of defective or failing material which the designator of the AQL is willing to accept.

Therefore, we suggest the following changes in H.R. 5698:

1. In section 3(a) (1) of the act (line 18, page 2 of the bill), add the following clause: ". . . in section 4 of this act, and which prescribes an acceptable quality level within which the product must fall."

2. In section 7(b) of the act (line 16, page 6 of the bill), delete "in conformity with" and substitute "within the acceptable quality level prescribed for such."

3. In section 7(c) (1) of the act (line 2, page 7 of the bill), delete "in conformity with" and substitute "within the acceptable quality level prescribed for such."

The biggest problem with H.R. 5698, as presently written, arises from time-scale considerations. The bill provides that sections 2, 4, and 5 of the act shall become effective 1 year after enactment. During that year, presumably, there is an opportunity for the industry to

file an application for approval of a testing program, or for the Secretary of Commerce to establish such program. Sections 3(a)(2) and 3(a)(3) both have the effect of staying certain provisions of the act if there is some delay by the Government in approval or establishment of such a program. But unfortunately these sections only stay the provisions dealing with certification and penalties for noncertification. They do not have any effect on other "no fault" violations. Thus, the manufacturer, through no fault of his own, could be subject to the increased penalties under the act, including the criminal penalty of section 7(b), without the protection of the "due care" clause.

We suggest, therefore, that sections 3(a)(2) and 3(a)(3) be amended as follows:

1. Rewrite the first portion of section 3(a)(2) of the act (lines 19 through 22, page 2 of the bill), to read: "This subsection and the penalties provided in subsections 7(b) and 7(c) of this act shall not take effect as to any product for . . ."

2. Rewrite the final portion of subsection 3(a)(3) of the act (lines 10 through 13, page 3 of the bill) to read ". . . such period applicability of the certification requirement of this section and the penalty provisions of subsection 7(b) and 7(c) of this act shall be stayed."

With these modest but critical changes, we would find H.R. 5698 completely acceptable, and we urge its prompt consideration and passage by the Congress.

That completes my original statement, Mr. Chairman, but I would like to take another couple of minutes to comment on the testimony given last Thursday by Mr. Needelman of the Federal Trade Commission.

The Commission statement makes the point that the activities of the Department of Commerce under the Flammable Fabrics Act have heretofore been limited to "technical considerations," and that Commerce therefore should not be assigned the authority to approve or establish testing programs. I cannot imagine what kind of considerations the Commission supposes to be involved in the setting up of a testing program. If not "technical," what are they?

Their lack of understanding of the fact that the establishment of a statistically valid quality control program is as technical, or even more so, than the establishment of a testing method and standard, would seem to be evidence of the Commission's own unsuitability for this task.

The statement further says that "the Commission has had considerable experience in establishing reasonable and representative testing programs," and cites the regulations promulgated for wearing apparel fabrics under section 8 of the act. This is one single program, established in 1954, more than 17 years ago; and my recollection of this particular rule is that the technical expertise was furnished almost exclusively by industry representatives.

The statement goes on to say that "it is essential that supervision of the testing program itself be placed with the agency which has primary enforcement responsibility." I do not think that H.R. 5698 contemplates anything different. Supervision of the testing program, that is, the steps taken to ensure that manufacturers comply with the approved program and keep adequate records, would presumably be

the responsibility of the Commission. It is only the initial approval or establishment of the program, which in my opinion is not enforcement, that would be given to the Department of Commerce because of their obvious technical capabilities.

The development of a meaningful testing program, based on a firm foundation of statistical quality control, is a highly technical task. I seriously question whether the Commission staff has the necessary knowledge and background. Certainly, in the past they have tended to rely upon the Bureau of Standards for technical advice in matters of this kind. Admittedly, the Commission could probably add to their staff the proper personnel for this function, but would this be a better solution than assigning the authority originally to a group which already has the qualifications?

Finally, without intending any specific criticism, I question whether the Commission has thus far met its responsibilities under the amended act in a satisfactory manner. The flammability standard for carpet has been in effect since April 16. It has been on the books since April 16 of last year, yet the Commission has still not published a final rule covering "reasonable and representative tests" upon which a guaranty must be based.

They have yet to amend rules 9 and 10, covering the wording of guaranties, to reflect the expanded scope of the act. And although the flammability standard, DOC FF 1-70, states that carpets treated with a fire retardant treatment shall be labeled with the letter T "pursuant to conditions established by the Federal Trade Commission," they have not as yet established those conditions. I submit that there may be extenuating circumstances to explain these delays—lack of funds, lack of staff, et cetera—but the fact remains that the delays have occurred and these delays have resulted in a definite burden on the industry.

For these reasons, I suggest that the responsibility for approving or establishing test programs be left with the Department of Commerce, as is currently provided for in H.R. 5698.

That completes my original prepared statement, Mr. Chairman, but I would like to take another couple of minutes to comment on the testimony given last Thursday by Mr. Needelman of the Federal Trade Commission.

The Commission statement makes the point that the activities of the Department of Commerce under the Flammable Fabrics Act have heretofore been limited to "technical considerations," and that Commerce therefore should not be assigned the authority to approve or establish testing programs. I cannot imagine what kind of considerations the Commission supposes to be involved in the setting up of a testing program. If not "technical," what are they? Their lack of understanding of the fact that the establishment of a statistically valid quality control program is as technical, or even more so, than the establishment of a testing method and standard would seem to be evidence of the Commission's own unsuitability for this task. The statement further says that "the Commission has had considerable experience in establishing reasonable and representative testing programs," and cites the regulations promulgated for wearing apparel fabrics under section 8 of the act. This is one single program, established in 1954, more than 17

years ago; and my recollection of this particular rule is that the technical expertise was furnished almost exclusively by industry representatives.

The statement goes on to say that "it is essential that supervision of the testing program itself be placed with the agency which has primary enforcement responsibility." I do not think that H.R. 5698 contemplates anything different. Supervision of the testing program, that is, the steps taken to insure that manufacturers comply with the approved program, and keep adequate records—would presumably be the responsibility of the Commission. It is only the initial approval or establishment of the program, which in my opinion is not enforcement, that would be given to the Department of Commerce because of their obvious technical capabilities.

The development of a meaningful testing program, based on a firm foundation of statistical quality control, is a highly technical task. I seriously question whether the Commission staff has the necessary knowledge and background. Certainly in the past they have tended to rely upon the Bureau of Standards for technical advice in matters of this kind. Admittedly, the Commission could probably add to their staff the proper personnel for this function, but would this be a better solution than assigning the authority originally to a group which already has the qualifications?

