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THOMAS A. FRAZIER, JR.
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October 30, 2003

Docket Management Facility
National Highway Traffic Safety Administration
U.S. Department of Transportation
Nassif Building, Room PL--401
400 Seventh Street, S.W.
Washington, D.C. 20590-001

Re: Docket No. NHTSA 03-15651 -28
Request for Comments
Notice of Draft Interpretations
Federal Motor Vehicle Safety Standard No. 108
Lamps, Reflective Devices, and Associated Equipment

Dear Sir or Madam:

I represent and am writing on behalf of the Specialty Equipment Market Association (SEMA), an industry association of over 5,000 businesses engaged in the manufacture and distribution of specialty automotive parts and accessories. We are providing comments with regard to the draft interpretive letters that were published in the Federal Register on July 17, 2003. The broad scope of the interpretive letters changing dramatically the long-standing policy of the National Highway Traffic Safety Administration (NHTSA) are of concern and significance to all of the members of SEMA and I speak on their behalf.

Draft Letters of Interpretation

The draft interpretive letters that were published in the Federal Register on July 17, 2003 contain fundamental flaws concerning the authority of NHTSA to establish and enforce the Federal Motor Vehicle Safety Standards (FMVSS). We wish to make clear those policies of NHTSA with which we agree and those with which we believe have no legal basis.

In Draft Interpretation No. 1, we agree with the statement that when a manufacturer designs a lamp to which the standard applies, the manufacturer must design the lamp to ensure that the vehicle will continue to comply with the standard. We do not agree, however, that the requirements of the standard as applied to replacement equipment are determined by reference to the original equipment being replaced. The statement that "...the replacement item must conform to the standard in the same manner as the original equipment for which the vehicle manufacturer certified compliance..." is a statement inconsistent with the stated policy of NHTSA and is grossly beyond the authority of the agency. It would appear that part of the assumed authority for this interpretive letter is based upon unpublished and non-precedential letters written earlier by the Office of Chief Counsel. In addition to the lack of authority for this change of policy, the agency would seem to have failed to have met fundamental requirements of due process by establishing such a policy without recourse to the requirements of the Administrative Procedures Act.

Draft Interpretation No. 2 also contains statements with which we agree as well as statements with which we disagree. For example, we agree with the statement that a "manufacturer of a replacement lamp (or other replacement equipment covered by the standard) is required to certify that the equipment meets the standard's requirements." Further, we agree with the statement that "...the manufacturer must design that lamp to ensure that the vehicle will continue to comply with Standard No. 108 when the replacement lamp is installed." As with Draft Interpretation No. 1, however, we completely disagree with the statement that "...the specific requirements ... that apply to an item of replacement equipment are determined by reference to the original equipment being replaced..." and "...the replacement item must conform to the standard in the same manner as the original equipment..." As stated above, this policy is beyond the authority of the NHTSA. The effective result of the proposed policy would be to prevent the manufacture and sale of aftermarket equipment that is subject to the FMVSS unless that equipment is identical to original equipment. The policy and its consequences are without authority and are unacceptable to the automotive aftermarket.

From the enactment of the enabling legislation that provides the authority for the creation of the FMVSS, it has been clear that the Congressional intent was that the standards to be adopted by NHTSA were to establish levels of performance for motor vehicles and motor vehicle equipment rather than establish standards for the design of motor vehicle equipment. From the inception of the adoption of the FMVSS, NHTSA, in turn, has maintained the policy that such standards were to be performance oriented and were to apply to both motor vehicles and motor vehicle equipment. The long-standing policy of NHTSA, thus, is consistent with clear legislative authority as well as Constitutional limitations on delegations of legislative authority. We respectively request that NHTSA withdraw the proposed interpretive letters and reaffirm the long-standing policy of the agency that the FMVSS apply equally to motor vehicle and motor vehicle equipment.

NHTSA's Authority

What is so amazing about the dramatic change of policy is that it is, on its face, vastly beyond the authority of the NHTSA. Article I, Section I of the United States Constitution establishes the broad authority to establish rules and regulations. The Constitution states that "All Legislative Powers herein granted shall be vested in a Congress of the United States..." U.S. Const. art. I, § 1. It has been long recognized that these powers cannot be delegated. One important consideration in prohibiting such delegations of power is the constitutional requirement for due process of law. It is not possible to assure due process of law where legislative authority is delegated to private parties; such delegations, therefore, have been prohibited. While granting of vast powers to administrative or executive agencies has been recognized as fundamental in governmental coordination, granting authority to private entities has not. Such authority allows administrative or executive agencies to "fill up the details" of a statute. By adopting a policy that equipment manufacturers must produce equipment that complies with standards adopted by NHTSA in the same fashion as compliance is achieved by the vehicle manufacturers establishes that the design of the vehicle manufacturer is the standard to be met by equipment manufacturers. Such a policy not only establishes a design, rather than a performance, standard, but also establishes that the design standard is to be created by the vehicle manufacturer. Unquestionably, NHTSA has sought to exceed its authority through the proposal of the interpretative letters, and would engage in an unconstitutional delegation of legislative authority.

