DAIMLERCHRYSLER

DaimlerChrysler Corporation
Stephan J. Speth
Director
Vehicle Compliance & Safety Affairs

February 13, 2003

The Honorable Jeffrey W. Runge, M.D.
Administrator
National Highway Traffic Safety Administration
400 Seventh Street, S.W.
Washington, D.C. 20590

RE: Federal Motor Vehicle Theft Prevention Standard; Notice of Proposed Rulemaking (67 Fed. Reg. 43,075); Docket No. NHTSA-2002-12231; Supplemental Comment

Dear Dr. Runge:

On August 26, 2002, DaimlerChrysler Corporation (DCC), a wholly owned subsidiary of DaimlerChrysler Aktiengesellschaft, Stuttgart, Germany (DCAG) submitted comments on behalf of DCAG and Mercedes-Benz USA, LLC (MBUSA, or the Company) to the National Highway Traffic Safety Administration (NHTSA or the Agency) regarding the proposed rulemaking to expand the parts marking provisions of the Federal Theft Prevention regulations at 49 C.F.R. Part 541 to all vehicle lines. (67 Fed. Reg. 43,075 (2002)). A supplemental comment containing cost data was submitted on October 24, 2002.

DCC, DCAG, MBUSA, or the Company (hereinafter DaimlerChrysler) now submits this second supplemental comment regarding the status of the docket for this rulemaking. Specifically, as outlined in further detail below, DaimlerChrysler believes that the Agency should not move forward to finalize this rulemaking because we do not believe that NHTSA has all the necessary data and information to support final rulemaking.

The Anti-Car Theft Act provides that the "Secretary shall include as part of the regulatory proceeding . . . the finding of, and the record developed by, the Attorney General" regarding the effectiveness of extending parts marking requirements to all model lines. 49 U.S.C. § 33103(b)(2). The statute also requires that the Attorney General's finding be based, in part, on "information the Attorney General develops after providing notice and an opportunity for a public hearing," and that the Attorney General "submit to the Secretary the finding and record on which the finding is based." Id. § 33103(c). While the Attorney General has developed information regarding the effectiveness of extending parts marking

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requirements to all model lines regardless of classification as "high" or "low" theft, not all of this information has been transmitted to the Agency, and made available for public access and comment. In fact, based on DaimlerChrysler's attempt to obtain information and data from the Department of Justice through the Freedom of Information Act process, the Company is aware that data considered in the Attorney General's report is missing. Because of the absence of this data, DaimlerChrysler does not believe that NHTSA may move forward with the parts marking rulemaking until the record is completed and this additional information is identified for proper consideration.

As noted in our August 26, 2002 comment on the parts marking proposal, the Attorney General's Initial Report attaches a summary of comments received by the Justice Department in response to its public notice regarding theft prevention. As part of that summary, and as cited by the Justice Department, there is a statement, listed under Volvo Cars of North America, that provides: "Insurance data supports no marking for low theft cars with anti-theft devices." Attorney General's Initial Report, Summary of Public Comments Received in Response to DOJ Publication: Auto Theft and Recovery: Request for Comments, 63 Fed. Reg. 48758, at 1 (2000). The Report by the Attorney General serves as one of the key bases for NHTSA's proposed expansion of the parts marking requirements. However, as noted above, attempts to obtain the Volvo comment referenced in the Attorney General's Report have been unsuccessful. In fact, as noted in the attached letters responding to our FOIA request, the document does not appear to exist. Nor based on a search, does this document appear to exist in the NHTSA docket. DaimlerChrysler considers the insurance information cited by the Attorney General to be of vital importance, especially in light of the fact that this information does not support the rulemaking proposed by NHTSA. Therefore, DaimlerChrysler does not believe that NHTSA should move forward with finalization of this rulemaking until this information is obtained and factored into the rulemaking analysis.

Failure to include all documents that form the basis for the rulemaking is inconsistent with the provisions of the Administrative Procedure Act (APA) and NHTSA's rulemaking provisions at 49 C.F.R. Part 553. Specifically, information supporting a rulemaking must be made available to the public. This is a core requirement of the APA. Failure to allow access to this information denies adequate due process. Rulemakings based on missing or inadequate information are arbitrary and capricious. Sections 553(b) and (c) of the APA mandate that substantive rulemaking conducted by Federal agencies of the United States provide for notice of proposed rules and an opportunity to participate in the rulemaking process through submission of written data, views or arguments. Inherent in the comment provisions is the requirement that an adequate record be established that forms the basis for the rulemaking. NHTSA has recognized that inherent

requirement as set forth in its own rulemaking regulations by the establishment of a regulatory docket where all "information and data deemed relevant by the Administrator relating to rulemaking actions" are maintained. See 49 C.F.R. § 553.5(a). Such information is available for public inspection as part of the overall rulemaking process. See Id. at § 553.5(b). The record in this rulemaking, however, is incomplete. As noted above, data that formed the basis for the Attorney General's report is missing from the docket. Without access to this information, DaimlerChrysler does not believe that meaningful public comment may be made on the rulemaking. Accordingly, without this information DaimlerChrysler does not believe this rulemaking should move forward. To do otherwise would be contrary to the intent and the requirements of the APA and NHTSA's own rulemaking regulations.