Finally, without intending any specific criticism, I question whether the Commission has thus far met its responsibilities under the amended act in a satisfactory manner. The flammability standard for carpet has been in effect since April 16. It has been on the books since April 16 of last year, yet the Commission has still not published a final rule covering "reasonable and representative tests" upon which a guaranty must be based. They have yet to amend rules 9 and 10, covering the wording of guaranties, to reflect the expanded scope of the act. And although the flammability standard, DOC FF 1-70, states that carpets treated with a fire retardant treatment, shall be labeled with the letter T "pursuant to conditions established by the Federal Trade Commission," they have not as yet established those conditions.

I submit that there may be extenuating circumstances to explain the delays—lack of funds, lack of staff, et cetera, but the fact remains that the delays have occurred, and these delays have resulted in a definite burden on the industry.

For these reasons, I suggest that the responsibility for approving or establishing test programs be left with the Department of Commerce, as is currently provided for in H.R. 5698.

I thank you, Mr. Chairman.

Mr. Moss. The committee is going to find out the reasons for the delay on the part of the Federal Trade Commission and that information will be available for the members prior to any markup on this piece of legislation. (See letter dated July 14, 1971, from Robert Pitofsky, Director, Bureau of Consumer Protection, Federal Trade Commission to Chairman Moss, p. 33.)

Mr. McCollister.

Mr. McCOLLISTER. I have no questions.

Mr. Moss. Mr. Eckhardt.

Mr. ECKHARDT. As I understood the last witness' testimony, he was concerned in his suggested amendment to the language on page 2 starting with line 19 of the bill, with the proposition that one might be subjected to additional liability without there having been a testing program established.

Mr. SEGALL. Yes, sir; so am I.

Mr. ECKHARDT. I do have some question about that in my own mind.

Mr. SEGALL. Could I give you an example, Mr. Eckhardt?

Mr. ECKHARDT. Yes, surely.

Mr. SEGALL. Let's be hypothetical for a moment and suppose that this bill passes tomorrow and becomes law. There is then a 1-year waiting period for the increased penalties provided for in section 7. Let us also suppose that our own industry makes application for the approval of a testing program to the Department of Commerce but that through lack on their part, they do not succeed in approving that testing program before the date at which section 7 goes into effect, that is 1 year from tomorrow. At that point, we, the carpet and rug industry, would be subject to the increased penalties provided under the law, which includes a criminal penalty for a nonwillful violation, and yet we would not have the offsetting protection of the "due care" clause because there would be nothing for that "due care" clause to operate on. This is what we are trying to protect ourselves against.

Mr. ECKHARDT. Of course there would have to be a standard established, would there not?

Mr. SEGALL. The standard has already been established. We are under a standard but I am talking about establishment of a testing program.

Mr. ECKHARDT. So section 2, which amends section 3 of the Flammable Fabrics Act, provides that, and I am reading from the top of page 2, that bringing any product, and so forth, into the United States and manufacturing it, "as to any of which applicable standards of flammability has been issued or amended under provisions of section 4 of this act, which product, fabric, or related material has not been certified by the manufacturer or importer thereof to meet requirements of the applicable standards."

You say that since the increased penalties would apply to that activity where only a standard but no testing program has been put into effect—

Mr. SEGALL. Correct, and possibly through no fault of the manufacturers.

Mr. ECKHARDT (continuing). You would be under a disadvantage and of course the last witness suggested that, as I understand, to take care of that, that the language insofar as they would prohibit sale of product without certification based upon approved testing program be stricken out of section 2, so that it provides "this subsection shall not take effect as to any product for which applicable or approved testing program has been timely filed with the Secretary," et cetera. I suppose that would satisfy you?

Mr. SEGALL. Right. I have also suggested wording in my prepared statement which would say "this subsection of penalties provided in subsection 7 (b) and (c) of this act shall not take effect."

I call attention to the fact I am not saying anything about 7(a), which is willful violation, the felony penalty, because anyone who commits a willful violation deserves a penalty.

Mr. ECKHARDT. I may not fully understand this but the thing that troubles me a little bit about the suggestion that this program, his subsection and penalties provided in section 7 of this act not take effect at all until the particular product has had 30 days for certification and testing program would seem to me also to exempt that product, even though a testing program for like products by another manufacturer had been put into effect.

That is what troubles me a little bit about that kind of change.

Mr. SEGALL. No, because it clearly says "shall not take effect as to any product for which application for approval of a testing program has been timely filed."

Mr. ECKHARDT. Yes; but the thing about it is that one manufacturer could be manufacturing a product which clearly would not fit an existing testing program and existing standard but it would seem to me that it would get a 30-day grace period if it makes its application and under circumstances like that it seems to me that is too great a leniency.

Mr. SEGALL. I don't think I understand, Mr. Eckhardt.

Mr. ECKHARDT. Suppose manufacturer A makes a baby garment out of a certain fabric and wants to put it on the market, and makes an application for certification and for testing, et cetera. As I understand, manufacturer A is going to be protected if you strike out that "insofar" language for at least 30 days after that application is applied for, is it not, absolutely protected?

Mr. SEGALL. No; until that 30 days after it has been acted on.

Mr. ECKHARDT. Now let's suppose it is acted on adversely. Then obviously manufacturer A would be under penalties for producing it and selling it. But suppose manufacturer B makes an almost identical product but makes his application. Ultimately he is likely to be refused, but couldn't he produce for that 30 days even though testing standards for that particular type of product had already been established?

Mr. SEGALL. I suppose so, but I think we are talking about something that is not going to happen, because I think in practice it will not be a matter of individual manufacturers applying for individual approval of individual testing programs. In the carpet and rug industry, for example, it would be a matter of the industry through an association such as the Carpet and Rug Institute applying for a testing program which would cover all carpets and rugs and upon approval of that program by the Secretary of Commerce, he would indicate this is the testing program which applies to all carpets and rugs.

The other way in which I think it will act is that the Secretary of Commerce will take upon himself to establish testing programs without application. The Department of Commerce in private conversations with me has indicated this is the way they would rather do it. They don't want to approve applications, they would much rather take it upon themselves to establish the testing program.

Mr. ECKHARDT. But if they did establish the standards and a testing program, if the language would change as has been suggested here, you would get an absolute protection as long as you had made your application even though you are manufacturing something that didn't fit that standard or that testing program at least for a period of time, would you not?

Mr. SEGALL. Right; but this is protecting the industry against unavoidable delay on their part, a delay by the Secretary of Commerce.

Mr. ECKHARDT. I may not have the order of this statute properly in my mind and this may be really not an appropriate place to do it, but suppose instead of changing the provisions after (2) on line 19, page 2, suppose you left that just as it is, but inserted on line 7, page 2, after the word "act" something like "and in which a testing program has been established." Do you have the act before you?

Mr. SEGALL. Yes.

