

**Legal Review of the Tire Fuel Efficiency
Consumer Information Program Proposed Rule**

**Prepared on behalf of the
Rubber Manufacturers Association**

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August 21, 2009

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**Legal Review of the Tire Fuel Efficiency
Consumer Information Program Proposed Rule
74 Fed. Reg. 29,542 (June 22, 2009)**

This legal review analyzes the legal issues presented by the National Highway Transportation Safety Administration's (NHTSA) proposed rule concerning the Tire Fuel Efficiency Consumer Information Program (Notice of Proposed Rule Making or NPRM),¹ and supplements the comments on the NPRM filed by the Rubber Manufacturers Association (RMA).

This review: (1) discusses the plain meaning of the Energy Independence and Security Act of 2007 (EISA)² (the legal authorization for this rule) and highlights those aspects of the proposed rule that are inconsistent with or are beyond the legal authority of the EISA; (2) supports the need to continue to use the traditional self-certification process long established in NHTSA's rules rather than require mandatory submission of data used for ratings to the Agency; (3) answers NHTSA's request for comments on whether NHTSA's rule must preempt the specific, proposed California regulations concerning rolling resistance; and (4) explains the need for a supplemental notice and comment period to afford interested parties an opportunity to evaluate adequately this complex new proposal and to provide meaningful comment upon all aspects of the proposed program.

¹ 74 Fed. Reg. 29,542 (June 22, 2009) (Notice of proposed rulemaking).

² Section 111 of the EISA, Public Law 110-140, 121 Stat. 1492 (Dec. 18, 2007). Section 111 amended Chapter 323 of title 49, United States Code, by inserting after section 32304 a new Section 32304A. *See* 74 Fed. Reg. at 29,544.

STATUTORY CONSTRUCTION

A. **The EISA does not give NHTSA authority to establish a new rating system for consumer information on tire “safety” or “durability”**

The EISA directs NHTSA to establish a “national tire fuel efficiency rating system for motor vehicle replacement tires to assist consumers in making more educated tire purchasing decisions”³ and a “consumer information program for replacement tires designed for use on motor vehicles to educate consumers about the effect of tires on *automobile* fuel efficiency, safety and durability.”⁴ So, Congress’ intent was to provide consumers with information about tire fuel efficiency and *automobile* fuel efficiency, safety and durability. Taking each of these provisions in turn, tire energy efficiency or rolling resistance affects a vehicle’s fuel economy, so it meets the criteria set forth in the statute. Likewise, a tire’s wet traction capability is related, although not the sole factor in a tire’s contribution to a vehicle’s safety performance, so it to meets the criteria.

However, a tire’s treadwear potential does not directly nor solely impact the durability of an automobile, so treadwear does not satisfy this statutory language. Since automobiles typically outlive any particular set of tires installed on them, it is difficult to identify a tire attribute that affects an automobile’s durability. However, the EISA also mandates a “national consumer education program” on many tire maintenance attributes, including tread wear, to “maximize fuel efficiency, safety and durability of replacement tires” and tire pressure inflation.⁵ This additional statutory authority, while focused on tire maintenance, also mentions

³ 49 U.S.C. § 32304A(a) (emphasis added). There are requirements to provide this information to consumers and specifications for test methods.

⁴ *Id.* (emphasis added).

⁵ *Id.*

the importance of tread wear maintenance and a relationship to tire performance. So, this provision, coupled with the existing statutory authority for the Uniform Tire Quality Grading System (UTQGS) program gives NHTSA the authority to include treadwear ratings in the proposed rating label.

Interestingly, the EISA does not grant NHTSA new authority to create new rating systems for either traction or treadwear. Instead, the EISA directs NHTSA to conduct a rulemaking and include specific items in the rule: (1) a “national tire fuel efficiency rating system”; (2) requirements for consumer “point of sale” information and “other potential dissemination methods”; (3) specification of rating test methods; and (4) the “national tire maintenance consumer education program.” Congress did not give NHTSA the authority to create new “safety” or “durability” consumer rating systems or mandate new consumer information on these attributes at point of sale.

The fact that the UTQGS system already exists enables NHTSA to use the existing wet traction and treadwear to satisfy the requirements. However, NHTSA is not authorized by the statute to create new ratings or consumer information requirements outside of UTQGS using this statute as a basis. Further, the statute does not grant NHTSA the authority to significantly modify the wet traction or treadwear rating requirements or provisions. To make modifications to the UTQGS program, the Agency must look to its authority under other existing statutes.⁶ There is no clear language in the enabling legislation for the UTQGS program authorizing NHTSA to periodically review and make modifications to regulations under this section, since the statute is silent on this point.

⁶ See 49 U.S.C. § 30123(b).

B. EISA Section 111 does not direct NHTSA to provide consumer information on a tire's greenhouse gas emissions

EISA Section 111 also does not address the issue of greenhouse gas (GHG) emissions or mandate that consumers be provided with any information about greenhouse gas emissions associated with a specific replacement tire. NHTSA cites as authority for the inclusion of the phrase “greenhouse gas emissions” Section 105 of the EISA.⁷ This section of the EISA directs the Department of Transportation (DOT/NHTSA) and the Environmental Protection Agency (EPA) to develop regulations that would require labels on *new* automobiles to “reflect fuel economy and greenhouse gas and other emissions over the useful life of the automobile.”⁸ This statutory provision specifically applies to *new* vehicles, not replacement tires. The NPRM quotes this provision of the EISA section 105 out of context by omitting the reference to new vehicles.⁹

EISA Section 111¹⁰ directs NHTSA to establish “a national tire fuel efficiency rating system for motor vehicle *replacement* tires to assist consumers in making more educated tire purchasing decisions.” A replacement passenger car tire, as defined in the NPRM, is “any passenger car tire other than a passenger car tire sold as original equipment on a new vehicle.”¹¹ Absent express statutory authority or Congressional intent, NHTSA must justify its use of “greenhouse gas emissions” in this context. Tires, by themselves, do not consume fuel or emit greenhouse gases without being installed and used on a vehicle. RMA recommends that NHTSA

⁷ 74 Fed. Reg. at 29,570.

⁸ 49 U.S.C. § 32908(g)(1)(A)(i); Public Law 110-140, 121 Stat. 1492 (Dec. 18, 2007).

⁹ 74 Fed. Reg. at 29,570.

¹⁰ *Id.* at 29,551.

¹¹ *Id.* at 29,584.

simply refer to the tire efficiency portion of the label as “tire fuel efficiency,” “tire energy efficiency” or simply “tire efficiency.”

C. The proposed tire rating system label and NHTSA poster would not satisfy the statutory requirements in EISA Section 111

EISA Section 111 directs NHTSA to conduct a rulemaking that includes, among other items, “requirements for providing information to consumers, including information *at the point of sale*”¹² The NPRM would require “each tire retailer” to provide rating information for each passenger car tire offered for each passenger car tire offered for sale.”¹³ The proposed regulatory text continues to require the tire retailer to “not remove the label containing the ratings graphic . . . until the tire is sold.”¹⁴ However, there is no specific requirement for the tire rating label on the tire to be shown to the consumer at any point in the transaction process, much less at point of sale. In fact, the preamble states the opposite – “[w]e [NHTSA] are not proposing to require that tire retailers must show consumers the label for the tire they are going to purchase, but merely that the label is kept on the tire until sale.”¹⁵

Given the realities of the tire retail business and this admonition in the preamble, coupled with ambiguous regulatory requirements, most consumers will never see the proposed tire rating system label on the tire, the supposed main communication vehicle for individual tire rating information. Of course, consumers may visit websites prior to arriving at a tire retailer, and a tire retailer may voluntarily offer Internet access to view individual tire ratings online, but since neither of these is mandatory *at point of sale*, they do not satisfy the provisions of the

¹² 49 U.S.C. § 30123A(a)(2)(b); Public Law 110-140, 121 Stat. 1492 (Dec. 18, 2007).

¹³ 74 Fed. Reg. 29,586.

¹⁴ *Id.*

¹⁵ 74 Fed. Reg. at 29,572.

EISA. The effectiveness of this program is seriously hampered by not mandating point of sale information to consumers to assist them in making more educated tire purchasing decisions.

Although RMA recognizes that the NPRM proposes a requirement for tire retailers to “display a tire fuel efficiency consumer information program poster that NHTSA shall print and provide to retailers,”¹⁶ RMA is concerned that the proposed tire rating system label would not reach consumers and therefore would not meet the express intent of the EISA. The contemplated poster would be helpful to raise general awareness about the program but it does not constitute “point of sale”¹⁷ information that would “assist consumers in making more educated tire purchasing decisions.”¹⁸ Since, as described above, tire fuel efficiency ratings will vary by tire line, model and size (stock-keeping units or SKUs), and since “well over 20,000”¹⁹ individual SKUs would be subject to this rule, it is impossible for such a poster to contain information about each tire a consumer may be considering in a purchase decision.

As a result, the rule should include an easy to use method by which tire retailers could provide meaningful information to the consumer at the point of sale.

D. The Civil Penalty Provisions Need to Be Clarified

Section 111 of EISA amends 49 U.S.C. § 32308 (the enforcement and penalty provision in the underlying statute) to provide that “[a]ny person who fails to comply with the national tire fuel efficiency information program under section 32304A is liable to the United States Government for a civil penalty of not more than \$50,000 for each violation.”

¹⁶ *Id* at 29,586.

¹⁷ 49 U.S.C. § 32304A(a)(2)(A).

¹⁸ *Id*.

¹⁹ 74 Fed. Reg. at 29,554.

First, nothing in this language suggest that it supersedes or repeals the existing civil penalty and enforcement provisions (e.g., those applicable to current traction-based and treadwear-based ratings (i.e., the UTQGS program)). The \$50,000 civil penalty for each violation applies only to the fuel economy rating program.

Second, the maximum penalty in the statutory civil penalty provision being amended by Section 111 of EISA (i.e., 49 U.S.C. § 32308(b)) states that for "**a related series of violations,**" there is a maximum penalty limit of \$400,000 in (bold face added). Nothing in Section 111 suggests that Congress meant to eliminate this limit for violations of the Tire Fuel Economy Information program.

Third, the term "for each violation" is defined in Section 32308 civil penalty provision, but "for each violation" is not defined in Section 111 of EISA. There is no legislative history to guide NHTSA or the regulated community.

The nature of a violation in the context of a consumer information program, however, is different than for a violation of a safety standard and, therefore, dictates that "for each violation" was intended to be different for this consumer information program. In the context of a consumer information program, the intent is to penalize the error or the decision which lead to a noncompliance. That is, the failure to comply with the rating for a particular SKU is a violation and the number of tires is not relevant. The mere fact that the amount of the penalty for each violation is drastically different (\$50,000 versus \$1,000) argues that a different definition of "for each violation" was intended. In fact, on its face, noncompliance for a SKU that represents a few thousand tires is the same violation as noncompliance for a SKU that represents a million tires. Any other interpretation risks imposing the same level penalties for an error or other decision that misstates a tire on fuel economy as a violation of a safety standard.

Thus, the NPRM fails to provide any fair warning as to what constitutes a violation and the magnitude of the civil penalty. Since this issue is important, a new proposed rule should be promulgated and public comment sought on this issue.

SELF-CERTIFICATION OF COMPLIANCE RATHER THAN MANDATORY DATA SUBMISSION IS APPROPRIATE AND CONSISTENT WITH PAST PRACTICE

NHTSA proposes that:

manufacturers be required to report various data [i.e., rolling resistance force or RRF, Adjusted Peak Coefficient of Friction for Asphalt (μ APA) and the Adjusted Peak Coefficient of Friction for Concrete (μ APC), and treadwear] to the agency. This is **necessary both for enforcement of the rating system, and for development** of NHTSA's tire fuel efficiency Web site, which will contain a database of tire information with a **calculator tool** that allows easy comparison of fuel savings between various replacement tires.²⁰

The fuel efficiency rating is "calculated from an ISO 28580 test value of rolling resistance force (RRF)...."²¹ According to preamble to the Tire Fuel Efficiency Consumer Information Program (but oddly not the proposed actual regulatory text):

A "tire manufacturer has the ability to estimate with relative accuracy the rolling resistance test value of a tire with a given size specification if it knows the rolling resistance test value of a tire in the same model line (*i.e.*, the ability to extrapolate test values for certain SKUs from knowing the actual test values of other SKUs). Tire manufacturers have this same ability to extrapolate for UTQGS traction test values and UTQGS treadwear test values by having actually traction and treadwear test values of other, similar tires of different SKUs. For these reasons, NHTSA tentatively concludes that it is **not reasonable or necessary to require a**

²⁰ 74 Fed. Reg. at 29,546 (emphasis added).