An administrative rule that is based on an incomplete or defective docket cannot be upheld. As noted by the U.S. Court of Appeals for the Third Circuit,

> Both the statute and the regulations provide the public with the opportunity to review, comment upon, and if appropriate challenge the evidentiary basis for a proposed agency rule. To fail to provide the public with access to the underlying information is to defeat the very purpose of the prescribed procedures.

Hanover Potato Products, Inc. v. Sullivan, 1991 WL 7668 (3d Cir. (Pa.)) at 3. In the Hanover case, the Court of Appeals struck down a lower court opinion upholding a U.S. Food and Drug Administration (FDA) rule banning the use of certain sulfating agents on fresh potatoes based on an Agency determination that the process was unsafe. FDA failed, however, to make available to the public the data supporting that conclusion. As a result, the Court of Appeals reversed the lower court opinion. In a more recent case, the U.S. Court of Appeals for the District of Columbia held that:

> . . . even in the informal rulemaking context, we have cautioned that the most critical factual material that is used to support the agency's position on review must have been made public in the proceeding and exposed to refutation.

Air Transport Association of America, v. Federal Aviation Administration, 169 F.3d 1, 6 (D.C. Cir. 1999), citing, Association of Data Procession Service Organizations, Inc. v. Board of Governors of the Federal Reserve System, 745 F.2d 677, 684 (D.C.

Cir. 1984); see also, Home Box Office, Inc. v. Federal Communications Commission, 567 F.2d 9, 35 (D.C. Cir. 1977) ("the notice required by the APA or information subsequently supplied by the public, must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based."); Portland Cement Association v. Ruckelshaus, 486 F.2d 375, 393 (D.C. Cir. 1973) ("It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data, or on data that, critical degree, is known only to the agency.").

The lack of access to the vital background information cited as part of the Attorney General's report is also inconsistent with the goals of the Data Quality Act, enacted by Congress in December 2000 as Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Public Law 106-554; H.R. 5658). Specifically, the Data Quality Act was aimed at "ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies." To meet these goals, the Office of Management and Budget (OMB) issued final guidelines under the Act directing agencies to develop procedures "for reviewing and substantiating . . . the quality (including the objectivity, utility, and integrity) of information before it is disseminated." 67 Fed. Reg. 369, at 370 (2002). The corresponding Department of Transportation's Information Dissemination Quality Guidelines (DOT Guidelines) were published in October 2002. 67 Fed. Reg. 61719 (2002).

The lack of information available as part of the parts marking rulemaking is inconsistent with OMB's mandate that agencies meet the objectivity standard by ensuring that their information is "presented in an accurate, clear, complete, and unbiased manner" and is itself "accurate, reliable, and unbiased." 67 Fed. Reg. 369, at 377 (2002). The objectivity standard directs agencies to "identify the sources of the disseminated information ... and the supporting data" and, where possible, provide "full, accurate, transparent documentation" for any information disclosed to the public. 67 Fed. Reg. 369, at 377 (2002). The corresponding DOT Guidelines are fully consistent with these OMB guidelines and further specify that DOT agencies "use reliable data sources" and "identify the source of information" used in rulemakings and other agency documents. DOT Guidelines at 515. NHTSA's reliance on the Attorney General's report, while itself appropriate, is incomplete without the underlying data supporting that report. This lack of appropriate support does not comprise presentation of "accurate, reliable, and unbiased" information "in an accurate, clear, complete, and unbiased manner" as required under the Act and the corresponding OMB and DOT guidelines. Accordingly, this lack of information availability contradicts the guidelines and the overarching goals of the Data Quality Act.

Because this rulemaking does not yet fully comply with the statutory mandate to include the record developed by the Attorney General, and because the docket is incomplete and because the proposed rulemaking does not meet the requirements of the Data Quality Act, DaimlerChrysler does not believe that the Agency should proceed with this rulemaking – at least until the omission has been corrected and the appropriate data considered. Accordingly, we request that the rulemaking process be stayed until the statutory and regulatory rulemaking requirements have been fully met and the missing information is complete. DaimlerChrysler believes this consideration is vital in that the information may, in fact, lead the Agency to conclude that extension of the parts marking requirements to all vehicle lines is unnecessary.

If you have any questions or comments regarding this supplemental comment, please feel free to contact us.