Mr. ECKHARDT. So that as to any of which an applicable standard of flammability has been issued or amended under provisions of section 4 of this act and under which a testing program has been established. Would that do the same thing?

Mr. SEGALL. That might, Mr. Eckhardt. The only reason I hesitated was that it took me several hours to analyze all of the time scales involved in the operative portions of this act in order to figure out who were in trouble in the first place, and so changing my proposal to yours, I would have to go back and analyze it again to make sure there wasn't another way we could arrive at the same problem.

Mr. ECKHARDT. The only thing I am trying to avoid, and this may be entirely hypothetical, but it seems to me it is always bad to provide in the statute that mere application for certification gives an immunity for a certain period of time. I agree with you that there are hardships on the person to be called to meet exact standards before any testing program within that area has been put into effect, but after a general testing program has been put into effect and there is a pattern established, it seems to me it would be a rather bad way to draw a law to provide any sort of king's x period merely applying for a certification.

Mr. SEGALL. I see the point you trying to make.

Mr. ECKHARDT. I may be wrong. It may be entirely theoretical but that is the point I am trying to meet.

Mr. SEGALL. I think it is a valid point.

Mr. ECKHARDT. Thank you.

Mr. MOSS. Mr. Curtis.

Mr. CURTIS. I would like to explore the timing just a little bit to highlight this point. We mentioned a 30-day period. As I understand the act, following the promulgation of a standard which is not coupled with a testing program, let's say, the manufacturer would have a reasonable time in which to file application for a testing program which is defined in the act as being within 6 months. Then he has tacked to that the period in which the Commerce Department would consider that application. Then, following approval, there is an additional 30-day period. Your suggested language would suspend the liabilities, both civil and criminal, under this section for this process to take place; is that correct?

Mr. SEGALL. Yes.

Mr. CURTIS. So we are talking about a good deal more than 30 days?

Mr. SEGALL. Yes, we are talking about the time until the Department of Commerce does whatever it is charged with doing. I am saying don't penalize the industry for delay caused by the Commerce Department. I am trying to protect the industry against that.

Mr. CURTIS. At our last session of the hearings the Federal Trade Commission very strongly argued that they be given the power to approve testing programs as a necessary adjunct to their enforcement powers, arguing that among other things that the manufacturers would be subjected to dual standards of marketability by the Commerce Department and the Federal Trade Commission. Can you comment a little more on that? Do you believe their arguments can be completely overcome?

Mr. SEGALL. I believe their arguments are completely fallacious in that the establishment of a testing program is a highly technical subject. It is involved with a science called "statistical quality control," about which I have no reason to believe the Commission has any knowledge. I am therefore saying that as far as approval or establishment, the technical aspects of this process, this should be left with the Commerce Department as is stipulated in the bill. The enforcement, on the other hand; that is, deciding whether or not a manufacturer really has complied with this, that is a function of the Federal Trade Commission, presumably.

Mr. CURTIS. I am bothered by one aspect in their enforcement dilemma. If a testing program is coupled with the standard development, then their enforcement activities would appear to be limited to merely certifying that the testing program is complied with. Would you feel that is a fair observation?

Mr. SEGALL. I don't know that is true. I would have to think about it a few minutes but I would assume they would still be maintaining the same attempts at enforcement involving picking up articles from the open market to see whether or not they complied. Having established that some article did not comply, then it would behoove them to go back to the manufacturer to find out whether or not this happened merely because it was normal statistical variation or whether on the other hand he had not adhered to quality control program which could be established by examining his records. If they found the latter was the case, then they would proceed against him.

Mr. CURTIS. I only want to highlight for the record the point that I believe they make is that what we are developing here is a flammability standard which is totally tied into quality control systems and that the value of the standard will be only as good as is the quality control system.

Mr. SEGALL. Agreed. It is.

Mr. CURTIS. I have no further questions, Mr. Chairman.

Mr. MOSS. I want to explore this science that you call "statistical quality control," or "acceptable quality control." I didn't know it was a science.

Mr. SEGALL. It is.

Mr. MOSS. We have had, back in 1958 and 1959 before a subcommittee of this committee, a rather extensive examination into some statistical sciences, the measuring of preferences among audiences, and radio and

television, and that was a science that fell under the assault of the committee, I can assure you that, because everything that couldn't happen, did, as we rather thoroughly probed into the practices. Now what is acceptable quality control? Does it vary from plant to plant, from section to section of the country?

Mr. SEGALL. You misread me. I never said "acceptable quality control." I only mentioned "acceptable quality level," AQL.

Mr. MOSS. Well, it is based on a quality control system.

Mr. SEGALL. It is based on a quality control system.

Mr. MOSS. Whose quality control system?

Mr. SEGALL. Ordinarily, AQL, acceptable quality level, is the result of an agreement between buyer and seller, in which the buyer sets up an AQL he says that he will accept.

Mr. MOSS. The wholesaler, the distributor, or the retail consumer?

Mr. SEGALL. In any transaction there is a buyer and seller and we are talking about a given buyer, a given seller. It can be any of those people.

Mr. MOSS. I can't even work that kind of a deal on an automobile.

Mr. SEGALL. You are not a buyer with enough muscle.

Mr. MOSS. Well, in any of these areas, a buyer with enough clout to work this kind of agreement. I go into a marketplace that is remarkable for certain uniform characteristics, whether I am buying a suit of clothes, a pair of shoes, or any other article, a refrigerator, an automobile, television set, or for that matter, probably the materials that I might put into the construction of a home that are pretty standard. Where is my leverage, my clout to make this kind of an agreement?

Mr. SEGALL. You don't really have it so I am talking about industrial transactions when the buyer has clout.

Mr. MOSS. Who determines this acceptability?

Mr. SEGALL. The buyer.

Mr. MOSS. But the buyer we have ruled out. The buyer is the public.

Mr. SEGALL. That you are talking about in this particular instance?

Mr. MOSS. Yes.

Mr. SEGALL. In this instance AQL is going to be set up by the Government.

Mr. MOSS. On what basis; averages throughout the industry?

Mr. SEGALL. No, this would be set by fiat, presumably by the Department of Commerce.

Mr. MOSS. What would they base it on?

Mr. SEGALL. They would base it on their own knowledge in the first case of what was possible and in the second case of what was desirable from the standpoint of protecting the public.

Mr. MOSS. Desirable from the standpoint of protecting the public is the absolute minimum of failures.

Mr. SEGALL. Agreed, and this has to be balanced against what is possible to produce.

Mr. MOSS. Is it possible on the basis of average or possible on the basis of the most efficient and technologically excellent operator?

Mr. SEGALL. I would be speaking for the Commerce Department if I tried to answer that.