²¹ *Id.* at 29,563. NHTSA based its "fuel efficiency rating on RRF rather than RRC is because it allows the program to readily provide consumers with a statement such as 'a difference of X on the fuel efficiency rating scale equates to Y gallons of fuel saved.'" *Id.*

physically-tested value of rolling resistance, traction, or treadwear test value for every combination of tire model, construction, and size (SKU).²²

NHTSA is proposing to require each SKU, or each size within each model of each brand, to be *rated* separately for fuel efficiency (using a rolling resistance test value), safety (using a UTQGS traction test value), and durability (using a UTQGS treadwear test value). Tire manufacturers may use their judgment to determine how many and which tires they must test to be able to accurately report rolling resistance ratings. A tire manufacturer will be responsible for the accuracy of the ratings they place upon the tire label and otherwise communicate to consumers. That is, for compliance purposes, NHTSA will test any rated tire according to the test procedures specified in the regulation (regardless of whether or not the tire manufacturer has tested this tire), and if the rolling resistance, traction, or treadwear test value falls outside of NHTSA's specified tolerance range, the agency will consider that rating a noncompliance.²³

For data reporting purposes, a manufacturer must calculate a test procedure value for rolling resistance, traction, and treadwear, although it is not required to conduct the specific test in the regulation.... A tire manufacturer is free to reasonably estimate the test values it reports.²⁴

Thus, NHTSA is essentially requiring tire manufacturers to report to NHTSA RRF values calculated for tires tested and the RRF values extrapolated from the data gathered from the tires tested.²⁵

However, submission of these data are not necessary for either enforcement of a self-certified rating system or as a method of estimating potential fuel savings. RMA would be pleased to work with NHTSA on developing appropriate test protocols and identifying what, if any, information might be necessary to develop a meaningful method to inform the consumer of the fuel efficiency benefits of the tires in rating bins or ranges. More importantly, such a system

²² *Id.* at 29,554 (emphasis added).

²³ *Id.* (emphasis in original).

²⁴ *Id.*

²⁵ In other parts of the comments on these proposed regulations, RMA explains the reasons that rolling resistance, not rolling resistance force, is the appropriate measure to use to rate the fuel efficiency of tires. *See infra*, p. 48.

must provide meaningful information to the public or the method will lose public credibility. RMA and its members are open to providing information, if relevant, for this effort on a case-by-case basis. If specific existing data concerning specific tires from specific companies were needed, the tire companies (either through RMA or directly) are receptive to voluntary submission of data.

However, NHTSA's proposal to require the mandatory submission of values calculated from test data and extrapolated data should not be adopted in the final rule.

There are several reasons for this position.

First, submitting this type of data to NHTSA (and thereby making such information available to public) is not required by statute and is not necessary to fulfill NHTSA's statutory mandate.

Second, mandatory submission of such information is contrary to NHTSA's (and other federal programs) long-standing practice of allowing self-certification, and using its enforcement authority to verify compliance.

Third, NHTSA's long-standing practice of allowing self-certification is an effective and efficient means to ensure compliance.

Fourth, a cooperative effort with the industry will allow NHTSA to efficiently identify and gather appropriate data for its regulatory purposes.

Fifth, mandatory data submission is overly burdensome and conflicts with the Reduction in Paperwork Act.

Sixth, mandatory data submission that are publicly available is likely to confuse the public and result in unintended misuse and misunderstanding of the data, which will frustrate the consumer education aims of the EISA.

Seventh, mandatory submission of confidential data will result in competitive harm to RMA's members.

A. Congress Did Not Mandate Submission of Testing Data

Nowhere in the statute does Congress require the agency to collect this information because the statute only requires the establishment of a tire fuel rating system and a national tire maintenance consumer education program for, among other things, traction and treadwear. The plain meaning of the statute does not even require a traction and treadwear system.

Thus, the proposed data submission requirement is inconsistent with Congress' mandate.

B. Submission of Data Is Unnecessary Because Self-Certification Efficiently Ensures Compliance

NHTSA's broad request for all rolling resistance, traction, or treadwear test value is unnecessary because the existing voluntary disclosure policy and NHTSA's authority to order the submission of data is adequate to enforce this rule. Rather than require companies to submit this information, RMA suggests that when NHTSA needs specific data or other information on specific tires for a valid regulatory purpose that it solicits the industry's cooperation, which has worked in the past.

First, in safety investigations, NHTSA regularly requests tire companies to provide proprietary and confidential data. Typically, such information is provided and the normal NHTSA procedures are followed to determine whether such information qualifies for

confidential treatment.²⁶ Since such a process is appropriate in a safety investigation, it should be more than adequate for information on fuel economy.

Second, NHTSA can also order companies to submit specific data or information.²⁷

Third, NHTSA uses “compliance audits” to ensure compliance with safety standards.²⁸ In such audits compliance engineers randomly select samples of motor vehicles and equipment from the marketplace and test them to the requirements of the safety standards. Failure to pass compliance audits subjects the company to stiff penalties.²⁹

RMA believes that if self-certification adequately ensure compliance with safety regulations, these processes are more than sufficient to ensure compliance with regulations concerning tire fuel economy, which is certainly significant but of less import than safety.

In this situation, in particular, the largest “penalty” is the loss of company reputation and credibility.

²⁶ See Memorandum from NHTSA to Representatives of the Motor Vehicle and Equipment Manufacturers and Their Attorneys, re: Practical Guidance on Submitting and Processing Requests for Confidential Treatment of Materials Submitted to NHTSA (June 23, 2006). See also *e.g.*, 69 Fed. Reg. 19,897, 19,898 n.4 (April 14, 2004) (General Motors Corporation; Ruling on Petition for Determination of Inconsequential Noncompliance) (in a safety investigation, GM requested and received confidentiality for data submitted to NHTSA).

²⁷ See, *e.g.*, 74 Fed. Reg. 37,878, 27,894 (July 29, 2009) (Data submission requirements for the Final Rule, Requirements and Procedures for Consumer Assistance To Recycle and Save Program).

²⁸ NHTSA’s Office of Vehicle Safety Compliance (OVSC) has the responsibility of ensuring that all motor vehicles and motor vehicle equipment under its jurisdiction are in full compliance with all Federal laws, standards and regulations pertinent to vehicle safety. See 73 Fed. Reg. 79,207, 79,212 (Dec. 24, 2008) (Recommended Best Importer Practices To Enhance the Safety of Imported Motor Vehicles and Motor Vehicle Equipment).

²⁹ See Dr. H. Keith Brewer of RMA, White Paper: Self Certification to NHTSA’s Vehicle Safety Standards and Consumer Information Regulations (attached at the end of this Appendix). Also in California CEC Docket 07-FET-1 (June 4, 2008)).

C. Self-Certification Is a Widely Accepted and Well-Demonstrated Method of Ensuring Compliance

First, submission of such comprehensive information is not the practice in any other NHTSA tire program, even for enforcing safety standards. NHTSA’s Federal Motor Vehicle Safety Standards (FMVSS) (which involve directly the safety and substantive requirements that tires must meet) require manufacturers to self-certify that all of the standards have been met.³⁰ Self-certification is preferable because it reduces costs of both the government and the regulated entities as well as enabling a quicker introduction of products to the marketplace.³¹

Second, NHTSA has also specifically adopted the self-certification approach (without the required submission of all the underlying information) in prior tire information and

³⁰ See 49 U.S.C. § 30115(a) (“A manufacturer or distributor of a motor vehicle or motor vehicle equipment shall certify to the distributor or dealer at delivery that the vehicle or equipment complies with applicable motor vehicle safety standards prescribed under this chapter.”); 49 C.F.R. part 567. As NHTSA publications note, “NHTSA does not issue type approval certifications and does not certify any motor vehicles or motor vehicle equipment as complying with applicable FMVSS.... Instead, we have a 'self-certification' process, which places responsibility on the fabricating manufacturer to certify the vehicle or equipment item as complying with the applicable FMVSS.” Recommended Best Importer Practices To Enhance the Safety of Imported Motor Vehicles and Motor Vehicle Equipment, 73 Fed. Reg. 79,207, 79,210 n.19 (Dec. 24, 2008). See Dr. Brewer’s White Paper on Self-Certification.

There are additional examples of agency use of self-certification. In the rulemaking for Screening Devices To Measure Alcohol in Bodily Fluids, NHTSA proposed that a manufacturer “must submit a self-certification, certifying that the manufacturer meets the requirements according to the U.S. Food and Drug Administration (FDA) Good Manufacturing Practices regulations for devices used for medical purposes and that the device’s label meets the requirements in FDA’s Labeling regulations for devices used for medical purposes, even if the devices are not to be used for medical purposes” 72 Fed. Reg. 71,188, 71,889 (Dec. 14, 2007) (internal citations omitted).

NHTSA also proposed self-certification for holders of a Commercial Driver’s License asserting a Federal medical certification, which is directed under Section 215 of the Motor Carrier Safety Improvement Act. The agency considered but rejected more costly processes for ensuring compliance, such as requiring the submission of a medical certificate. See *Introduction to The Regulatory Plan and the Unified Agenda of Federal Regulatory and Deregulatory Actions*, 72 Fed. Reg. 69,735, 69,900 (Dec. 10, 2007).

³¹ 73 Fed. Reg. at 79,212.

labeling rulemakings, including the UTQG rulemaking where the agency solicited the voluntary cooperation of affected companies to submit data.³²

Third, more broadly, use of self-certification (without the wholesale submission of data) is consistent with the overarching United States' regulatory philosophy favoring self-certification.³³

Fourth, the merits of self-certification are supported by research. A recent self-certification study of environmental regulations utilizing data from 82 randomly selected automotive refinishing facilities found “statistically significant improvements” in four major performance categories when using self-certification: occupational health and safety, air pollution control, hazardous waste management, and wastewater discharge (Enander study).³⁴ The Enander study concluded that “the new self-certification approach to environmental and worker protection is effective and can be used as an adjunct to further enhance state and federal enforcement programs.”³⁵

³² 59 Fed. Reg. 19,686, 19,688 (April 25, 1994) (Consumer Information Regulations Uniform Tire Quality Grading Standards, Request for Comments) (“NHTSA needs additional data on the measurement of peak traction coefficients and on the correlation of peak traction coefficients with stopping distance, which may be available from commenters. The agency is soliciting any such data.”).

³³ Maureen A. Breitenberg, Office of Standards Services National Institute of Standards and Technology, *The U.S. Certification System from a Governmental Perspective* (NISTIR 6077) (Oct. 1997) (available at <http://ts.nist.gov/standards/information/govcer.cfm#U.S>) (“The United States's regulatory philosophy relies heavily on a manufacturer's declaration of conformity (or self-certification) wherever possible.”). For example, many of the regulations of the Environmental Protection Agency (EPA) are self-certifying. For example, question of what is a hazardous waste is based on a self-determination by the waste generator. See 40 C.F.R. § 262.11.

Similarly, many trade laws require self-certification of conformity to the importing country's standards. National Research Council, *Standards, Conformity Assessment, and Trade: Into the 21st Century*, at 121, 129-30 (1995) (available at http://www.nap.edu/catalog.php?record_id=4921). Other examples of self-certification are discussed *supra* at note 31.

³⁴ Richard T. Enander, Ph.D., et al., Environmental Health Practice: Statistically Based Performance Measurement, *Am. J. Public Health*, 97(5) at 819-24 (May 2007) (available at <http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1854879>).

³⁵ *Id.*

Self-certification is viewed as an efficient means for ensuring certification as well as the industry's understanding of the regulations.³⁶

RMA urges NHTSA to use self-certification rather than mandatory universal submission of this information to NHTSA.

D. Rather Than A Blanket Submission of Data Generated for Regulatory Purposes, NHTSA Should Work with RMA to Gather the Appropriate Using the Appropriate Protocols

NHTSA's proposal to require submission of the information used to select the fuel efficiency rating, in part, so that NHTSA can develop a "the fuel efficiency calculator tool"³⁷ seems to be based more on the fact that this information is available than a determination that this information is the appropriate information to use to estimate fuel efficiency for tires on various vehicles in different ratings. NHTSA is asking for this information before it has determined that the data is necessary. Rather, NHTSA should work with RMA to determine what type of data is necessary (which may or may not be the standardized testing data required to implement the consumer information program). Then, NHTSA and RMA should decide how best to obtain that data or analyses.

Finally, the data (once gathered) should be reviewed to determine whether it is sufficient and to the requisite degree of accuracy. Simply put, it is premature to determine whether the data that will be obtained by the tire companies is the "right" data.

³⁶ *Id.*, at n.3 (citing U.S. Environmental Protection Agency, Innovative Environmental Permitting. Environmental Results Program (available at <http://www.epa.gov/ooaujeag/permits/erp/what.htm>)).

³⁷ 74 Fed. Reg. at 29,546.

E. Mandatory Data Submission Is Overly Burdensome and Conflicts with the Reduction in Paperwork Act

Not only is the submission of testing data unnecessary, but it also creates a burden on the regulated entities that is contrary to the intent and spirit of the Paperwork Reduction Act (PRA) to minimize unnecessary submission of information to government agencies. The PRA requires that federal agencies receive Office of Management and Budget (OMB) approval before requesting most types of information from the public, including regulated industries.³⁸ If an information request “does not receive OMB approval, it is not issued a control number and the agency is prohibited from collecting the information.”³⁹ The OMB has expressed the importance of these regulations to agencies in its effort to obtain full compliance with the PRA.⁴⁰ NHTSA should follow the spirit and intent of these directives in this situation. Whether this rulemaking is significant or not, OMB should review this requirement during the process of reviewing any NHTSA draft final regulation.

F. Mandatory Data Submission Does Not Enhance Consumer Education, and, Therefore, Frustrates the Purpose of the Statute

The voluminous amounts of information (some of it based on test data and some based on extrapolations) will not enhance the consumer education aims of the EISA and the proposed regulations. In fact, voluminous amounts of highly technical and complex scientific information may only lead to additional consumer confusion. This is also inconsistent with the intent of the Data Quality Act, which directs that agencies strive for maximum data quality and

³⁸ 44 U.S.C. § 3501 *et seq.*

³⁹ *United States v. Ionia Mgmt. S.A.*, 498 F. Supp. 2d 477, 488 (D. Conn.) (internal citations omitted) (citing *Dole v. United Steelworkers of America*, 494 U.S. 26, 40 (1990)).