The Congress, consistent with its authority under the Constitution, enacted the National Traffic and Motor Vehicle Safety Act of 1966, as amended. 15 U.S.C. §§ 1381 et seq. (1966), later recodified at 49 U.S.C. §§ 30101 et seq. (2003). The Act provides specific authority to the Department of Transportation to prescribe motor vehicle safety standards that are practicable, meet the need for motor vehicle safety, and can be stated in objective terms. 49 U.S.C. § 30111. The language of the Act clearly establishes that the authority is "...to prescribe motor vehicle safety standards for motor vehicles and motor vehicle equipment..." 49 U.S.C. § 30101(1) (*emphasis added*). In fact, NHTSA, having been delegated this authority, has adopted a series of safety standards, namely the FMVSS. To date, NHTSA has largely followed its legislative mandate. It has sought to adopt standards that are practical and necessary to meet the needs of motor vehicle safety.

Another obligation of NHTSA in terms of adopting standards is that they be objective. The courts have addressed this issue. The courts have made clear that the standards adopted by NHTSA are to be performance standards, not design standards and that such standards are to apply equally to motor vehicles and motor vehicle equipment. *Chrysler Corp. v Department of Transp.*, 515 F.2d 1053 (6th Cir. 1975). As a result, NHTSA is prohibited from creating design standards. This would include establishing the design of a vehicle manufacturer's product as the required design for compliance with a FMVSS by aftermarket products. Clearly, if NHTSA cannot adopt the design of a particular product as the basis for complying with a standard, it would be precluded as

well from allowing vehicle manufacturer design decisions to serve as the compliance standard.

A second element of the Chrysler decision is the finding that standards are adopted for the purpose of guiding both the vehicle manufacturer and the parts manufacturer in the design of products. The standards are to apply equally to vehicle and parts manufacturers. The court specifically addressed the mandate of the Act that defines safety standards as "...a minimum standard for motor vehicle performance, or motor vehicle equipment performance..." *Chrysler*, 515 F.2d at 1056, citing 15 U.S.C. at 1391(2). Establishing this point, the court quoted the legislative history of the Act to confirm the clear intent of the Congress in guiding the development of safety standards:

...standards are expected to be performance standards, specifying the required minimum safe performance of vehicles but not the manner in which the manufacturer is to achieve the specified performance. (sec. 101(b)). Manufacturers and parts suppliers will thus be free to compete in developing and selecting devices and structures that can meet or surpass the performance standard.

The Secretary would thus be concerned with the measurable performance of a braking system, but not its design details. Such standards will be analogous to a building code which specifies the minimum load-carrying characteristics of the structural members of a building wall, but leaves the builder free to choose his own materials and design. Such safe performance standards are thus not intended or likely to stifle innovation in automotive design. S. Rep. No. 1301, 89th Cong., 2d Sess. (1966), 1966 U.S. CODE CONG. & AD. NEWS 2713-14. *Chrysler*, 515 F.2d at 1058 (emphasis added).

The court concluded that "[t]hese excerpts lead us to conclude that Congress had two purposes in directing the NHTSA to establish performance standards rather than design standards. First, Congress decided that the need for safety could best be met by encouraging competition among manufacturers in devising methods to achieve objective performance goals..." *Id.* Interestingly, the Chrysler case involved a finding by NHTSA that the shape of headlights did not appear to have an impact on the performance of the lights and to eliminate the requirement for round headlights allowed greater styling latitude for manufacturers of lighting systems. The court made it clear that the agency was not authorized to establish design standards.

Both the Congress and the courts have established the parameters of the authority of NHTSA in developing safety standards. In fact, NHTSA has long recognized the limitations on its authority and has acknowledged the appropriate criteria for the adoption of standards. NHTSA has long acknowledged its limitations on establishing design standards. For example, in a letter from the Office of the Chief Counsel of NHTSA maintained that, in the case of windshields, the FMVSS requires that "...windshields installed in new vehicles and new windshields sold as replacement equipment to meet certain performance requirements..." Letter from Erika Z. Jones, Chief Counsel,

NHTSA to Andrew P. Kallman (October 28, 1988). Similarly, John Womack, Acting Chief Counsel advised that "...NHTSA is authorized to issue Federal Motor Vehicle Safety Standards that set performance requirements for new motor vehicles and items of motor vehicle equipment." Letter from John Womack, Acting Chief Counsel, NHTSA to Mr. Allan Ferver (February 1, 1993) (emphasis added).