Mr. MOSS. No; we are writing law here. We are interested in your views. I have made suggestions here and we are not at all in awe of the Commerce Department up here. We have a greater responsibility

than they have. We might as a result of these hearings at some point decide to very drastically limit their flexibility, their areas of judgment, so let's have your views as to how this would be imposed.

Mr. SEGALL. It is obvious that one side of this equation would say that the most desirable AQL would be a hundred percent compliance, in other words, that every product on the market would pass.

On the other hand, an analysis of current technology would show that that is not possible with a destructive test such as we are talking about here. So it is something less than a hundred percent. The Department of Commerce would presumably make some sort of an analysis of what was currently being produced in attempt to find out what the average of the industry was. They would also attempt to find out what increments in that average would cost. For example, if industry was capable with current controls and current equipment of producing 95 percent, they would try to find out what would it cost to go to 96 percent and eventually they would come to a balance in terms of dollars.

Mr. MOSS. Then you are talking about industry averages.

Mr. SEGALL. I would certainly think they would have to know what industry was capable of doing. If you want to term that an industry average; yes.

Mr. MOSS. Should they attempt to determine what the most efficient producer is capable of doing?

Mr. SEGALL. When they are trying to figure out what the burden would be on the consumer, I think they would have to look at averages because that is what would determine how much the consumer would have to pay for having 97 percent or some increment up from what the industry average might be. This is the problem that Commerce is always faced with in administration of the Flammable Fabrics Act.

Mr. MOSS. Well, I don't like to see just the averages without giving some consideration to the reasonable capabilities of a producer or manufacturer to do a better job. Averages in many manufacturing processes today or the manufacturing of many products today are not as high as they could be because they utilize an internal quality control that is very tolerant of far less than I would say in some fields of unreasonable expectations. I mentioned the automobile. I think it is rather an outrage the burden the consumer is forced to assume today in buying an automobile. From the moment he takes delivery forever after he is plagued with problems because of not very good quality control and striking an average there could produce a pretty shoddy product, so it would not, and from your expression I think you probably have had some of the same experiences the rest of us have had. So I think we have to do a little better than just averages of what they are doing now. I think we should certainly have reasonable standards but I think we should be very demanding that it be a standard based on the real ability to do a better job and not one that is very tolerant of far less than inadequate effort.

Mr. SEGALL. I have confidence in the Commerce Department as far as their recognition of their responsibility to the consumer.

Mr. MOSS. We have confidence in the Commerce Department. We have given them certain things to do and we have confidence in the Federal Trade Commission. You gentlemen on previous occasions have indicated you had confidence in both groups, too. Today there is indi-

cation you have less than the confidence you used to have in the Federal Trade Commission. So this becomes a very variable thing, too.

Mr. SEGALL. I only say I have very little confidence in the Federal Trade Commission's technical ability.

Mr. Moss. I think you were critical of some of its enforcement practices.

Mr. SEGALL. I didn't mean to be.

Mr. Moss. Well, in any event, these are items that the committee will certainly give its careful attention to at the time of markup.

I want to thank you for your appearance.

The committee will now stand adjourned.

(The following statements and letter were received for the record:)

STATEMENT OF THE AMERICAN APPAREL MANUFACTURERS ASSOCIATION

The American Apparel Manufacturers Association (AAMA) is the principal trade association of the apparel manufacturing industry. In view of the substantial effect that the proposed amendments to the Flammable Fabrics Act contained in H.R. 5698 could have on our industry, we wish to submit this statement on behalf of our association.

During the last session of Congress, AAMA filed a statement with this Committee on a similar bill, H.R. 16824. Many of the comments made on that proposed legislation are reiterated in this statement.

TESTING AND CERTIFICATION

Under the Flammable Fabrics Act as presently enacted, the apparel manufacturers receive a guaranty or certification from their fiber and fabric suppliers. This certification signifies that the fiber and/or fabric meets the flammability standard imposed by the Act. Relying upon this certification, the apparel manufacturer incorporates the fabric into a finished product for sale to the consumer. Since the product manufactured for sale consists of components which meet the flammability standard, the apparel manufacturer does not test each finished product for flammability.

With respect to the amendments presented by H.R. 5698, Section 3(a) (1) would require apparel manufacturers to certify that their products meet the applicable standards established by the Flammable Fabrics Act. Such certification would be based upon a reasonable testing program approved by the Secretary of Commerce. Such requirements would impose an added expense upon the apparel manufacturer which he could not possibly absorb. These expenses would include:

1. Testing facilities—the apparel manufacturer would have to establish laboratory facilities and purchase equipment for flammability tests.
2. Personnel—the manufacturer would have to hire a technical staff to conduct the flammability tests.
3. The actual testing—the apparel manufacturer can only test his products by burning samples of the finished garment.

These increased manufacturing costs would have to be passed on to the consumer. It is difficult to estimate what the full effect of such increased expenses will be upon the ultimate price of each garment, but it is certainly conceivable that the consumer will be faced with substantially increased prices for the apparel which he buys. An attempt has been made to calculate the increased cost which the consumer must bear if the apparel manufacturer is required to test. Attached hereto as Exhibit A is a summary from a document prepared by some apparel manufacturers which attempts to illustrate that increase in cost. (This is the summary of a document that was submitted to the Department of Commerce in connection with their proposed standards for children's sleepwear.)

In addition to creating a financial burden to be ultimately borne by the consumer, the testing and certification requirement will impose a disproportionate hardship on many small apparel manufacturers. There are approximately 25,000 apparel manufacturers in the U.S. and about half of them are small companies with less than 20 employees. The small businessman may not have the technical,

managerial or financial resources to maintain such a testing program. Thus, if the apparel manufacturer is required to test, many small companies may be forced to leave the apparel manufacturing business.

Under the present statute, the apparel manufacturer's reliance upon his component supplier's certification is based on the concept that if an item of apparel is made up of components which met the flammability standard then the finished product will also meet that standard. While it is true that a few apparel products with a rigid vertical test on a seam might not meet the flammability standard even though all their components do, such situations are extremely rare and in no way justify the imposition of testing and certifying upon the entire apparel industry.

PENALTIES

Section 3(a)(1) of H.R. 5698 must be read with Section 7(d) in order to determine whether or not an apparel manufacturer will be subject to prosecution or penalty under these proposed amendments to the Act. Section 7(d) provides that no prosecution will take place for a violation of Section 3 of the Flammable Fabrics Act if the person establishes that he (1) has received a fabric certified as required by the Act which is signed and contains the name and address of the persons who certified and (2) has not, by further processing, affected the flammability of the fabric covered by the certification. In view of Section 7(d) it appears as though an apparel manufacturer will not violate this Act if the fabric it purchases is certified and if the transformation of that fabric into an item of wearing apparel does not affect the flammability of the tested and certified fabric.