⁴⁰ Donald R. Arbuckle, Acting Administrator of the Office of Information and Regulatory Affairs of the OMB, *Memorandum for Selected Chief Information Officers* (May 10, 2006) (available at http://www.whitehouse.gov/omb/assets/omb/inforeg/pramemo_to_cio_051006.pdf).

utility in determining whether to provide such data to the public.⁴¹ Providing the information data used in rating the tires will not further the educational goals of the proposed rules and may in fact only add to the informational noise confronting consumers facing tire purchasing decisions.

Additionally, the testing data may be misinterpreted or misused in other contexts that prejudice RMA's members.

G. Mandatory Data Submission Will Result in Competitive Harm

If the testing data is made public, it will create competitive harm.⁴² The tire industry is fiercely competitive.⁴³ Because tire producers constantly study and monitor competitors' tires, the proposed requirement to submit testing data to the agency will inflict competitive harm on the tire industry in several respects.

First, information on RRF could provide information on the basic design and characteristics of tires. This proprietary information is expensive to collect and when compared with similar data from competitors (and observable design differences between the tires) may provide competitors information that could be used to vary designs without the expense of testing and calculations. That is, competitors could obtain trade secrets relating to production, design, and operation of RMA's members' tires.⁴⁴ This will hurt not only the submitting tire

⁴¹ The Data Quality Act amended the PRA, 45 U.S.C. § 3501 *et seq.*, to ensure that the information it disseminates, particularly over government websites, meets certain quality standards. *See Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication*, 67 Fed. Reg. 8,452 (Feb. 22, 2002).

⁴² *See* 49 C.F.R. § 512.15(b) ("Confidential Business Information").

⁴³ *See* 72 Fed. Reg. 59,434, 59,441 (Oct. 19, 2007) (Final rule, confidential business information) ("Vehicle and equipment manufacturers ... operate in a highly competitive environment that is expected to become even more competitive.").

⁴⁴ *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981) (commercial feasibility of reverse engineering and private testing that could make disclosure inappropriate).

company but the tire industry as a whole because producers will have less incentive to innovate. That is, one competitor may benefit from the information without having to pay for it.

Second, NHTSA has in other situations specifically recognized the competitive harm of making public data or information submitted to NHTSA because it reveals the risk margin that one company may accept as a business decision. For example, in submitting information on the existing rating systems, one company may accept a lower grade for a product as a business decision. NHTSA has in such situations agreed that release of underlying information would present competitive harm because it reveals business strategies. As a result, the Agency has not made the information public. The same logic applies to the public submission of the information used to support a tire fuel economy rating.

Third, release of the testing data may compromise the submitting company's competitive position by revealing business practices (*i.e.*, changes in design and performance intended to capture a greater portion of the market).⁴⁵ Lacking confidentiality of this proprietary business information will inflict competitive harm on the submitting firm.

The public availability of this information will enable the industry (both RMA members and other companies who make tires throughout the world) to understand the nature of the tire designs and the trade off between different designs and performance with respect to rolling resistance, traction, and treadwear.⁴⁶

⁴⁵ 71 Fed. Reg. 61,738, 61,744 (Oct. 31, 2006) (Notice of proposed rulemaking).

⁴⁶ See 74 Fed. Reg. at 29,543 (discussing potential trade offs among fuel efficiency (*i.e.*, rolling resistance), safety (*i.e.*, traction), and durability (*i.e.*, treadwear)). The public availability of testing data will allow competitors to precisely calculate each other's trade offs between design and performance with respect to rolling resistance, traction, and treadwear.

Fourth, this information may undermine the company’s relationships with its distributors and retailers. For instance, a competitor could send misconstrued data to the submitting producer’s dealers, which would strain the producer-dealer relationship.

Fifth, making this highly complex technical data public may result in the data being misused, misinterpreted or so generalized as to provide inaccurate information. The centerpiece of the underlying legislation is to inform the consumer, not confuse them. The purpose of having one central agency provide a consistent interpretation of this complex data furthers that statutory mandate. Having a thousand voices claiming to interpret the data does not.

In summary, the long-standing practice of relying upon just self-certification, without the wholesale release of complex information is not broken and, therefore, this proposal should not be adopted. If NHTSA seeks information on rolling resistance for reasons other than compliance with the proposed rule, RMA will work with NHTSA to ensure that the scientific appropriate information is obtained using the agency’s effective and long-standing policies and practices.

PREEMPTION

NHTSA’s ANPRM explicitly asked for “public comment ... in particular on whether, and to what extent, Section 111 would or would not preempt tire fuel consumer information regulations that the administrative agencies of the State of California may promulgate in the future pursuant to California’s Assembly Bill 844 [AB 844].”⁴⁷

This portion of the Appendix provides a supplemental analysis on this preemption question (the summary is provided in the 15-page comment submitted by RMA). Section A

⁴⁷ 74 Fed. Reg. at 29,552.

summarizes the general principles of preemption law. Section B analyzes the language and plain meaning of Section 111 of EISA. Sections C through E apply that legal framework to the question of whether and under what conditions NHTSA’s tire fuel consumer information regulations preempt future regulations issued by California administrative agencies (pursuant to California’s AB 844).

In summary, the EISA and other Federal law preempt the proposed California tire fuel economy efficiency information rule issued pursuant to AB 844. Both NHTSA’s proposed rule and AB 844 require the provision of tire rolling resistance information to consumers so that consumers may choose more fuel efficient tires. AB 844 either conflicts with or undermines NHTSA’s proposed regulations on this topic.

A. The General Principles of Preemption Law

1. General Principles

The doctrine of preemption ensures that State and local laws do not undermine the laws of the United States. It is grounded in Article VI of the Constitution, which provides that the laws of the United States “shall be the supreme Law of the Land; . . . anything in the Constitution or laws of any State to the contrary notwithstanding.”⁴⁸ Congressional purpose is “the ultimate touchstone” of preemption analysis.⁴⁹

Preemption can be either express or implied. Congress may expressly preempt a State law by explicitly forcing out State regulation in the Federal statute at issue.⁵⁰ The Clean Air Act (CAA), for instance, explicitly preempts all State standards “relating to the control of

⁴⁸ U.S. Const. art. VI, cl. 2.

⁴⁹ *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

⁵⁰ See *Michigan Canners & Freezers Assn., Inc. v. Agricultural Marketing and Bargaining Bd.*, 467 U.S. 461, 477 (1984) (citing *Shaw v. Delta Air Lines, Inc.*, 463 U. S. 85, 95-96 (1983)); *Boggs v. Boggs*, 520 U.S. 833, 839-41 (1997) (ERISA preempts state community-property law).

emissions from new motor vehicles”⁵¹ Similarly, the National Traffic and Motor Vehicle Safety Act has long preempted any State safety standards.⁵²

Absent express preemptive language, courts have recognized two types of implied preemption: field preemption and conflict preemption. Field preemption is found when Congress demonstrates an intent to occupy an entire field of regulation, in which case the States must leave all regulatory activity in that area to the Federal government.⁵³ Fields occupied by Congress relevant to the proposed regulation include motor vehicle fuel efficiency,⁵⁴ consumer safety relating to motor vehicles,⁵⁵ and climate change.⁵⁶ Thus, even absent a specific conflict in provisions, some Federal regulation may be so pervasive that Congress intended for Federal regulation to govern over States’ interests.

Conflict preemption applies when either “compliance with both federal and state regulations is a physical impossibility,” or when State law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁵⁷ Courts

⁵¹ 42 U.S.C. § 7543(a).

⁵² See Motor Vehicle Safety Act, 49 U.S.C. § 30103(b)(1).

⁵³ *American Insurance Association v Garamendi*, 537 U.S. 1100 (2003) (state Act conflicted with national policy and “stands in the way of [the President’s] diplomatic objectives.”); *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U. S. 141, 153 (1982); *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947).

⁵⁴ See Energy Policy and Conservation Act, 49 U.S.C. § 32919(a).

⁵⁵ See Motor Vehicle Safety Act, 49 U.S.C. § 30101 *et seq.*

⁵⁶ NHTSA has found that the EPCA not only expressly preempts state regulation of CO₂ emissions but also impliedly preempt such regulations because of Congress’s unmistakable intent to occupy the field of climate change. See *Average Fuel Economy Standards For Light Trucks Model Years 2008-2011*, 71 Fed. Reg. 17,566, 17,654 (Apr. 6, 2006) (concluding that state greenhouse gas regulations are both expressly and impliedly preempted by the EPCA).

⁵⁷ *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-73 (2000); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U. S. 132, 373 U. S. 142-143 (1963) (compliance with both impossible); *Hines v. Davidowitz*, 312 U. S. 52, 312 U. S. 67 (1941) (state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”).

examine the effect of the regulations rather than the intent to determine whether a conflict exists.⁵⁸ Thus, if the State regulation has the “practical effect” of regulating a Federally occupied field such as motor vehicle fuel economy, the Federal regulation preempts the State law.⁵⁹ State or local laws may be preempted under more than one of the above grounds, which often overlap.⁶⁰

2. Savings Clauses

“Savings clauses” in some Federal statutes establish what precisely Congress intends to preempt or not preempt. In the Clean Water Act, for example, Congress states that “[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief”⁶¹

Despite the language disfavoring preemption, the Supreme Court found that the clause applies only to the laws of the State in which the discharge *originates*, and not any other State that may come into contact with the effluence. The Court held that the savings clause did not apply to the affected, non-originating State and that the Clean Water Act preempted the affected State’s laws.⁶² Thus, when considering savings clauses potential conflicts between the State and Federal regulation should be considered.

⁵⁸ *Engine Mfrs. Ass’n v. South Coast Air Quality Management Dist.*, 541 U.S. 246, 255 (2004) (finding that “[i]f one State or political subdivision may enact such rules, then so may any other; and the end result would undo Congress’s carefully calibrated regulatory scheme”).

⁵⁹ *Id.* at 256 (“the Rule would effectively coerce manufacturers into meeting the artificially created demand”).

⁶⁰ See James B. Slaughter & James M. Auslander, *Preemption Litigation Strategies Under Environmental Law*, NR&E Journal, at 18 (Spring 2008).

⁶¹ 33 U.S.C. § 1365(e).

⁶² *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 493 (1987).

3. The President's Preemption Memorandum and Executive Order 13132

In addition to the considerable decisional law and agency statements concerning preemption, the President has set forth guidelines for preemption analysis through President Clinton's Executive Order 13132 (August 4, 1999) and President Obama's Memorandum concerning preemption on May 20, 2009. Neither the Executive Order nor the Presidential Memorandum purport to change preemption law, nor could they change the law.

Executive Order 13132 provides several relevant guidelines concerning preemption, including:

- Preemption (i.e., national action limiting the policymaking discretion of the States) “shall be taken only where there is constitutional and statutory authority for the action and the national activity is appropriate in light of the presence of a problem of national significance.”⁶³
- Federal agencies should consult with appropriate State and local officials as to the need for national standards, any alternatives that would limit the scope of national standards, and the development of national standards required by Federal statutes.⁶⁴
- “National activity is appropriate in light of the presence of a problem of national significance.”⁶⁵
- Federal preemption is appropriate when “there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute.”⁶⁶

President Obama's Memorandum concerning preemption supports Executive Order 13132 and directs agencies to justify preemption “under legal principles governing

⁶³ Executive Order 13132, 64 Fed. Reg. 43,255, 43,256 (Aug. 4, 1999).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 43,257.

preemption, including the principles outlined in Executive Order 13132.”⁶⁷ Thus, on its face, this memorandum does not change the law nor the analysis required to determine if preemption applies in a particular situation.

With these principles in mind, consumer education and fuel efficiency are national in scope and significance, thus, preemption may be an appropriate approach. Moreover, economic objectives are best served with an overarching Federal regulatory regime rather than different standards for California.

It is our understanding that NHTSA has consulted with California on this regulation. Here, the issue is the application of existing law. There is no additional benefit likely to occur by the issuance of confusing and contradictory rules on rolling resistance.

B. The Energy Independence and Security Act

1. The Stated Federal Aims of the EISA

Congress passed the EISA to foster greater energy independence and enhance efficient use of energy sources.⁶⁸ NHTSA’s NPRM focuses on all three factors and notes the significant effect of rolling resistance on each of the factors, which are largely unknown to consumers at this time.⁶⁹

The NPRM also considers the Federal government’s responsibility to reduce GHG.⁷⁰ As directed by the President, NHTSA and the EPA will initiate a joint rulemaking to

⁶⁷ Memorandum from President Obama to Heads of Executive Departments and Agencies, 74 Fed. Reg. 24,693 (May 20, 2009).

⁶⁸ Pub. Law 110-140, 121 Stat. 1492 (Dec. 18, 2007) (preamble).

⁶⁹ 74 Fed. Reg. at 29,543-44.

⁷⁰ As noted above, NHTSA views rating of tires for their GHG emissions to be beyond the scope of the statute. However, use of higher inflated tires and tires that have less rolling resistance will decrease a vehicle’s GHG emissions. Since the NHTSA NPRM discusses the GHG impacts, they should be considered in the preemption analysis.

propose new fuel efficiency and GHG emission standards. The Notice of Proposed Rulemaking notes that “this joint rulemaking proposal will reflect a carefully coordinated and harmonized approach to implementing these two statutes.”⁷¹

2. The Plain Meaning Of Section 111

Section 111 of EISA⁷² also states:

Nothing in this section prohibits a State or political subdivision thereof from enforcing a law or regulation on tire fuel efficiency consumer information that was in effect on January 1, 2006. After a requirement promulgated under this section is in effect, a State or political subdivision thereof may adopt or enforce a law or regulation on tire fuel efficiency consumer information enacted or promulgated after January 1, 2006, if the requirements of that law or regulation are identical to the requirement promulgated under this section. **Nothing in this section** shall be construed to preempt a State or political subdivision thereof from regulating the fuel efficiency of tires (including establishing testing methods for determining compliance with such standards) not otherwise preempted under this chapter. (bold face and underlying added)

The plain meaning of this language is threefold.