NHTSA has long recognized that FMVSS are intended to apply equally to motor vehicle manufacturers and motor vehicle equipment manufacturers. As recently as April 21, 2000, NHTSA stated that with regard to FMVSS 108, it "...has promulgated a Federal Motor Vehicle Safety Standard that requires replacement lighting equipment to comply with the same requirements as are applicable to the original equipment that it replaces (see S5.8.1 of Federal Motor Vehicle Safety Standard No. 108)." Letter from Frank Seales, Jr., Chief Counsel, NHTSA to Mr. Dennis G. Moore (April 21, 2000). NHTSA's stance, it seems, is that replacement equipment must meet the requirements of the standard, not the requirements as they have been met by the original equipment manufacturer. Making this policy more clear, in a letter to an official of the California Highway Patrol concerning the replacement of round headlights with rectangular headlights NHTSA stated that "[w]e construe the words 'like equipment' broadly. If one headlighting system is being replaced with another, the replacement headlighting system must meet the requirements of Standard No. 108, even though its configuration differs from that of the original. In that same letter, Mr. Berndt addressed the circumstance of the replacement of original sealed beam headlights with replacement quartz-halogen headlights. Mr. Berndt wrote as follows: "Quartz-halogen headlamps sold in the aftermarket, intended as replacement for headlamps that comply with Standard No. 108, must also meet Federal requirements." Letter from Frank Berndt, Acting Chief Counsel, NHTSA to Warren M. Heath, Commander, Engineering Section, Department of California Highway Patrol (February 2, 1977) (emphasis added). Interestingly, both letters dealt with the application of FMVSS No. 108. They are representative of the long-standing policy of NHTSA in furtherance of its legislative authority.

In addition to proposing a policy that flatly violates the Constitutional and legislative authority of NHTSA, it has sought to do so in a fashion that violates the constitutional requirement for fundamental due process through compliance with the requirements of the Administrative Procedures Act. First, by delegating to the vehicle manufacturers the authority to determine the design parameters of products that will be found in compliance with FMVSS, NHTSA is proposing to deny replacement manufacturers and the public the opportunity to participate in the process of determining how the laws are enforced. Such action is a denial of due process and clearly beyond the authority of NHTSA. Second, even if NHTSA was within its authority to delegate the authority to establish FMVSS to the vehicle manufacturers, which it is not, it would be required to engage in the delegation process in a fashion consistent with the requirements of the Administrative Procedures Act. This has not been done. In addition to the failure of NHTSA to comply with the requirements of fundamental due process and the provisions of the Administrative Procedures Act, it has failed to comply with the requirements of the legislative authority enabling the creation of the FMVSS. The National Traffic and Motor Vehicle Safety Act of 1966 requires that the Secretary

consider relevant available motor vehicle safety information, consult with other agencies, consider whether the proposed standard is reasonable, practicable and appropriate and consider whether the standard will carry out the other requirements of the Act. The Secretary cannot fulfill these responsibilities if the design standards are being established by the vehicle manufacturers. Beyond the lack of authority for the proposed action of NHTSA, it has also failed to meet the procedural requirements imposed upon it.

Clearly, NHTSA does not possess the constitutional or legislative authority to adopt the policy contained in the draft interpretive letters. Further, it is completely inconsistent with the long-standing policy of NHTSA that the FMVSS apply equally to original and replacement equipment. Further still, for the reasons described above, the actions of NHTSA constitute denial of the requirement for due process and violate the requirements of the Administrative Procedures Act.

Conclusion

In reviewing the interpretive letters that lack underlying authority, one can but wonder what is to be achieved with such a dramatic change of policy. Certainly, we can understand the concern of the agency with the sale and use of products that fail to meet the requirements of the standard. We also see the potential of products being manufactured and sold that comply with the standards, but may contain latent or patent deficiencies that could lead to safety problems. On the other hand, the agency has sufficient authority to deal with such concerns. As we have made clear, replacement motor vehicle equipment may be manufactured and sold only if it is in compliance with the standards and is so certified by the manufacturer. Enforcement against manufacturers of non-complying products would seem to deal adequately with the concern with non-complying products. Similarly, products that comply with the standards, but may contain safety-related defects are also subject to enforcement action under well-established legislative authority. What can then be the rationale for such draconian measures that seek to challenge the entire automotive aftermarket and that could lead to a challenge to the entire regulatory program?

Accordingly, we respectfully request that NHTSA withdraw the proposed interpretive letters and reaffirm the long-standing policy of the agency that the FMVSS apply equally to both motor vehicles and motor vehicle equipment. Please feel free to contact me if I may be of assistance in addressing any additional concerns that you may have.

Sincerely,



JOHN RUSSELL DEANE III
General Counsel
Specialty Equipment Market Association