AAMA believes that in order to allow apparel manufacturers to continue to rely on the certification of their suppliers and to avoid the requirement of testing, Section 7(d) should be clarified so as to allow an apparel manufacturer to sew together two tested and certified fabrics without being required to test.

As presently constituted, Section 7 of the Flammable Fabrics Act provides that a willful violation of Section 3 or 8(b) is a criminal misdemeanor punishable by a fine of not more than \$5,000 or imprisonment up to one year or both. The other amendments to Section 7 contained in H.R. 5698 seek to increase the criminal penalty for willful violations while at the same time creating a new criminal sanction against a violation, regardless of knowledge, plus establishing a civil penalty for all violations.

AAMA concurs that willful violators of the Act should be severely punished, and therefore, we support proposed Section 7(a). AAMA also supports Sections 7(b) and 7(c) if they are changed as proposed by George S. Buck, Jr., in his testimony before this subcommittee on July 6, 1971.

SUMMARY

The pretesting and certification requirement when applied to the apparel industry would result in an unnecessary burden upon the industry which would result in substantially increasing the cost of apparel to the consumer. Therefore, Section 7(d) should clearly exempt an apparel manufacturer who merely sews two certified fabrics together from testing and prosecution.

AAMA supports Section 7(a) and recommends that the language changes proposed by George S. Buck, Jr., in his testimony before this subcommittee on July 6, 1971, be incorporated into Sections 7(b) and 7(c).

Exhibit A

SUMMARY

This study clearly indicates the excessive costs to the consumer involved in an apparel manufacturer testing program. All estimates are intentionally understated. Had we calculated costs for independent laboratory tests, the retails would be even higher because the testing Lab must show a profit and we assumed a very efficient self administered program.

The average increase of the garments studied would cost the consumer from 12¢ to 95¢ more depending on the kind of merchandise and the size of plant.

The proposed standard will drive small cutters out of business. Cost efficiencies are gained only by large cuttings.

When the additional factors of higher fabric costs (at least 50-75¢ per garment in any fabric) and higher costs because of lot failures that must be disposed of,

the estimate of \$1.00 to \$2.00 minimum additional cost per garment is not unreasonable.

When this is combined with a 50% reduction in wear life, as is the result with many treated celluloseics, the net impact on the consumer looks like this:

Original 100 percent cotton knit garment-----	\$2. 98
Average size manufacturers additional cost for testing and control-----	. 40
Average cost increase in fabric (based on 25 percent resin content) -----	. 75
Total -----	4. 13
Roundoff to-----	3. 98
Plus 50 percent wear reduction-----	1. 99
Based on replacement one-half again as often-----	5. 97

The average cost to the consumer for *the same wear life is double.*

STATEMENT OF THE AMERICAN RETAIL FEDERATION

This statement is submitted on behalf of the American Retail Federation to the Subcommittee on Commerce and Finance, House Committee on Interstate and Foreign Commerce, in connection with its consideration of H.R. 5698, which would strengthen enforcement of the Flammable Fabrics Act (15 U.S.C. 1911 et seq.).

The American Retail Federation is a national organization which through its 50 state and 28 national retail trade association affiliates, represents more than one million retail establishments. Many of these establishments sell fabric and/or wearing apparel subject to the provisions of the Flammable Fabrics Act and regulations promulgated thereunder.

FEDERATION SUPPORT OF H.R. 5698

We recognize the strong public interest involved in protecting the consumer against dangerously flammable merchandise, and we certainly support the purposes and policies underlying the Flammable Fabrics Act, as well as the amendments proposed in H.R. 5698. Particularly, we favor any amendment which will aid in detecting dangerously flammable fabrics before they are placed in the channels of distribution.

As this Subcommittee is aware, there is little that smaller retailers can do, other than rely on the reputation of a supplier and in good faith seek to obtain guarantees, to insure that they do not sell dangerously flammable fabrics. Even larger retailers purchasing from domestic suppliers cannot possibly perform their own tests on all fabrics and wearing apparel they receive, and must to some extent rely on their suppliers' guarantees.

We believe that the basic thrust of H.R. 5698 would significantly improve the Flammable Fabrics Act and procedures under the statute. Amending Section 3 of the Act to require manufacturers to certify, based upon a reasonable testing program approved by the Secretary of Commerce, that relevant merchandise meets the requirement of the applicable standards under the Act would have two favorable effects. First, it would require producers to respond to a definite public need for assurance that adequate protective procedures have been adopted. Additionally, it recognizes that the major responsibility for statutory compliance must rest with the producer, rather than his customers.

Similarly, we recognize that stronger penalties under the statute will provide a greater deterrent to insure that those subject to the statute adequately meet their responsibilities.

However, we do urge that H.R. 5698 should be modified in the following respects:

1. Protection of Persons Who Have Complied With the Statute

Section 2 of H.R. 5698 would require producers to test merchandise, subject to procedures approved by the Secretary of Commerce, and to issue certifications that such testing has been done and that the merchandise sold meets the applicable standards and regulations.

If a retailer in good faith believes that merchandise has been properly certified, in accordance with required statutory procedures, no purpose is served to place further responsibilities on the retailer. Should such merchandise subsequently be found not to meet the requirements of the statute, a retailer, who in good faith has relied upon a certification received from the manufacturer, should not be subjected to prosecution. Such strict liability is unnecessary and unduly punitive. Moreover, those primarily responsible for certification procedures should be immune from prosecution so long as the applicable merchandise has been properly certified and tested.

Accordingly, we urge that the following language should be added, on page 2, line 18 of H.R. 5698 (the proposed new subsection 3 (a) of the Flammable Fabrics Act, as amended) :

"No manufacturer or importer shall be guilty under this Act if he establishes by a preponderance of the evidence that with respect to the product alleged to have violated this Act, such manufacturer or importer has conducted tests in accordance with a reasonable testing program which has been approved by the Secretary of Commerce in accordance with procedures established in Section 4 of this Act and in all such tests has achieved test results equal to or exceeding those required by this Act and its implementing regulations. No person other than a manufacturer or importer shall be guilty under this Act with respect to any product, fabric, or related material as to which he establishes receipt in good faith of a certification by the manufacturer or importer thereof issued in accordance with this subsection."

This amendment would in no way limit the ability of the Federal Trade Commission to prosecute persons who do not comply with the requirements of Section 3 of the Act as amended by H.R. 5698, or persons who do not receive such certifications in good faith. The amendment would prevent only the prosecution of persons who have fully complied with the requirements of the Act, and would permit retailers to rely in good faith on certification of their suppliers without fears of prosecution, as they do now under Section 8 of the Act.