First, explicitly, all States (except California) are prohibited from issuing tire fuel efficiency consumer information rules unless the regulations are identical to NHTSA’s information.

Second, the express preemption provided by Section 111 of EISA does not by itself preempt California from issuing tire fuel efficiency consumer information regulations that are not identical to the NHTSA rule.

Third, the use of the words “[n]othing in this section” means Congress left unchanged the ability of a court to hold that regulations issued pursuant to California’s AB 844

⁷¹ 74 Fed. Reg. at 29,544.

⁷² 49 U.S.C. § 32304A.

are preempted (expressly or by implication) pursuant to other parts of the EISA (other than Section 111(e)), other statutes, or constitutional principles.

C. The California Staff Proposal Irreconcilably Conflicts with the Proposed NHTSA Rule Concerning Consumer Information

The California proposal purports to impose replacement tire rolling resistance standards that would restrict California consumers from purchasing replacement tires less energy efficient than original equipment tires.⁷³ California AB 844 also requires a State agency to develop consumer information requirements for replacement tires. AB 844 aims to effectuate California policy “to fully evaluate the economic and environmental costs of petroleum use and to establish a State transportation energy policy that results in the least environmental and economic cost to the state.”⁷⁴

Section 111 of EISA specifically states that the purpose of the national tire fuel efficiency rating system is “to assist consumers in making more educated tire purchasing decisions.”⁷⁵ NHTSA’s intent is to have “consumers benefit from the ready availability of easy-to-understand information.”⁷⁶ NHTSA’s Notice of Proposed Rulemaking focuses on rolling resistance, treadwear, and traction,⁷⁷ not just fuel efficiency. Therefore, California in essence has the same goals as NHTSA relating to environmental policy and consumer education with regard to fuel economy, but uses different means.

⁷³ See Cal. Pub. Res. Code § 25772.

⁷⁴ Cal. Assembly Bill 844 Preamble (available at http://www.energy.ca.gov/tires/documents/ab_844_bill_20031001_chaptered.pdf).

⁷⁵ 49 U.S.C. § 32304A(a)(2)(A), cited in 74 Fed. Reg. at 29,551.

⁷⁶ 74 Fed. Reg. at 29,551.

⁷⁷ *Id.* at 29,543-44.

For several reasons, compliance with both is impractical, if not impossible (*see* Table 1 below). NHTSA's proposed rules should therefore preempt California's regulations.

First, by definition, if both California and NHTSA are trying to inform consumers, different messages can only cause confusion, not enlightenment. Thus the Consumer Union advocated "one system universally" be used in a tire fuel efficiency program.⁷⁸ NHTSA proposes a numerical rating based on a 0 to 100 scale rating system. RMA agrees that there should be a gradation in the ratings so differences between various tires can be understood and utilized by consumers. However, RMA believes that a 0 to 100 rating scheme gives the consumer the misimpression that a one unit difference in the scale of 0 to 100 has meaning and it simply does not. A bucket, bin or grade system that categorizes the ratings in five buckets or bands, on the other hand, will accurately convey to consumers a tire's efficacy without the misimpression of a meaningful difference between tires separated by a small number of unit differences on the 0 to 100 scale. Thus, for simplicity, the remainder of this Appendix will use the term gradation rating system, instead of 0 to 100.

California, on the other hand, proposes a simple binary rating based on fuel efficiency.⁷⁹ NHTSA's and California's differing proposals would create two rating systems on tires sold in California with separate labels displaying ratings on different scales. Two dissimilar ratings will only serve to confuse rather than educate consumers.

Second, the substance of the NHTSA and California communication is conceptually different and irreconcilable.

⁷⁸ Consumer Union, available at http://www.energy.ca.gov/transportation/tire_efficiency/documents/2009-4-08_workshop/2009-04-08_TRANSCRIPT.PDF at 133.

⁷⁹ 74 Fed. Reg. at 29,545; CEC Staff Draft Proposal Summary.

California is proposing to designate all tires with rolling resistance values within 15% of tire with the lowest rolling resistance as fuel efficient (i.e., in effect use two ratings --- fuel efficient tires and all other tires, which, by implication, are not fuel efficient). Thus, the California proposal is limited to consumer information relating to rolling resistance and, in essence, does not use the bulk of the rolling resistance information required.

NHTSA, on the other hand, uses a gradation scale for each tire and the label delineates the different ranges of fuel efficiency with a range of colors. Both system cannot be used to convey information.

Third, Congress and NHTSA are not only choosing to require disclosure of information concerning “fuel efficiency (rolling resistance),” but are instead implementing a comprehensive education program about automobiles that “establish[es] a national tire fuel efficiency consumer information program for replacement tires designed for use on motor vehicles to educate consumers about the effect of tires on *automobile* fuel efficiency, safety, and durability.”⁸⁰ NHTSA concluded that “[b]y putting information on all three parameters on a

⁸⁰ 49 U.S.C. § 32304A(a) (emphasis added); *see also* 74 Fed. Reg. at 29,563-65.

RMA notes that the terms safety, durability, in particular, are misnomers in the context of objective technical standards. These tests that this rule proposes to use to provide consumer information measure specific physical properties that can be tested using objective, reproducible tests. They do not define nor can they be used to predict how a tire may operate under specific real world conditions.

For example, fuel efficiency (the subject of this rulemaking) is affected by many factors of which rolling resistance is just one and rolling resistance affects other characteristics of the tire.

Durability is not the equivalent of treadwear. The rule should use the term “tread life” rather than “treadwear.” Measuring just treadwear does not allow one to predict the useful life of the tread. The amount of tire tread lost is affected by many factors, including road conditions, driving habits, and weather, among many other things. RMA believes that consumers will fail to account for these and other factors and instead assume the accuracy of the posted treadwear life without accounting for other factor also impacting tread life. Similarly, traction measurements can provide objective information on stopping distance in controlled circumstances, but it does not equate to safety.

Both safety and durability depend on numerous factors, such typical road conditions, tire inflation, handling, vehicle type, driver error, property maintenance, among other conditions. For example, NHTSA stated in
(continued...)

label, a consumer would factor any possible tradeoffs between rolling resistance, traction, and treadwear, and/or cost differences between tires. That is, with all three ratings on one label, a consumer could see whether they were opting for a decrease in traction and treadwear to gain improved rolling resistance.”⁸¹ If California issues a rule based solely on rolling resistance and NHTSA’s program addresses rolling resistance, traction, and treadwear, the schemes will be even more in conflict than if they both only addressed rolling resistance.

Fourth, the California statute not only does not substantially advance the State’s public health goals, on the face of the NHTSA administrative record, but it results in less environmental benefits. NHTSA considered a “thumbs up/down strategy” similar to the California statute and concluded that only 1% of the tire’s rolling resistance would be reduced using this approach compared to between 2 to 10% if a gradation rating scheme is utilized, resulting in less fuel savings, lower amounts of carbon dioxide emission reductions.⁸²

(continued...)

this notice of proposed rulemaking, “[t]here is a growing appreciation but still a limited understanding of how tire traction, wear resistance, and rolling resistance relate to the practical outcomes of vehicle fuel consumption, crash incidence, and tire service life.” 74 Fed. Reg. at 29,560 The use of these terms without adequate explanation of the overarching framework may mislead or confuse consumers about the complexity of tire performance.

⁸¹ 74 Fed. Reg. at 29,560. *Id.* at 29,543. As noted above, NHTSA simply does not have legal authority for the scheme that it proposes. This section of these comments, however, evaluates whether the system proposed by NHTSA is preempted. The modification to the NHTSA program proposed by RMA would also preempt the California program.

⁸² NHTSA, Preliminary Regulatory Impact Analysis, Notice of Proposed Rulemaking Replacement Tire Consumer Information Program Part 575.106 at pp. 82, 85 (June 2009) (NHTSA-2008-0121-0015.1) (PRIA on Tire Efficient Rule).

Table 1: Comparison of Select Requirements of the California and NHTSA Draft Consumer Information Rules

REQUIREMENT IN PROPOSED RULE	CALIFORNIA	NHTSA PROPOSED TIRE EFFICIENCY RULE
Number of tires tested	Test three tires with identical SKUs for passenger or light truck tire which is regulated ⁸³	Rating rolling-resistance test protocol or calculation based on interpolated and extrapolated test values (i.e. numerical modeling) ⁸⁴
Basis for rating	<p>All tires of the same Tire Size Designation and Load Index (LI) ranked from lowest to highest Rolling Resistance Force (RRF)</p> <p>All tires with an RRF within fifteen percent of the lowest RRF reported tire in each category will be rated “Fuel Efficient Tire.”</p>	<p>Separate tests for: (a) rolling resistance; (b) <i>wet</i> traction; and treadwear), then each test measurement is converted or normalizing into a numerical rating with a range of 0 to 100.⁸⁵ (RMA prefers a bucket or band-based gradation rating scheme that has several gradations, but does not use a 0 to 100 scale.)</p> <p>The proposed rule express a tire rolling resistance rating on a scale of 0 to 100, with 100 being the lowest rolling resistance or best rating, and zero being the highest rolling resistance or worst rating⁸⁶</p> <p>Specify that the traction rating, for purposes of the tire fuel efficiency consumer information program, be calculated using the peak coefficients of friction⁸⁷</p> <p>However, these are not straight forward because “they depend on other factors (in addition to the traction rating of the tires) such as the handling characteristics of the vehicle on which they are mounted, the force with which the brakes are applied, and the loading of the vehicle⁸⁸</p>

⁸³ California Energy Commission, Fuel Efficient Tire Program, Staff Draft Proposal: Summary (June 10, 2009, available at < http://www.energy.ca.gov/transportation/tire_efficiency/documents/2009-06-10_workshop/2009-05-29_STAFF_SUMMARY.PDF> (“CEC Staff Draft Proposal Summary”).

⁸⁴ 74 Fed. Reg. at 29,554.

⁸⁵ *Id.* at 29,563-65.

⁸⁶ *Id.* at 29,564.

⁸⁷ *Id.* at 29,565.

⁸⁸ *Id.* In fact, according to NHTSA, “the difference between two such tire safety ratings would not reflect the same economic difference in terms of safety, where the tires were mounted on two different types of vehicles. *Id.* at 29,565-66.

Table 1 (cont.)

REQUIREMENT IN PROPOSED RULE	CALIFORNIA	NHTSA PROPOSED TIRE EFFICIENCY RULE
Designation	A simple “Fuel Efficient Tire” designation ⁸⁹	0 to 100 scale for each tire with color range ⁹⁰
Rationale	<p>Actual test results readily available in the public domain provide improved knowledge among manufacturers.</p> <p>A ranking system driven by the “best in class tire” can ignite a competitive spirit. Combined they provide the basis and incentive for enhanced competition and technology advancement.⁹¹</p>	<p>According to NHTSA, comparing this new proposed label across potential replacement tires would enable consumers to see how different replacement tires can affect the fuel economy they are getting from their vehicle. The label would also allow consumers to see the tradeoff they may be facing between rolling resistance, <i>wet</i> traction, and treadwear, and how the balance of these factors may differ from tire to tire.⁹²</p> <p>Many consumers make their choice of tire at the location of purchase with guidance from a sales associate⁹³</p> <p>Many tire consumers do conduct research to determine specifications for their vehicle, and then visit a store or go online to compare tires of different specifications.⁹⁴</p> <p>Many tire purchases are unplanned, where consumers needed to take immediate action to restore their vehicle.⁹⁵</p> <p>The connection between fuel efficiency and tire selection was not brought up unaided⁹⁶</p>

⁸⁹ CEC Staff Draft Proposal Summary.

⁹⁰ 74 Fed. Reg. at 29,545.

⁹¹ CEC Staff Draft Proposal Summary.

⁹² 74 Fed. Reg. at 29,543.

⁹³ *Id.* at 29,572.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

Table 1 (cont.)

REQUIREMENT IN PROPOSED RULE	CALIFORNIA	NHTSA PROPOSED TIRE EFFICIENCY RULE
Label		<p>A paper label (with an individual tire’s ratings based on rolling resistance, traction, and treadwear⁹⁷</p> <p>Located on existing paper label affixed to tire with other required information or on a separate new paper label with just tire fuel economy information⁹⁸</p> <p>Poster in each tire retailer/dealer location that would be visible to consumers, to make consumers aware that there are comparative government tire ratings available for the passenger car tires they are considering⁹⁹</p>
Consumer education program	Comprehensive database providing reliable test results and objective information accessible to everyone	Consumer education program to inform consumers about the effect of tire properties and tire maintenance on rolling resistance, traction, and treadwear ¹⁰⁰
Manufacturer reporting requirement	<p>Report all rolling resistance data to State.¹⁰¹</p> <p>Each manufacturer must include with reports a list of all tire models and sizes that it claims are excluded from the proposed requirements.</p>	<p>Each manufacturer must submit data for each individually rated tire regarding rolling resistance force, test load, rolling resistance rating, traction rating, average peak coefficient of friction for asphalt and concrete (both UTQGS test and NHTSA's formula), treadwear rating, and wear rate as measured during the UTQGS test.</p> <p>Each manufacturer must include with reports a list of all tire models and sizes that it claims are excluded from the proposed requirements (In the preamble, but not in the regulatory text)</p>

The proposed California program, as written, therefore stands as an obstacle to the “full purposes and objectives of Congress” under the NHTSA Program.¹⁰² That California

⁹⁷ 74 Fed. Reg. at 29,545.