Sincerely,

Stephan J. Speth
Director
Vehicle Compliance & Safety Affairs

Enc.

U.S. Department of Justice

Office of Information and Privacy

Telephone: (202) 514-3642

Washington, D.C. 20530

Ms. Hillary C. Rubin
Hogan & Hartson, L.L.P.
555 13th Street, NW
Washington, DC 20004

SEP 26 2002

Re: AG/02-R0802
CLM:AR

Dear Ms. Rubin:

This is to acknowledge receipt of your letter dated July 29, 2002, and received in this Office on August 8, 2002, in which you requested copies of comments submitted by Volvo in response to a request published by the Department of Justice for public comment to determine if the amended version of The Anti-Car Theft Act of 1992 substantially inhibits chop shop operations and motor vehicle thefts. This response is made on behalf of the Office of the Attorney General.

The records you seek are maintained outside of this Office and our staff has not yet been able to complete a search to determine whether there are records within the scope of your request. Accordingly, we will be unable to comply with the twenty-working-day time limit in this case, as well as the ten additional days provided by the statute. In an effort to speed up our records search, you may wish to narrow the scope of your request to limit the number of potentially responsive records or agree to an alternative time frame for processing, should records be located; or you may wish to await the completion of our records search to discuss either of these options.

We have also directed a copy of your request to the Criminal Division for processing and direct response to you.

In accordance with Department of Justice regulation 28 C.F.R. § 16.3(c) (2001), this letter also confirms your agreement to incur all applicable fees involved in the processing of your request, up to the amount of $25. I note in your letter that you agree to pay fees up to $50. If we anticipate the fees to exceed $50, we will promptly notify you prior to continuing the processing of your request.

I regret the necessity of this delay, but I assure you that your request will be processed as soon as possible. If you have any questions or wish to discuss reformulation or an alternative time frame for the processing of your request, you may contact me at (202) 514-5121.

Sincerely,

Amanda Ruggles

Amanda Ruggles
FOIA Specialist

U.S. Department of Justice

Office of Information and Privacy

Telephone: (202) 514-3642

Washington, D.C. 20530

OCT 3 1 2002

Ms. Hillary C. Rubin
Hogan & Hartson, L.L.P.
555 13th Street, NW
Washington, DC 20004

Re: AG/02-R0802
MAP:TSW:AR

Dear Ms. Rubin:

This responds to your Freedom of Information Act (FOIA) request dated July 29, 2002, and received in this Office on August 8, 2002, in which you requested copies of comments submitted by Volvo in response to a request published by the Department of Justice for public comment to determine if the amended version of The Anti-Car Theft Act of 1992 substantially inhibits chop shop operations and motor vehicle thefts. This response is made on behalf of the Office of the Attorney General.

Please be advised that a records search was conducted in the Department Executive Secretariat, the official records repository for the Office of the Attorney General, and no responsive records were located.

Pursuant to our September 26, 2002 letter to you, we directed a copy of your request to the Criminal Division for processing. That component will be responding to you directly, if they have not already done so.

If you consider my response to be a denial of your request, you may administratively appeal by writing to the Co-Director, Office of Information and Privacy, United States Department of Justice, Flag Building, Suite 570, Washington, D.C. 20530-0001, within sixty days from the date of this letter. Both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

for

Melanie Ann Pustay
Deputy Director

U.S. Department of Justice

Criminal Division
Office of Enforcement Operations

(202) 616-0307 *Washington, D.C. 20530*

CRM-200201091F JAN 3 2003

Ms. Hillary C. Rubin
Hogan & Hartson, LLP
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Washington, DC 20004

Dear Mr. Rubin:

This is in response to your Freedom of Information Act request dated July 29, 2002, for Criminal Division records concerning comments made on the Anti-Car Theft Act of 1992.

We have conducted a search of the appropriate indices to Criminal Division records and have located no records responsive to your request.

If you consider this response to be a denial of your request, you have a right to an administrative appeal of this determination. Department regulations provide that such appeals must be filed within sixty days of your receipt of this letter. 28 C.F.R. 16.9. Your appeal should be addressed to: Co-Director, Office of Information and Privacy, Flag Building, Suite 570, United States Department of Justice, Washington, D.C. 20530. Both the envelope and the letter should be clearly marked with the legend "FOIA Appeal." If you exercise this right and your appeal is denied, you also have the right to seek judicial review of this action in the federal judicial district (1) in which you reside, (2) in which you have your principal place of business, (3) in which the records denied are located, or (4) for the District of Columbia. If you elect to file an appeal, please include, in your letter to the Office of Information and Privacy, the Criminal Division file number that appears above your name in this letter.

Sincerely,

Thomas J. McIntyre

Thomas J. McIntyre, Chief
Freedom of Information/Privacy Act Unit