The fact that there have been major increases in the penalties which may be imposed under the Act (a criminal violation has been made a felony, the amount of fines which may be imposed has been doubled and the maximum term of imprisonment has been tripled) further underscores the inappropriateness of prosecuting persons who have either complied with Section 3 of the Act, as modified by H.R. 5698, or relied on their supplier's assurances of compliance.

2. Establishment of Relevant Criteria for Testing

H.R. 5698, in our opinion, is deficient in that it does not provide relevant criteria to be followed by the Secretary of Commerce in his development of a reasonable testing program, nor does it specifically permit foreign and domestic testing of fabrics in order to determine the flammability of products covered by the Act.

It is essential that the rules to be established by the Secretary of Commerce provide a necessary measure of predictability by establishing requirements for the number of tests to be made and the appropriate intervals during which such tests should be made. The Secretary should also clearly establish the nature of the records which should be maintained in connection with testing programs.

Of paramount importance, however, is the need for guidance as to the testing laboratories which may be utilized in connection with the testing programs established by the Secretary of Commerce.

Under present conditions industry testing does not protect a company from enforcement procedures, even though recognized laboratories are utilized and satisfactory test results are obtained. In all instances, the Federal Trade Commission can totally disregard such results. It is essential for an industry member to be permitted to proceed with certainty in connection with the test results obtained from recognized independent testing laboratories. Otherwise, all marketers of textile fabrics will, on a continual basis, risk prosecution of the most serious civil and criminal nature. Thus, the Secretary should be required to establish an approved list of testing laboratories.

Obviously, the Secretary of Commerce can supervise the activities of qualified testing laboratories by reviewing their equipment, procedures, and personnel

on a regular basis. The list of approved laboratories can then be modified accordingly.

Additionally, appropriate foreign testing laboratories as well as domestic laboratories, should be included. Otherwise, importers will have no assurance as to the acceptability of the textile products they introduce into commerce. Such certification will also avoid costly and time-consuming delays. The Secretary of Commerce could rely upon the certifications and approvals of foreign governments as a basis for deciding upon the foreign laboratories to be approved. The testing activities of such laboratories could also be periodically checked for accuracy.

Accordingly, we therefore propose that the following language be inserted into H.R. 5698, on page 5, following line 20:

"(7) Rules promulgated by the Secretary of Commerce prescribing the testing programs provided for in paragraph (6) of this subsection shall include, but not be limited to:

- (a) Appropriate numbers and intervals of tests in relation to the nature and physical properties of the particular product to be tested;
- (b) designated domestic and foreign testing laboratories approved by the Secretary of Commerce under suitable criteria; and
- (c) procedures for the maintenance of adequate records evidencing the test results obtained in accordance with the procedures set forth in subparagraphs (a) and (b) of this paragraph."

3. Federal Trade Commission Imposition of Civil Penalties

It is inappropriate for the Federal Trade Commission itself to be authorized to impose civil penalties upon persons who it believes have violated the Flammable Fabrics Act. However, Section 4 of H.R. 5698, would authorize such actions. The combination of investigative powers, quasi-legislative rulemaking, and enforcement duties placed in the same agency, which also has judicial powers, makes it totally inappropriate to grant the Commission the power to impose monetary penalties.

However, we do not object to statutory procedures which would permit the Commission to institute civil penalty actions in federal district court. This procedure has been adopted by the Senate Committee on Commerce recently when it approved a comprehensive measure (S. 986) providing for substantial amendment to the Federal Trade Commission Act.

It should be noted that no other statute grants the Federal Trade Commission the power to itself order civil penalties against a respondent. This fact no doubt reflects deep Congressional concern that the power of independent federal agencies should not be overextended.

We therefore recommend that this Subcommittee strike the proposed new subsections 7(c) (1) through 7(c) (3) of the Act (page 6, line 18 through page 7, line 11) and insert in lieu thereof the following language:

"(c) The Commission may initiate civil actions in district courts of the United States against whoever performs any act in violation of section 3 or section 8 (b), in addition to any other penalties imposed for such violation, to obtain a civil penalty not to exceed \$10,000 for each such violation. In seeking such penalty, the Commission shall give consideration to the appropriateness of the penalty, to the size of the business of the person charged, to the gravity of the violation, and to the history of previous violations. The Commission may compromise, mitigate or settle its claim for civil penalties. However, no person shall be held in violation of this subsection if such person establishes that he exercised due care in the application of an approved testing program required under section 3(a) of this Act and that such application disclosed that the product, fabric, or related material was in conformity with applicable standards of flammability established pursuant to section 4 of this Act."

CONCLUSION

The retail industry has given its support to the Flammable Fabrics Act since its initial enactment in 1953. At this time, three retail representatives serve on the National Advisory Committee for the Flammable Fabrics Act.

We respectfully request the Subcommittee to give prompt consideration to H.R. 5698, and to include the comments and suggestions we have made in its deliberations.

STATEMENT OF THE FLAMMABLE TEXTILE PRODUCTS GROUP OF THE AMERICAN
IMPORTERS ASSOCIATION, INC.

The American Importers Association, Inc. (Association) was organized in 1921 (originally under the name of the National Council of American Importers, Inc.) as a non-profit, non-partisan association to represent the United States Import trade. The Association is the only national trade organization representing United States importers. Its members are required to be United States corporations, partnerships or citizens and therefore subject to the laws of the United States. The Flammable Textile Products Group of the Association is a special group concerned primarily with and vitally interested in the subject of flammability.

The Members of the Association import into the United States the widest range of products and bring to the industry of this country, as well as to its consumers, goods, wares and merchandise produced abroad. The value of these imports and the importance to the United States economy is immense and not possible to calculate in dollars and cents. The members of the Association play a vital role in the development of the economy of many foreign nations of the Free World. Indeed the bedrock of many foreign economies is the trade conducted with Members of the Association.

Since 1921 the Association has been a major voice for the import trade, which is recognized as a most important segment of our economy. It is one of the major purposes of the Association to protect and foster the import trade and to keep its Members abreast of any changes or proposed changes in the law and equally important to make known to the public and the Congress the views of its Members.

The Flammable Textile Products Group of the Association submits this statement for the record as its position on HR 5698, the proposed amendments to the Flammable Fabrics Act. As a general comment, we believe that these amendments to the Flammable Fabrics Act are not necessary or required to protect the public against unreasonable risk of injury to life and limb or damage to property as a consequence of burning articles of wearing apparel, fabric, related materials, etc. We do support whole heartedly the proposed appropriation provided for in this bill.