⁹⁸ *Id.* at 29,546.

⁹⁹ *Id.* at 29,572.

¹⁰⁰ *Id.* at 29,546, 29,573.

¹⁰¹ CEC Staff Draft Proposal Summary.

¹⁰² *Hines*, 312 U. S. at 67.

shares a similar policy goal with Congress to educate consumers is not sufficient to save the proposed California program from preemption.¹⁰³

Furthermore, the Supreme Court has held that a State law is preempted if it interferes with the methods by which a Federal statute was designed to reach its goal.¹⁰⁴ In *International Paper*, the Court found that a State's common law stood as an obstacle to the full implementation of the Clean Water Act.¹⁰⁵ Plaintiffs had filed a common law nuisance suit filed in a Vermont court under Vermont law concerning water pollution originating from New York. The Court found that the application of an affected State's law to an out-of-state source would undermine the important goals of efficiency and predictability of the Clean Water Act.

Moreover, such an application would violate Congress's intent to establish clear and identifiable discharge standards and would lead to chaotic confrontation between sovereign states.¹⁰⁶ In finding that the Clean Water Act preempted a non-source State's common law, the Court stated, "[i]t would be extraordinary for Congress, after devising an elaborate permit system that sets clear standards, to tolerate common law suits that have the potential to undermine this regulatory structure."¹⁰⁷

¹⁰³ *Int'l Paper*, 479 U.S. at 494; see also *Michigan Cannery & Freezers Assn.*, 467 U.S. at 477 (state statute establishing association to represent agricultural producers preempted even though it and the federal Agricultural Fair Practices Act share the goal of augmenting the producer's bargaining power).

¹⁰⁴ *Int'l Paper*, 479 U.S. at 494.

¹⁰⁵ 33 U.S.C. § 1251 *et seq.*

¹⁰⁶ *Int'l Paper*, 479 U.S. at 496-97.

¹⁰⁷ *Id.* at 497. It is important to note that Court ruled in favor of preemption even where personal tort claims were at stake. Courts have formed a presumption against preemption in tort cases, especially where there is no strong alternative remedy for a party. See *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (1995) (stating "If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly."); see also *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984). The NHTSA and California programs do not involve tort claims, and thus, courts should be less hesitant to rule in favor of preemption, especially where the NHTSA Program's whole structure may be undermined.

In the instant matter, NHTSA devised national standards for a consumer information program on tire rolling resistance, including an informative consumer tire label. Divergent California rolling resistance standards and tire labels will certainly interfere with the NHTSA's goal of enhancing fuel efficiency by educating consumers on the significance of rolling resistance on tire performance.¹⁰⁸ Allowing California's regulations to exist side-by-side with NHTSA will therefore undermine the agency's proposed regulatory structure.

D. The California Staff Proposal Irreconcilably Conflicts with NHTSA's Safety Rules

The Safety Act, as repeatedly amended,¹⁰⁹ explicitly states that “[w]hen a motor vehicle safety standard is in effect under this chapter, a State or political subdivision may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter....”¹¹⁰ NHTSA has long recognized this explicit preemption and the implied preemption that occurs when there is a conflict between a NHTSA regulation and State law or regulations related to safety.¹¹¹

¹⁰⁸ Safety ratings will likely be confused as well.

¹⁰⁹ 49 U.S.C. §§ 30101-30105 *et seq.*

¹¹⁰ *Id.* at § 30103(b).

¹¹¹ See NHTSA, *Federal Motor Vehicle Safety Standards; Roof Crush Resistance; Phase-In Reporting*, 74 Fed. Reg. 22,348, 22,380 and 22,382 (May 12, 2009), which cites the explicit provisions that provide a preemptive effect and implied preemption when there is a conflict. *Id.*; see also 74 Fed. Reg. at 1,790-92 (Jan. 13, 2009).

There has been some controversy concerning the use of this provision to preempt State personal injury law and the meaning of the Safety Act's “[c]ompliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.” 49 U.S.C. § 30103(e). That controversy is not at issue in this situation since we consider the conflict between an explicit State regulation, not State common law.

As discussed above, NHTSA’s preamble states that the rule regulates “fuel efficiency (rolling resistance), **safety** (*i.e.*, traction) ... and durability (*i.e.*, treadwear)”¹¹² (bold face added). NHTSA also states that traction indicates “a tire’s ability to stop on wet pavement” and “is one metric that corresponds to safety.”¹¹³ Rolling resistance is a “measurement of fuel efficiency.”¹¹⁴ However, NHTSA’s testing of 16 different tire models also found “a strong and significant relationship between better rolling resistance and poorer wet slide numbers,”¹¹⁵ *i.e.*, “tires with lower rolling resistance will have poorer wet traction in the sliding region.”¹¹⁶

NHTSA acknowledges that the relationship between traction and safety is not straight-forward because safety “depend[s] on other factors (in addition to the traction rating of the tires) such as the handling characteristics of the vehicle on which they are mounted, the force with which the brakes are applied, and the loading of the vehicle.”¹¹⁷ As noted above, however, NHTSA’s prior determinations link rolling resistance and safety in some circumstances.¹¹⁸

¹¹² 49 U.S.C. § 32304A (a)(2)(D); *see also* 74 Fed. Reg. at 29,563-65. As NHTSA acknowledges, the relationship between rolling resistance is not straight-forward and many other factors are involved. RMA takes no position concerning this issue at this time. However, NHTSA has repeatedly stated its view that rolling resistance may impact safety under certain circumstances (see text). Therefore, NHTSA’s decision on preemption must be consistent with this position.

¹¹³ 74 Fed. Reg. at 29,543.

¹¹⁴ *Id.* at 29,560.

¹¹⁵ NHTSA, *Tire Fuel Efficiency Consumer Information Program Development: Phase 2 – Effects of Tire Rolling Resistance Levels on Traction, Treadwear, and Vehicle Fuel Economy*, at iii, 56, and 78 (2009) (NHTSA-2008-0121-0020) (Phase 2 Report on Effects of Rolling Resistance on Traction, Treadwear, and Fuel Economy).

¹¹⁶ Phase 2 Report on Effects of Rolling Resistance on Traction, Treadwear, and Fuel Economy at 56.

¹¹⁷ 74 Fed. Reg. at 29,565. In fact, according to NHTSA, “the difference between two such tire safety ratings would not reflect the same economic difference in terms of safety, where the tires were mounted on two different types of vehicles. *Id.* at 29,565-66.

¹¹⁸ The fact that the California regulation does not mention safety and only explicitly discusses rolling resistance and fuel economy does not mean that it does not impact safety and therefore must give way to NHTSA’s jurisdiction over safety requirements.

AB 844's purpose is to influence which tires consumer choose based on rolling resistance classification. According to NHTSA's analysis, California will impact the safety issues summarized above. This represents an impermissible State regulation in a field Congress reserved solely for Federal Regulation in the Safety Act. Congress, NHTSA, and the underlying scientific principles have tied safety (i.e., traction) and fuel economy (i.e., rolling resistance) together at least in some circumstances.

Additionally, as noted in prior RMA comments, the California proposed regulatory structure "may favor seasonal tires and lead to inappropriate tire purchases for some consumers with potential safety consequences depending upon geographic location and whether seasonal tires are used all year around."¹¹⁹ Seasonal tires are more likely to be deemed "fuel efficient" in California's proposal due to their rolling resistance. Depending on geographic location and whether seasonal tires are used all year around, California's proposed rating system may lead to inappropriate tire purchasing decisions that negatively affect safety.

California's proposal may lead other poor tire purchasing decisions due to its grouping of tires by combined size designation and load index. Within a given group, it is likely that those tires deemed "fuel efficient" will be clustered in a small number of speed and load ratings. Thus, consumers needing tires with a different speed or load rating may be forced to choose between tires lacking the "fuel efficient" rating and "fuel efficient" tires that are not suitable for the vehicle's speed and load requirements or may not be the appropriate size.¹²⁰ For example, an extremely cost conscious buyer may select (and a tire dealer or an Internet site) may

¹¹⁹ Letter from Tracey Norberg, Rubber Manufacturers Association, to California Energy Commission at 4 of 7 (June 24, 2009 (Docket 07-FET-1)).

¹²⁰ *Id.*

sell a tire that is too small to carry the load of the vehicle on which the consumer installs the tire. Tires with inappropriate size, speed and load capabilities not only create a safety concerns, but are also less fuel efficient.¹²¹

In summary, only NHTSA has authority to regulate the safety of tires. NHTSA's consumer information rule explicitly includes safety provisions. Thus, the California rule must be preempted because it would interfere with NHTSA's sole authority to regulate safety.

E. The Aggregate Impact of Federal Regulation Preempts a California Rule and Burdens Interstate Commerce

Preemption analysis allows consideration of the aggregate effect on the Federal scheme.¹²² NHTSA's proposed tire fuel efficiency information rule is a significant component of the United States' comprehensive national energy policy --- a mosaic of statutes, regulations, and executive orders that plainly evidence the Federal government's intent to control energy policy and regulate fuel efficiency.

The Federal government has long since occupied the field of fuel efficiency in implementing Corporate Average Fuel Economy (CAFE) standards for various vehicles.¹²³ This decision to leave fuel economy related decision-making with the federal government dates to the

¹²¹ Using the wrong size tire may affect safety, e.g., "[t]o maintain tire safety, purchase new tires that are the same size as the vehicle's original tires or another size recommended by the manufacturer. Look at the tire information placard, the owner's manual, or the sidewall of the tire you are replacing to find this information. If you have any doubt about the correct size to choose, consult with the tire dealer." NHTSA Internet site, available at <http://www.safercar.gov/portal/site/safercar/menuitem.13dd5c887c7e1358fefe0a2f35a67789/?vgnextoid=87e7cf6677526110VgnVCM1000002fd17898RCRD>

¹²² *Engine Mfrs. Ass'n*, 541 U.S. at 255; *Healy v. Beer Inst.*, 491 U.S. 324 (1989).

¹²³ NHTSA, *Average Fuel Economy Standards Passenger Cars and Light Trucks Model Year 2011; Final Rule*, 74 Fed. Reg. 14,196 (March 30, 2009) (available at <http://edocket.access.gpo.gov/2009/pdf/E9-6839.pdf>); see also Pub. Law 110-140, 121 Stat. 1492 (Dec. 18, 2007) (preamble of EISA) (aim of the EISA is "to move the United States toward greater energy independence and security, to increase the production of clean renewable fuels, to protect consumers, to increase the efficiency of products, buildings, and vehicles, to promote research on and deploy greenhouse gas capture and storage options, and to improve the energy performance of the Federal Government, and for other purposes.").

passage of the Energy Policy and Conservation Act in 1975 (EPCA). In fact, EPCA expressly preempts State regulation of fuel economy: “A state may not adopt or enforce a law or regulation related to fuel economy standards”¹²⁴

The comprehensive nature of NHTSA’s occupation of the field is demonstrated by the fact that NHTSA specifically provides that vehicle manufacturers can utilize decreased rolling resistance to achieve compliance with the vehicle fuel economy standards.¹²⁵ For example, NHTSA used 1 to 2 percent incremental reduction in fuel consumption “for application of low rolling resistance tires in the final rule.”¹²⁶

The goal of the EPCA and EISA is “energy conservation.”¹²⁷ The EISA, which compels the instant rulemaking, declares Congress’ intent to secure energy security and independence for the United States and to fight global warming by reducing GHG emissions.¹²⁸

¹²⁴ 49 U.S.C. § 32919(a).

Notwithstanding the explicit preemption language cited above, the NHTSA CAFE rule does not make a determination concerning preemption. Rather, the President requested that NHTSA consider whether any provisions regarding preemption in the CAFE Standard are consistent with the EISA, the Supreme Court’s decision in *Massachusetts v. EPA* and other relevant provisions of law and the policies underlying them. As a result, NHTSA decided not to include any provisions addressing preemption in the rule due to lack of time, but announced that it will re-examine the issue of preemption. Any such analysis should conclude that a confusing, costly, ineffective, and impractical regulatory scheme will be created if a State the size of California can impose different requirements for fuel efficiency or climate change.

¹²⁵ The proposed rule specifically includes a “typical low rolling resistance tires” bill of materials or list of components of the fuel economy-improving technology, which include, among other things, material change, and constructions with less hysteresis, geometry changes (e.g., reduced aspect ratios), reduction in sidewall and tread deflection, potential spring and shock tuning.” *CAFE Standards*, 74 Fed. Reg. at 14,297.

¹²⁶ *Id.* Additionally, the “final rule includes a phase-in cap for low rolling resistance tires with a phase-in rate of 20 percent for MY 2011.” *Id.*

¹²⁷ Memorandum from President Obama to NHTSA, 74 Fed. Reg. 4,907 (Jan. 28, 2009).

¹²⁸ *See* Memorandum of the President for the Secretary of Transportation [and] the Administrator of the National Highway Traffic Safety Administration, 74 Fed. Reg. 4,907 (Jan. 26, 2009).

The preamble to the NHTSA tire fuel economy information rule and the support document for the California proposal both specifically discuss the reduction in GHG emissions achievable from use of low rolling resistance tires.¹²⁹ NHTSA even proposes to change the name of the rating to “Fuel Efficiency and Greenhouse Gas Rating.”¹³⁰ Thus, the purpose of the NHTSA and California rules are to reduce greenhouse gas emissions, not to increase fuel efficiency to save the public costs.

A comprehensive climate change bill, which includes reductions in industrial emissions, wide ranging mandates and incentives for the use of more energy efficient products, and mandated changes to the use of fuels in the generation of electric energy, among other things, passed in the House of Representatives.¹³¹ In parallel, the EPA Administrator has stated that “[a]s Congress does its work, ... [EPA is] mov[ing] ahead to comply with the Supreme Court’s decision recognizing EPA’s obligation to address climate change under the Clean Air Act.”¹³²

NHTSA’s further proposals of new CAFE standards (pursuant to the EPCA as amended by EISA) and EPA proposing GHG emissions standards under the Clean Air Act “is intended” to be a “joint rulemaking proposal” that “reflect[s] a carefully coordinated and harmonized approach to implementing these two statutes.”¹³³

¹²⁹ 74 Fed. Reg. at 29,543, 29,544, 29,548, and 29,570.

¹³⁰ *Id.* at 29,570.

¹³¹ The American Clean Energy and Security Act of 2009, 2009 Bill Tracking H.R. 2454 (111th Congress, 1st Session). There are limited preemption provisions in the current draft, but it is unknown what, if any, final bill will contain.

¹³² Memorandum from: Lisa P. Jackson, EPA Administrator to All EPA Employees (January 23, 2009), available at <<http://www.epa.gov/administrator/memotoemployees.html>>.

¹³³ 74 Fed. Reg. at 29,544.

By attempting to regulate fuel efficiency through tire labels, California's standards practically impose a fuel efficiency standard and impermissibly intrude in a field already occupied by the Federal government. Each of these statutes combined provide persuasive reasons to conclude that the entire field of energy efficiency in tires and the vehicles upon which they are placed is preempted. Here, the aggregate effect of Congress' integration of vehicle fuel economy, rolling resistance, the related "safety" implications, and other regulation in the climate change and energy areas means that a California tire fuel efficiency information rule could undo this Federal scheme. Preemption of California's proposed regulations is therefore warranted as a necessary step to prevent State interference with the Federal energy plan.

In addition, the additional testing, the incompatibility, and other burdens documented in prior RMA submissions to California and in other portions of the RMA comments on the NHTSA proposed rule unduly burden interstate commerce.¹³⁴

F. Conclusion

NHTSA's proposed rules preempt California's regulations proposed in California AB 844. Both the proposed Federal regulation and State rules aim to educate consumers on rolling resistance, treadwear, and traction concerning motor vehicle tires. Not only has Congress declared that the Federal government intends to regulate these fields, but requiring business to comply with both sets of regulations would be highly impractical and a burden on interstate commerce. Accordingly, RMA urges NHTSA to announce that the proposed rules will preempt all non-identical State regulation, including California Assembly Bill 844.

¹³⁴ See *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

THE NOTICE OF PROPOSED RULEMAKING DOES NOT AFFORD INTERESTED PARTIES SUFFICIENT NOTICE, AND OPPORTUNITY TO REVIEW AND COMMENT

The Administrative Procedures Act (APA)¹³⁵ requires agencies to provide interested parties notice of proposed rules and an opportunity to meaningfully review and comment on such rules before their promulgation. RMA has made its best efforts to review the proposed rule as it understands it.

Unfortunately, there are portions of the rule that, despite RMA's best efforts, we are unable to be certain what is being proposed due to inconsistencies between the preamble and proposed rule, or cannot meaningfully comment due to the lack of disclosure in the administrative record of scientific and engineering data, information and formulas supporting the proposed rule. Obviously, to preserve our right to comment, where possible, we have attempted to provide comments. However, there may be components of the proposed regulation where due to contradictions, missing data or other similar issues, we have not been able to determine NHTSA's intent.

Section A describes: (1) the undisclosed data and information used by NHTSA in arriving at the proposed regulations; and (2) the inconsistencies between the proposed regulations and the rule's preamble.

Section B sets forth the legal requirements of the APA to provide for adequate notice and comment and explains how RMA was unable to provide comments on all aspects of the proposed rule.

¹³⁵ 5 U.S.C. § 551 *et seq.*

Finally, section C discusses why an additional period for notice and comment, in the form of an advanced notice of proposed rulemaking, will benefit the rulemaking process.

RMA accordingly requests that NHTSA repropose this rule prior to issuance of a final rule in order to ensure that the comments have fully addressed and commenters can evaluate NHTSA's response and obtain greater clarity on what is actually being proposed.

A. The Notice of Proposed Rulemaking's Inconsistencies, Nondisclosures, and Conflicts

1. Without proper data to support provisions in the NPRM, RMA and interested parties are unable to provide comment on a number of provisions in the proposed rule.

a. Lack of data to support proposed numerical constants to adjust the concrete and asphalt average peak coefficients

The NPRM requests comment on the proposal that manufacturers employ the UTQGS test methods described in 49 C.F.R. 575.104(f) to measure peak traction coefficients on concrete and asphalt.¹³⁶ The methods described in Part 575.104(f) are specifically used for measuring slide traction coefficients. To adjust the measured average peak coefficients for concrete and asphalt, the NPRM proposes the use of numerical constants: 0.75 for concrete and 0.60 for asphalt. The NPRM and the administrative record, however, contain no supporting data or test results to establish the validity of these numbers, even though they are alleged to be "based on agency test data."¹³⁷

NHTSA has requested comment on the use and possible change of these numerical constants and has indicated that the numerical constants are likely to be altered due to the repaving of test course surfaces. RMA is unable to comment fully on the validity of these

¹³⁶ 74 Fed. Reg. at 29,564.

¹³⁷ *Id.*

specific tests because NHTSA has not provided the technical data or basis for generating these constants.

Also, RMA questions the specific minimum and maximum values of the coefficients of traction obtained at the NHTSA at the San Angelo facility and, therefore, requested that information. This request is warranted because the minimum and maximum values of the coefficients of traction contradicts test data from RMA members, compliance data (which is available to both NHTSA and the RMA), and data cited in the Phase 2 Test Report. An examination of data provided by the RMA members on over 700 tires shows that the maximum and minimum values of coefficients on wet asphalt are approximately 1.0 and 0.55 for commercial passenger tires. The corresponding values for wet concrete are approximately 0.05 and 0.86. Thus the additive range based on RMA test data is 1.05 to 1.85.

- b. Lack of wet traction data to support the proposed upper and lower ranges for minimum and maximum peak coefficients

NHTSA determines the values of the empirical constants in its rating formula based on estimates of the minimum and maximum peak coefficients of traction at its San Angelo Test Facility. The additive range of these coefficients is from 0.7 to 2.3 for the two surfaces. NHTSA proposes to further expand this range to 0.6 to 2.6 and to adjust the numerical constants in the rating formula so that 0.6 represents a 0 score and 2.6 represents a 100 score.¹³⁸

However, NHTSA provides **no** wet traction test data in the NPRM to support the upper and lower ranges it has proposed. RMA has repeatedly requested this data from the Agency, which apparently was unable to provide it. These range limits have a profound effect

¹³⁸ *Id.* NHTSA determines the values of the empirical constants in its rating formula based on estimates of the minimum and maximum peak coefficients of traction at its San Angelo Test Facility. The additive range of these coefficients is from 0.7 to 2.3 for the two surfaces. NHTSA then proposes to further expand this range to 0.6 to 2.6

on the tire rating scale and the Agency must provide the data cited in the NPRM so that manufacturers can adequately evaluate and comment on them.

c. Lack of data to support traction rating formula

NHTSA proposes to use a complex formula which is empirically based to derive overall wet traction ratings based on adjusted wet peak friction coefficients for asphalt and concrete. RMA's efforts to review the formula and provide meaningful comment have been frustrated because the agency does not explain its derivation aside from footnoting that the formula "is an adaptation of the Fahrenheit to Centigrade conversion formula."¹³⁹ NHTSA does not explain how the temperature conversion formula, which involves only two variables, can serve as a model for the proposed traction rating formula, which uses three variables (which means that either information is missing or it is impossible). Absent some explanation, RMA cannot know what the basis of the proposal is and, therefore, as a practical matter, no comment is possible.

RMA requests that NHTSA provide a complete description of how this formula was derived and the basis for the numerical constants it contains, so that the industry is able to analyze the basis of this formula and provide comment. Since NHTSA has not provided this description in sufficient time to be reviewed and included in these comments, NHTSA must repromulgate the final rule for comments.

d. Lack of data to support equal risk of a crash on wet asphalt and wet concrete

The NPRM states that the rating formula is designed to penalize a tire's wet traction rating if there is a difference between its peak coefficients on wet concrete and wet

¹³⁹ 74 Fed. Reg. at 29,564 n.133.

asphalt.¹⁴⁰ The greater this difference, the greater the penalty. NHTSA applies this penalty uniformly even though data from a national survey of roadways surfaces by the Federal Highway Administration (“FHWA”) shows that only 8% of the road surfaces in the United States are concrete while 92 % are asphalt. As a result, it is reasonable to assume that the distribution of crashes on the nation’s highways, for concrete and asphalt, would be similar. NHTSA has not demonstrated with crash data that there is equal risk of a crash on wet asphalt and wet concrete. RMA recommends that this penalty be eliminated or significantly reduced, particularly since the peak coefficient of traction is generally higher on wet asphalt than wet concrete.

NHTSA’s failure to provide a safety-based rationale based on crash statistics for assessing this penalty prohibits RMA’s ability to comment on this aspect of the rating formula. RMA asks that NHTSA assess the agencies’ crash database to substantiate this penalty.

e. Lack of data to support the proposed tolerance bands

NHTSA proposes a tolerance band of +/-0.06 for the traction rating, based on “agency test data where peak coefficients of friction for asphalt and concrete were recorded, and the average and standard deviations calculated for each.”¹⁴¹ The supporting data was not presented in the NPRM or Phase 2 Test Report or any other document in the docket. Therefore, RMA cannot comment on what we do not have and this renders meaningful comment on the appropriateness of this tolerance band not possible.

¹⁴⁰ *Id.* at 29,564.

¹⁴¹ *Id.* at 29,580.

2. Numerous inconsistencies contained in the preamble and in the proposed rule constrict RMA's ability to provide comments.

a. SKU versus Size Designation Testing

RMA is unable to understand the tire selection for testing proposal due to an inconsistency between the preamble and the NPRM. The language in the preamble proposes “to require each SKU [Tire Stock Keeping Units], or each size within each model of each brand, to be rated separately for fuel efficiency (using a rolling resistance test value), safety (using a UTQGS traction test value), and durability (using a UTQGS treadwear test value).”¹⁴² Alternatively, the NPRM proposes that “each tire of a different size designation is to be rated separately. Each tire shall be able to achieve the level of performance represented by each rating with which it is labeled.”¹⁴³ RMA is unclear as to whether NHTSA is proposing that each SKU be rated, or whether each tire of a different size is to be rated. SKU is distinguishable from “each tire of a different size” because a SKU can include different load or speed ratings for a given tire. This inconsistency obstructs RMA's ability to comment on which tires are to be rated for rolling resistance.

b. Confusion surrounding the upper half of the proposed tolerance bands

As currently drafted, the proposed rule seeks to disallow ratings in the upper half of the tolerance bands. NHTSA proposes that the “ratings reported by a manufacturer under the proposed rule *must be less than or equal to* the rating determined by the agency using the procedures specified in this rule.”¹⁴⁴ In addition, the NPRM also proposes separate tolerance

¹⁴² *Id.* at 29,554 (emphasis in original).

¹⁴³ *Id.* at 29,585.

¹⁴⁴ *Id.* at 29,580 (emphasis added).

bands for the rolling resistance, traction and treadwear ratings.¹⁴⁵ These two provisions clearly conflict with one another. As a result, manufacturers are precluded from using the upper portion of the tolerance band and could be found in non-compliance if its rating is in the upper half of the tolerance band.

As an example, if NHTSA conducts a Fuel Efficiency test on a certain tire and obtained a rating of 73, the +/- 5% tolerance band around this rating would be 69 to 77. If a manufacturer's rating was 75 – within upper half of this tolerance limit, but greater than the mean rating – the manufacturer could be found in non-compliance according the agency's statement because the rating is not "less than or equal the rating determined by the agency." RMA is unable to comment on this aspect of the NPRM because of these conflicting statements.

c. Inconsistent figures regarding fuel savings

In the NPRM, NHTSA provides two different fuel savings figures derived from using tires with superior rolling resistance. First, the agency provides a "rule of thumb" that 10 points on the Rolling Resistance Rating scale is equivalent to 6 gallons/year in fuel savings.¹⁴⁶ However, figure 14 in the NPRM shows that a 10-point spread equates to 12 gallons/year in fuel savings.¹⁴⁷ RMA is unable to meaningfully review and comment on the fuel savings in the NPRM because of these inconsistent figures.

¹⁴⁵ 74 Fed. Reg. at 29,580-81. For instance, the fuel efficiency tolerance band is 5.5 percent of the respective mean.

¹⁴⁶ *Id.* at 29,563.

¹⁴⁷ *Id.* at 29,576.

- d. The NPRM is unclear about what compliance approach is proposed in the NPRM versus where comments are sought on potential alternative approaches.