The proposed bill seeks primarily to amend Sections 3(a), 4 and 7 of the Flammable Fabrics Act. The purpose of the proposed amendments to Sections 3(a) and 4 of the Act is to include in these sections provisions for pre-marketing test procedures. The proposed amendment to Section 7 of the Act seeks to increase and add to the penalties for violations. A minor amendment is suggested for Section 8(a) of the Act to bring this latter section in line with the proposed amendment of penalties under Section 7.

THE ASSOCIATION OPPOSES THE PROPOSED AMENDMENTS TO SECTION 3(A) AND 4
OF THE FLAMMABLE FABRICS ACT

As presently written, HR 5698 would require a manufacturer to certify that its product, fabric or related material meets the requirements of the applicable standards or other regulations issued or amended under the provisions of Section 4 of the Act, such certification to be based upon a reasonable testing program conducted by the manufacturer and approved by the Secretary of Commerce.

Under the law as it now exists, there is an extensive program provided for pre-marketing test procedures. The Flammable Fabrics Act as it is presently written provides for a guarantee which may be given by those engaged in the marketing of the products covered by the Act. In connection with these guarantees, the Federal Trade Commission has promulgated its Rule 7 under the Flammable Fabrics Act, which provides for reasonable and representative tests to be conducted to support the guarantee. It is essential to understand that the tests provided in FTC Rule 7 to support a guarantee are made prior to as well as during the marketing program of the item covered by the Act. In today's market, as a practical matter, manufacturers, importers and distributors of products covered by the Act are continuously required by their customers to furnish these guarantees. Therefore, at the present time and under the Act as it is presently written, the public is now adequately protected by the reasonable and representative tests required by the Federal Trade Commission Rules to support a guarantee.

In addition to the tests referred to above, the Federal Trade Commission presently has very substantial enforcement tools. Section 5(b) of the Flammable Fabrics Act, provides that the Commission has all of the powers and duties under the Federal Trade Commission Act to the same extent as if the Federal Trade Commission Act were set forth in full in the Act. Rule 5(d) of the Commission's Rules under the Act authorizes the Commission to inspect, examine and test any product and to cooperate on all matters related to the purposes of the Act with all other departments and agencies of the United States Government. Under Section 6 of the Act, the Commission has broad and sweeping injunction and condemnation powers. We submit that a reading of the present Act and the rules and the regulations of the Federal Trade Commission thereunder provide all of the necessary enforcement procedures which the Commission could reasonably expect.

We do not believe that the pre-marketing test procedures provided for in H.R. 5698 would result in substantially added protection to the public, commensurate with the inflationary effect of such programs which would result in substantial price increases.

SECTION 7 OF THE FLAMMABLE FABRICS ACT

The provisions of HR 5698, amending Section 7 of the Flammable Fabrics Act, are, in our opinion, unreasonable, unwarranted and unnecessary. The present Section 7 provides for criminal penalties of jail sentence and/or fines for willful violations of the Act. In addition, the Federal Trade Commission Act, which is incorporated by reference under Section 5 of the Act, provides additional penalties for violations. Therefore under the Act as it presently exists manufacturers, distributors and importers are all subject to very severe penalties.

We oppose unequivocally the proposed amendments to Section 7 of the Act. We believe that the present penalties, not only those in Section 7 of the Act but also those under the Federal Trade Commission Act which is made a part of the Flammable Fabrics Act, together with the injunction and condemnation procedures contained in the Act, are more than adequate for the enforcement of the Act by the Federal Trade Commission and for the protection of the public.

Under the Flammable Fabrics Act as it exists today, the testing of all wearing apparel for flammability is conducted in accordance with the test procedures prescribed in CS 191-53. This test procedure is not sufficiently scientifically accurate to produce uniform results. To the best of our knowledge, there are only two independent testing laboratories in the United States, i.e. Better Fabrics Testing Bureau in New York City and United States Testing Company in Hoboken, New Jersey. There have been instances where pieces of fabric have been cut into two identical samples and submitted to both of these independent testing laboratories. The results of the test have been dramatically different. The same legal test procedure was followed by both laboratories, but the test itself does not produce consistent results. It has also been experienced that finished garments, i.e. dresses, were divided into three separate samples, with one sample of each being given to the Federal Trade Commission, Better Fabrics Testing Bureau and United States Testing Company. Here again the results among the three laboratories differed.

Several years ago, Dr. Sandholzer and Mrs. Vaishnev of the National Bureau of Standards reviewed the test procedures under CS 191-53. At the conclusion of their research, they wrote a report setting forth various inadequacies of the present test system. In it they explained some of the reasons why results might differ among test laboratories, despite the fact that all laboratories were following the legal procedure set forth in CS 191-53.

In view of the present state of the test procedure, it appears to be totally unreasonable for severe penalties to be assessed or imposed upon industry for non-willful violations of the Act. If for no other reason but this, it would appear that the present penalties set forth in the Act, as well as those set forth in the Federal Trade Commission Act, are sufficient to penalize violators and reasonably protect the public.

In conclusion, we strongly urge that HR 5698 be limited entirely to the appropriation provision set forth in Section 13. We urge that the present Flammable Fabrics Act contains all necessary and reasonable provisions to protect the public against unreasonable risk. We urge that under the present state of the art and the present conditions existing in the market place it is not necessary or practical to provide for premarketing test procedures as proposed. We also

urge that the present sanctions contained in Section 7 of the Act and those contained in the Federal Trade Commission Act are sufficient for the proper enforcement by the Federal Trade Commission and for the reasonable protection of the public.

Notwithstanding our objections to the premarketing test procedures and revised penalty provisions as set forth above, if the committee on interstate and foreign commerce determines that it is necessary to have a premarketing test procedure and revised penalties, we respectfully request consideration of the following changes in HR 5698.

1. Section 2 of the Bill which seeks to amend Section 3 of the Flammable Fabrics Act provides among other things that it shall be unlawful, an unfair method of competition and an unfair and deceptive act or practice to import into the United States any product which has not been certified by the manufacturer or importer to meet the requirements of applicable standards issued under Section 4 of the Act. Under Section 4 of the Bill, which seeks to amend Section 7 of the Flammable Fabrics Act, it is provided in sub-paragraph (e) that an importer who chooses to rely on the certification of a foreign manufacturer shall be responsible as a manufacturer for any violation of Section 3 of the Act. Therefore, if an importer desires not to rely on the foreign manufacturer's certification, the importer himself must, in order to make the statutory certification, conduct his own test program as provided or promulgated by the Secretary of Commerce. However, as stated above, under Section 3 of the Act the importer could not import the product which has not been certified. The importer should not be discriminated against by being subjected to treatment different from that of a domestic manufacturer. A domestic manufacturer has his products available to him at his plant for pre-marketing test programs. Similarly, an importer should have the same opportunity to have the imported products in the United States at his place of business or warehouse for conducting his own pre-marketing test program in the United States.