It is unclear in reading the NPRM whether NHTSA intends to propose tolerance bands or whether NHTSA is proposing a minimum rating requirement and is seeking comments on a potential rating band approach. For the purpose of these comments, RMA assumes that NHTSA seeks comments on a potential rating band approach. Specifically, the NPRM states that the notice “proposes tolerances for RRF, traction, and treadwear which indicate what NHTSA is proposing to consider a noncompliance for the reporting and rating requirements if there is a difference between NHTSA’s test result and a reported rating.”¹⁴⁸ Additionally, NHTSA states that “proposing to require the ratings reported by a manufacturers under this proposed rule must be less than or equal to the rating determined by the agency using the procedures specified in the rule.”¹⁴⁹ This statement seems to be contemplating an approach akin to the approach used for UTQGS, where NHTSA audits a sample of tires and challenges the rating should NHTSA’s test data not reflect a rating that is as good or better than the rating identified by the tire manufacturer. RMA is supportive of this approach. In addition, NHTSA “request comments on a requirement which would require the ratings reported by a manufacturer to be within a specified tolerance limit as explained below for each rating.”¹⁵⁰ RMA interprets NHTSA’s “proposals” regarding tolerance bands as proposed areas should NHTSA decide to pursue tolerance bands, rather than as integral to the NPRM proposal itself. RMA opposes the

¹⁴⁸ *Id.* at 29,579.

¹⁴⁹ *Id.* at 29,580.

¹⁵⁰ *Id.*

concept of tolerance bands for the areas to be regulated in this rulemaking. Because of the conflicting sections regarding the tolerance bands, RMA is unable to provide comment.

e. Computer modeling verses “as measured” and proposed test method

NHTSA is proposing to require each SKU to be rated separately for rolling resistance, traction, and treadwear.¹⁵¹ The NPRM indicates that “a tire manufacturer is free to reasonably estimate the test values it reports” for rolling resistance, traction and treadwear. However, NHTSA later indicates that a tire manufacturer, when reporting rolling resistance, traction or treadwear ratings information for a tire, must report the data must be “as measured.”¹⁵² Following the requirement for data that is, “as measured,” the NPRM specifies testing procedures to measure rolling resistance, traction and treadwear.¹⁵³ RMA is unclear as to whether NHTSA intends to allow tire manufacturers to estimate test values, or whether NHTSA intends to require the testing of all tires to determine rolling resistance, traction and treadwear. Again, this inconsistency frustrates RMA’s ability to provide comment because NHTSA has proposed two contradicting requirements for reporting a tire’s rolling resistance, traction, and treadwear.

f. Fuel efficiency rating versus RRF rating.

NHTSA uses the terms “fuel efficiency rating” and “RRF rating” interchangeably when referring to the proposed tolerance band for fuel efficiency.¹⁵⁴ The term “rating” implies that the agency is referring to fuel efficiency rating. The term “RRF rating” is an incorrect

¹⁵¹ 74 Fed. Reg. at 29,554.

¹⁵² *Id.* at 29,585.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 29,580.

statement because RRF is a tested value and is not a rating. RRF refers to the measured rolling resistance of a tire using a test method. RMA asked for further clarification from the Agency regarding the proposed tolerance band for fuel efficiency and what the agency intended to mean when using the terms “fuel efficiency rating” and “RRF rating.” NHTSA informed RMA that it intended the proposed tolerance band for fuel efficiency to be around the test value. The use of inconsistent and incorrect wording regarding this tolerance band precludes RMA’s ability to comment on the topic.

g. Inconsistent and inadequate use of terms

The inconsistent and inadequate language contained in the following table further frustrates RMA’s ability to adequately comment on the proposed rule.

74 Fed. Reg. Page Number	Description
29565	In middle column, last sentence in only full paragraph, sentence refers to “traction” when heading of section is “durability.” The sentence should read, “Similarly, a tire rated a 75 on the proposed <i>treadwear</i> scale would last three times longer than a tire rated 25 on the proposed <i>treadwear</i> rating scale.” (emphasis added to highlight correct word).
29586	In middle column, below first formula at top of page, the provision lacks units for the values presented and should be revised to read: Where RRF is expressed in lbs and where RRF_{max} is equal to 25(lbs) and represents the highest rolling resistance the agency believes should be represented on the fuel efficiency rating scale and where RRF_{min} is equal to 5 (lbs) and represents the lowest rolling resistance the agency believes should be represented on the fuel efficiency rating scale. (emphasis added to highlight recommended clarification).
29586	In the middle column, (iii) Treadwear. The provision regards treadwear but text in paragraph refers to “traction.” The provision should be modified to read, “(iii) <i>Treadwear</i> . Each tire shall be rated for treadwear performance on a scale of 0 to 100, . . . where TW_{UTQGS} is the <i>teadwear</i> grading . . . A <i>treadwear</i> rating . . .” (emphasis added to highlight correct word).
Several	Several places in the NPRM, both in the preamble and the proposed regulatory text, the full name of the ISO 28580 test procedure is cited. The name of this test procedure is not cited correctly. The correct name for the test procedure is: <i>International Organization for Standardization (ISO), International Standard ISO/DIS 28580: Passenger car, truck and bus tyres – Methods of measuring rolling resistance – Single point test and correlation of measurement results</i> . Every instance where this document is cited should be corrected to reflect the actual title of the document.

B. The Rulemaking Fails to Provide RMA Adequate Notice and Comment under the Administrative Procedures Act

1. Agencies Must Apprise Parties of Relevant Issues in the Rulemaking

The APA's rulemaking provisions require that notice of proposed rules be published in the Federal Register and that "interested persons" be given the "opportunity to participate in the rule making through submission of written data, views, or arguments"¹⁵⁵ The notice must contain "either the terms or substance of the proposed rule or a description of the subjects and issues involved."¹⁵⁶ Central to notice-and-comment rulemaking is the ability of an agency to craft a final rule based on the comments of interested parties.¹⁵⁷ This encourages public participation in the administrative process and enables the agency to receive public feedback and therefore promulgate more informed agency decision-making.¹⁵⁸ It also provides affected parties an opportunity to comment and present supporting evidence before being subjected to the regulation.¹⁵⁹

An adequate notice and comment opportunity exists "if it affords interested parties a reasonable opportunity to participate in the rulemaking process and if the parties have not been deprived of the opportunity to present relevant information by lack of notice that the

¹⁵⁵ 5 U.S.C. § 553(b), (c).

¹⁵⁶ *Id.* at § 553(b)(3).

¹⁵⁷ *See New York v. EPA*, 413 F.3d 3, 32 (D.C. Cir. 2005).

¹⁵⁸ *See Chocolate Mfrs. Assoc. v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985); *see generally* Jeffrey Lubbers *et al.*, *A Guide to Federal Agency Rulemaking*, 186 (3d ed. 1998).

¹⁵⁹ *Am. Radio Relay League v. Fed. Communications Comm'n*, 524 F.3d 227, 236 (D.C. Cir. 2008) (citing *Chamber of Commerce v. SEC*, 443 F.3d 890, 900 (D.C. Cir. 2006)); *MCI Telecommunications Corp. v. Fed. Communications Comm'n*, 57 F.3d 1136, 11140 (D.C. Cir. 1995) (notice and comment serves to "reintroduce ... fairness to affected parties after governmental authority has been delegated to unrepresentative agencies").

issue was there.”¹⁶⁰ Accordingly, a notice of proposed rulemaking must “fairly apprise interested persons” of the issues in the rulemaking.¹⁶¹

A party is not fairly apprised of issues in the rulemaking and is thus denied an adequate opportunity for comment when the agency neglects to include data or information in the rulemaking record allegedly supporting the agency’s proposed rules.¹⁶² “By requiring the ‘most critical factual material’ used by the agency be subjected to informed comment, the APA provides a procedural device to ensure that agency regulations are tested through exposure to public comment, to afford affected parties an opportunity to present comment and evidence to support their positions, and thereby to enhance the quality of judicial review.”¹⁶³ In *Chamber of Commerce v. SEC*, for example, the D.C. Circuit found the SEC violated the notice and comment requirements because in promulgating a rule it relied on cost estimates derived from private studies that were not included in the rulemaking record. The Chamber therefore did not have an opportunity to comment on the cost estimates.¹⁶⁴

¹⁶⁰ *Am. Radio Relay League*, 524 F.3d at 236 (citing *WJG Tel. Co. v. Fed. Communications Comm’n*, 675 F.2d 386, 389 (D.C. Cir. 1982) (quotations omitted)).

¹⁶¹ See *United Steel Workers v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980).

¹⁶² See *Portland Cement Assoc. v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973) (EPA provided inadequate opportunity to comment on the proposed standards due to the absence of disclosure of its detailed findings and test procedures) (*cert. denied*, 417 U.S. 921 (1974)); *Am. Radio Relay League*, 524 F.3d at 236 (“[d]isclosure of staff reports allows the parties to focus on the information relied on by the agency and to point out where that information is erroneous or where the agency may be drawing improper conclusions from it.”); *Owner-Operator Indep. Drivers Ass’n v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 199 (D.C. Cir. 2007) (“the agency’s duty to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules” is an integral requirement of the APA).

¹⁶³ *Chamber of Commerce of the United States v. SEC*, 443 F.3d 890, 900 (D.C. Cir. 2006).

¹⁶⁴ *Id.* at 901.

Thus, “[a]n agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.”¹⁶⁵

Additionally, a final rule does not fairly apprise interested persons if it is not a “logical outgrowth” of the proposed rule.¹⁶⁶ A final rule is not a logical outgrowth from the notice if the final rule differs substantially from or is inconsistent with the NPRM’s description.¹⁶⁷ The “key focus” of the logical-outgrowth inquiry remains whether the purposes of notice and comment have been served.¹⁶⁸ Such purposes are not served if interested parties are left with “a guessing game” of what the final rule may include.¹⁶⁹

¹⁶⁵ *Owner-Operator*, 494 F.3d at 199.

¹⁶⁶ *Nat’l Mining Ass’n v. Mine Safety & Health Admin.*, 116 F.3d 520, 531 (D.C. Cir. 1997) (“It is clear to us that 30 C.F.R. § 75.360(a)(1) is not a ‘logical outgrowth’ of the 1994 proposed rule.”); *Public Citizen, Inc. v. Mineta*, 427 F. Supp. 2d 7 (D.D.C. 2006) (final rule concerning confidential business information is not a logical outgrowth); *AFL-CIO v. Chao*, 496 F. Supp. 2d 76 (D.D.C. 2007) (new rule vacated because, *inter alia*, there was no reasoned explanation for a parenthetical instruction that allegedly contradicted a stated goal of narrowing the requirement’s scope).

¹⁶⁷ *See Env’tl. Integrity Project v. EPA*, 425 F.3d 992, 998 (D.C. Cir. 2005) (“[A] ‘logical outgrowth’ of this proposal ... certainly does not include the Agency’s decision to repudiate its proposed interpretation and adopt its inverse.”); *American Water Works Ass’n v. EPA*, 40 F.3d 1266, 1275 (D.C. Cir. 1994) (EPA failed to provide adequate notice that it would adopt a novel definition of “control”); *Fertilizer Inst. v. Environmental Protection Agency*, 935 F.2d 1303, 1310-11 (D.C. Cir. 1991) (agency failed to provide an adequate notice and comment opportunity because portions of the final EPA rule concerning administrative exemptions could not be considered a logical outgrowth of the proposed rulemaking, which discussed only statutory exemptions); *Nat’l Air Transp. Ass’n v. McArtor*, 866 F.2d 483, 485 (D.C. Cir. 1989) (insufficient notice and comment because the notice and preamble refer to sections of the C.F.R. not normally applicable to the affected companies); *AFL-CIO v. Donovan*, 757 F.2d 330, 338 (D.C. Cir. 1985) (“If the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal.”) (citation omitted); *see also Public Citizen*, 427 F. Supp. 2d at 15 (agency cannot rely on a broad “catch-all” notice provision in the proposed rulemaking to put parties on notice.).

¹⁶⁸ *AFL-CIO*, 496 F. Supp. 2d at 87 (citing *Fertilizer Inst.*, 935 F.2d at 1311); *Public Citizen*, 427 F. Supp. 2d at 14.

¹⁶⁹ *Fertilizer Inst.*, 935 F.2d at 1311.

2. The NPRM Fails to Provide RMA with Adequate Notice and Comment

While RMA reviewed the proposed rule as best it understood and given the amount of data that was disclosed, it was unable to meaningfully comment upon all aspects of the proposed rule because NHTSA has (1) failed to disclose certain data and information supporting its proposed regulations, and (2) drafted proposed regulations that are inconsistent with the rulemaking's preamble and are thus not a logical outgrowth of the preamble.

As discussed *supra* in section A, the rulemaking record fails to disclose NHTSA's data and information in support of the peak traction coefficients, the upper and lower ranges of the coefficients, the traction rating formula, the crash risks for wet concrete versus asphalt, and the traction tolerance bands. By simply stating the numerical constants and formula without disclosing the data purportedly supporting them, NHTSA defies the APA's mandate of robust public review of proposed regulations. Not only does this provide for more informed agency decision-making, but it also ensures fairness to the regulated parties. NHTSA's failure to disclose such data fails to satisfy the APA's notice and comment requirements.