If the importer is prohibited from importing his products prior to a pre-marketing test program certification as proposed in the present Bill, he would, in fact, be required to rely on the foreign test program. This he may not desire to do. He may wish to conduct his own pre-marketing test program in the United States. It is, of course, possible for him to retain his products in a bonded warehouse during the time it would take him to conduct his pre-marketing test program in the United States. However, the charges for bonded warehouse space are extremely high and this would unduly increase his cost basis of the products. This would discriminate therefore against the importer as compared to the domestic manufacturer.

We therefore propose that the "importation" of the products into the United States be deleted from Section 3(a)(1) of the Act as proposed in HR 5698. By deleting "or the importation into the United States" from this Section there remains the prohibition from selling, introducing, delivering or transporting products in Commerce in the United States unless the same has been properly certified. The report of your Committee should include a statement to the effect that it would not be a violation of Section 3(a)(1) of the Act for an importer to import products into the United States for the purpose of conducting a pre-marketing test program provided the importer does not thereafter sell, deliver, introduce or transport such products in commerce until it has completed the test program and properly certified the products under the Act.

In this way, the importer will be permitted to enter the products into the United States but will be prohibited from thereafter dealing with them until the required test program has been followed and his certification has been given. This certainly will protect the public in exactly the same manner as the public is protected in connection with domestically manufactured products.

We also want to point out that if it is later found that the imported products violated the standards there are additional penalties against the importer under Section 9 of the Act, which are not assessed against the domestic manufacturer. Therefore the importer is not only subject in that instance to penalties under Section 7, but is also subject to additional penalties under Section 9.

2. Section 3 of the Bill, which amends Section 4 of the Flammable Fabrics Act by adding a new subsection (g), provides the procedure for establishing the test program. The test program as proposed in the Bill is established in one of two ways. An interested party may submit to the Secretary of Commerce for approval

his own test program or the Secretary of Commerce may himself promulgate rules prescribing a test program. Subsection (g) (5) provides that any person adversely affected by an approval or denial of the test program he submits to the Secretary of Commerce may seek judicial review in accordance with Section 4 (3) of the Flammable Fabrics Act. However, HR 5698 does not provide this judicial review for those adversely affected by a test program promulgated by the Secretary of Commerce under Subsection (g) (6).

We recommend that Subsection (g) (6) be renumbered Subsection (g) (5) and that Subsection (g) (5) be reworded and redesignated as Subsection (g) (6) as follows:

"6. Any person who will be adversely affected by approval or denial of a test program submitted to the Secretary of Commerce as provided in subsection (1) above or any person who will be adversely affected by a test program promulgated by the Secretary of Commerce as provided in Subsection (5) above, may seek judicial review in accordance with procedures set forth in Subsection (e) of this Section."

3. Lastly, we believe that Subsection (g) (6) of HR 5698 as presently written should be reworded. This Subsection (6) presently provides "The Secretary of Commerce may promulgate rules prescribing the testing program to be used in the manufacture of any produce * * * *". This present language is limited solely to "the manufacture of any product", and precludes any testing program by importers. We therefore suggest that after the word "manufacture" in the above quoted language, there be added the words "or importation".

STATEMENT OF NATIONAL CONSUMERS LEAGUE

The National Consumers League has for over 70 years been in the forefront of the campaign to protect the health and well-being of consumers. Accordingly, in 1953, when the original Flammable Fabrics Act was passed, and since that time, the League has supported efforts to provide adequate protection for consumers against the devastating effects caused by the continued use of flammable fabrics in clothing and other consumer goods.

In spite of the Act which has now been in existence for 18 years, every year we still suffer from some 3,000 to 5,000 deaths and from 150,000 to 250,000 injuries from burns associated with flammable fabrics. The majority of those involved in these traumatic experiences are children and the elderly. The 1953 Act supposedly would have outlawed any article of wearing apparel or fabric which was so highly flammable as to be dangerous when worn by individuals. But according to the former executive director of the National Commission on Product Safety, the test procedure of the Act would allow 99% of all fabrics involved in serious burn cases to pass. According to one safety expert, the Act was so weak that in 12 years of analyzing fabrics from burn cases, *only one* failed to pass.

Under the 1967 amendments to the Act, the Commerce Department was given power to set new standards for clothing and other household fabrics. The Department has not yet adopted any new standards affecting garments, although it is now proposing a standard for children's sleepwear which would apply to very young children (up to size 6x) covering less than 1% of textile production. No proposals have been advanced for protecting older children, or the younger children who might be going to bed in clothing other than sleepwear, or the elderly. The latter group, although only 10% of the population, represents 20% of the burned clothing cases. It is obvious that unless the Act is strengthened, the public cannot rely on the industry to provide the protection of flame resistant clothing, as the huge list of manufacturers and retailers cited by the FTC for selling dangerously flammable articles reveals.

What is required is that dangerous fabrics be prevented from reaching the marketplace by a compulsory pre-testing procedure, accompanied by meaningful criminal and civil sanctions. The League therefore supports the provisions for pre-testing and certification in H.R. 5698. Moreover, the League supports the recommendation of the FTC that the certification be made to that agency, and that power to approve or prescribe testing programs also be given to FTC. Apparently, the Department of Commerce is also supporting these recommendations as a means for much more effective administration of the Act.

The public interest demands prompt action on the strengthening of the Flammable Fabrics Act. Since it is technically possible to make all textiles flame-resistant, it is more than time that American consumers be adequately protected against the hazards of clothing that kill and maim so many.

The League, therefore, urges prompt enactment of H.R. 5698 with the suggested amendments, and that sufficient funding be provided to make possible strong and vigorous administration of the Act.

WISCONSIN CONGRESS OF PARENTS AND TEACHERS, INC.,
Madison, Wis., June 21, 1971.

Hon. JOHN E. MOSS,
*U.S. House of Representatives,
 House Office Building, Washington, D.C.*

DEAR SIR: The members of the executive board of the Wisconsin PTA are on record as opposing any weakening of the standards on flammable materials by the Secretary of Commerce.

We are in unanimous opposition to any proposal which will allow flammable materials to be manufactured or imported, with the only restriction being a label of warning.

We are in strong opposition to any request to limit precautionary legislation to labeling of materials; and than to further limit legislation to make only the labeling of sleepwear mandatory.

We request the strongest anti-flammable legislation it is possible to realistically expect Congress to pass pertaining to material for use by juveniles and would like to see this legislation expanded to include all material of a flammable nature.

Any help you can give to parents on the implementation of this matter will be appreciated.

Sincerely,

LOIS JONAS (Mrs. Phillip).

(Whereupon, at 12:15 p.m. the committee was adjourned.)