Similarly, the inconsistencies between the preamble and the proposed regulations deny RMA and other interested parties a meaningful opportunity to review and comment. In particular, and as discussed in section A, (1) the NPRM's preamble calls for ratings of each tire SKU, while the proposed final rule states that "each tire of a different size designation is to be rated separately"¹⁷⁰, (2) NHTSA contradicts the purpose of the proposed tolerance bands by requiring all scores to be below the proposed rating, which negates the upper half of the proposed tolerance band, (3) the proposed fuel savings figures are contradictory, (4) the proposed compliance approach is inconsistent comments in the preamble, (5) the confusion

¹⁷⁰ 74 Fed. Reg. at 29,585.

surrounding whether NHTSA intends to allow tire manufacturers to estimate test values, or whether NHTSA intends to require the testing of all tires to determine rolling resistance, traction and treadwear, (6) the fuel efficiency rating is inconsistent with the RRF rating, and (7) the NPRM inconsistently uses the “divide by 10 step” concept to bring the wear rate of tested tire into a 0 to 100 scale. These demonstrate that the proposed rules are not a “logical outgrowth” of NHTSA’s preamble.

C. **The Rulemaking Should Include an ANPRM to Allow for Meaningful Review and Comment**

1. **Agency Issuance of ANPRMs**

An agency issues an advanced notice of proposed rule making (ANPRM) when it seeks additional information or data from the affected parties to shape the its decision-making.¹⁷¹ For instance, in the tire label rulemaking initiated after the TREAD Act, NHTSA recognized the need for additional information “relating to such matters as tire identification number content, readability and location, loading, plies and cord material, tread wear indicators, Uniform Tire Quality Grading Standards, speed ratings, run-flat and extended mobility tires, tire inflation pressure, and dissemination of tire safety information” before issuing its final rules.¹⁷² ANPRMs are accordingly considered part of the “prerule” analysis, when the agency “will undertake [actions] to determine whether or how to initiate rulemaking.”¹⁷³

¹⁷¹ See, e.g., 61 Fed. Reg. 57,252 (Nov. 5, 1996) (FHWA, in issuing an ANPRM in a rulemaking concerning driver hours-of-service (HOS) regulations, “requests assistance in locating any other relevant information, including research, operational tests, or pilot regulatory programs conducted anywhere in the world, that may be used by the agency . . .”); 65 Fed. Reg. 75,222 (Dec. 1, 2000) (NHTSA stated in an ANPRM for tire labels that it needed additional information from the affected parties about costs).

¹⁷² 65 Fed. Reg. at 75,223.

¹⁷³ 73 Fed. Reg. 71,093, 71,098 (Nov. 24, 2008) (Introduction to The Regulatory Plan and the Unified Agenda of Federal Regulatory and Deregulatory Actions) (emphasis added).

2. Data Insufficiencies and Rulemaking Inconsistencies Compel Further Review and Comment from Affected Parties

Congress set a deadline for issuing the Tire Fuel Efficiency Program rule.

However, a statutory deadline does not repeal or diminish the due process safeguards incorporated in the APA.¹⁷⁴ Federal agencies (including NHTSA) have faced statutory deadlines in the past. Sometimes the deadline is met and sometimes an agency determines that a final rule satisfying APA requirements cannot be issued within the statutory deadline, thus, they miss the deadline.

The failure to provide a meaningful opportunity to comment is heightened in this situation, because the proposed Tire Fuel Efficiency Program rule issued by NHTSA is substantively an advanced notice of proposed rule making (ANPRM).

First, there are several instances where NHTSA has cited numerical criteria important to the rule without providing the source of such data.¹⁷⁵ Rather than issue a proposed rule with arbitrary values (on the hope that tire companies will provide actual data), NHTSA should have issued an ANPRM requesting the specific data that is needed.¹⁷⁶

¹⁷⁴ See *Satellite Broadcasting Co. v. Fed'l Comm. Comm'n*, 824 F.2d 1, 3 (D.C. Cir. 1987) (“Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.”).

¹⁷⁵ E.g., 74 Fed. Reg. at 29,564 (NPRM contains no supporting data or test results to establish the validity of average peak coefficients for concrete and asphalt even though they are alleged to be “based on agency test data”); *id.* (no wet traction data disclosed to support the proposed upper and lower ranges of minimum and maximum peak coefficients).

¹⁷⁶ See 61 Fed. Reg. 57,252 (Nov. 5, 1996) (FHWA, in issuing an ANPRM in a rulemaking concerning driver hours-of-service (HOS) regulations, “requests assistance in locating any other relevant information, including research, operational tests, or pilot regulatory programs conducted anywhere in the world, that may be used by the agency”); 65 Fed. Reg. 75,222 (Dec. 1, 2000) (NHTSA stated in an ANPRM for tire labels that it needed additional information from the affected parties about costs).

Second, in some instances, the proposed rule requests data expressly (or implicitly by using data generated for a different purpose in a new way in this rule).¹⁷⁷ Requesting data in a proposed rule, as this proposed rule does in several instances,¹⁷⁸ deprives RMA of its right to review and comment on the validity or interpretation of this data and deprives other interested parties their right to comment on any data submitted by RMA. For example, the proposed rule utilizes measurement tolerances and other measurement factors to demonstrate compliance with the Tire Fuel Efficiency Program rule. This changes the manufacturer's approach to the measurements, tolerance bands, and the "natural" variability in the data. The "rush to judgment" in this rulemaking has resulted in a failure to consider some important tradeoffs in the existing proposal and any likely final rule that derives from this proposal.

Third, where the preamble and regulatory text in the proposed rule differ significantly (as here in the Tire Fuel Efficiency Program rule), it is difficult to understand what is being proposed. It is therefore appropriate to propose alternative approaches in an ANPRM. However, in a proposed rule such as this, the agency typically gives notice to the regulated community concerning what approach the Agency intends to actually use, as opposed to exploring viable alternatives.

The contradictions between the preamble and regulatory text in the proposed rule also means that the final rule runs the strong risk of not being a "logical outgrowth" of the

¹⁷⁷ 74 Fed. Reg. at 29,554 (NHTSA requests comment on the appropriateness of using interpolated values ... and extrapolated values ... to provide tire ratings."), *id.* at 29,561 ("NHTSA requests comments on whether it is premature to suggest moving to an ABS-ESC focused rating based on new vehicles."), *id.* ("The agency requests comments on whether it should instead consider a composite test, and if the four friction numbers should be weighted equally or differently.").

¹⁷⁸ *See id.*

proposed rule, as discussed *supra* in section B. Given these inconsistencies and the absence of key data in the rulemaking record, RMA cannot reasonably anticipate what it should have filed comments on during the notice-and-comment period. A final rule is not a logical outgrowth from the notice if the final rule differs substantially from the NPRM's description.¹⁷⁹

RMA believes that the proposed rule, as written, does not “afford ... interested parties a reasonable opportunity to participate in the rulemaking process” because RMA has “been deprived of the opportunity to present relevant information by lack of notice that the issue was there.”¹⁸⁰

Each of these aspects of this proposed rule individually and more so cumulatively erode RMA's ability to provide a meaningful public comment. This deprives RMA of its right to be heard prior to subjecting itself to regulation and risks the issuance of a rule that is ineffective and may even be counterproductive.

D. Conclusion

RMA has made a good faith effort to review and comment upon the proposed rule, but has been unable to provide meaningful comment upon all aspects of the proposed rule due to the lack of data supporting some aspects of the proposed rule and the inconsistencies in the proposed rule identified above. For the foregoing reasons, RMA respectfully requests that NHTSA repropose this rule and publish an advanced notice of proposed rulemaking to allow for an additional notice and comment period. RMA believes that additional notice and comment

¹⁷⁹ *Nat'l Mining Ass'n*, 116 F.3d at 531 (“It is clear to us that 30 C.F.R. § 75.360(a)(1) is not a ‘logical outgrowth’ of the 1994 proposed rule.”); *Public Citizen*, 427 F. Supp. 2d 7 (final rule concerning confidential business information is not a logical outgrowth); *AFL-CIO*, 496 F. Supp. 2d 76 (new rule vacated because, *inter alia*, there was no reasoned explanation for a parenthetical instruction that allegedly contradicted a stated goal of narrowing the requirement's scope).

¹⁸⁰ *Am. Radio Relay League*, 524 F.3d at 236 (citing *WJG Tel. Co.*, 675 F.2d at 389 (quotations omitted)).

along with full data disclosure will ensure that interested parties can obtain greater clarity on what is actually being proposed in this admittedly technical and complex field. RMA desires to cooperate with NHTSA to effectuate the goals of the proposed rulemaking as stated by Congress in the EISA. With additional time for notice and comment, RMA believes that it will be able to fully evaluate and comment on the proposed rule and work with NHTSA to develop thorough and efficient regulations concerning the tire fuel efficiency consumer information program.

CONCLUSION

RMA appreciates NHTSA's consideration of its comments regarding the proposed rule and looks forward to working with the Agency to promulgate rules consistent with the EISA. Respectfully, RMA submits that the proposed rule impermissibly extends beyond the mandate of the EISA by creating new traction and treadwear consumer rating systems and mandating new consumer information on these attributes at point of sale.

RMA also suggests that the submission of testing data to the Agency is an inefficient means of enforcement as compared to data self-certification, which is the preferred method of enforcement in similar programs.

In response to NHTSA's request for comments on the preemptive effect of its proposed rule, RMA states that the proposed California regulations are preempted because they attempt to regulate areas Congress has reserved for the Federal government.

Finally, RMA proposes that NHTSA repromulgate the proposed rule and issue an advanced notice of proposed rulemaking to afford all interested parties an opportunity to review and comment upon all aspects of the proposed rule.

White Paper

Self Certification to NHTSA's Vehicle Safety Standards and Consumer Information Regulations

H. Keith Brewer, Ph.D.¹

June 4, 2008

Manufacturer Obligation Under Federal Law

Under United States Federal Law it is the responsibility of a manufacturer of vehicles and/or items of motor vehicle equipment to certify that each of its regulated products is in full compliance with the performance requirements of all applicable Federal Motor Vehicle Safety Standards (FMVSSs) and consumer information regulations. This is a **self-certification** process. Under self-certification, the burden for ensuring that all new vehicles and equipment comply with Federal safety and consumer information regulations is borne solely by the manufacturer. The Federal government does not stipulate a means by which manufacturers may meet their certification burden. Instead it left to the manufacturer to take whatever actions it deems necessary to certify that their products meet requirements of all Federal regulations. This usually means laboratory testing in accordance with the specific requirements of the FMVSS or conducting other studies or analyses (due care process) to ensure that its products fully comply. However, as guidance, the Federal government does make publically available the specific test procedures that it intends to employ to confirm that a manufacturer's product is in compliance.

In the United States, manufacturers must not only be concerned with the initial certification, but must also monitor continued compliance of vehicles and vehicle equipment throughout the production run. This requires the establishment of a comprehensive quality control program to periodically inspect and test vehicles and equipment randomly selected from the assembly line to ensure that the original performance is carried through the entire production cycle.

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Since NHTSA does not stipulate to manufacturers how certification is to be performed, it likewise does not specify the type of quality control program that a manufacturer must put in place to ensure continued compliance. That decision is left to the manufacturer. If the vehicle or vehicle equipment is designed with a reasonable factor of safety, the manufacturer may elect to have a selective sample surveillance program to demonstrate that production variations will not take the vehicle or equipment out of the range of full compliance. On the other hand, if the margin of safety were less with respect to the required performance, a more stringent quality control program must be implemented.

Insuring Compliance with NHTSA Safety standards and Regulations

NHTSA's Office of Vehicle Safety Compliance (OVSC) has the responsibility of ensuring that all motor vehicles and motor vehicle equipment under its jurisdiction are in full compliance with all Federal laws, standards and regulations pertinent to vehicle safety, and consumer information. To carry out this responsibility this office annually conducts an extensive compliance test program of the agency's various vehicle and equipment safety standards and regulations. In this test program compliance engineers randomly select samples of motor vehicles and equipment from the marketplace and test them to the requirements of NHTSA safety standards and consumer information regulations to verify compliance. A cadre of independent automotive test laboratories under contract to NHTSA carries out the actual test program. In the event that a laboratory determines that there may be a non-compliance or test failure it is thoroughly documented in a test report that is submitted to NHTSA. This action triggers an internal investigation by NHTSA compliance engineers that may ultimately lead to an owner notification and remedy campaign (e.g., product recall) and a civil penalty.

During this investigative phase NHTSA engineers work closely with the manufacturer, to identify and resolve the failure issue. Typically, this procedure will lead to corrective action in the form of a redesigned vehicle component or equipment item or an improvement in the manufacturer's quality control process. Generally manufacturers cooperate fully with the Agency during investigations and institute changes when it becomes clear that a modification in the vehicle or equipment design or production procedures is required in order to return to full compliance. It is in the best interests of manufacturers to maintain a strong quality control program in the design and production of their products to avoid the severe financial and marketplace consequences of a determination of non-compliance by the Federal government. Federal law allows NHTSA to levy civil fines for non-compliance with its regulations of up \$6,000 per occurrence with a maximum of \$16,375.000 for a related series of violations.

Test Procedures Development and Compliance Testing

The agency's Federal Motor Vehicle Safety Standards and regulations specify the minimum performance requirements and, in very general terms, the objective tests required to demonstrate product compliance. From these general regulatory requirements, the agency develops and publishes detailed Laboratory Test Procedures for each of its standards and

regulations. These Test Procedures provide step-by-step instructions on how the compliance test is to be conducted as well as specifying the types of laboratory test apparatus to be used, testing tolerances, equipment calibration requirements, check sheets, and reporting requirements. The test procedure documents serve a dual purpose. First, they provide detailed instructions to the contract test laboratories for conducting compliance testing. This is essential for maintaining the quality, objectivity, and integrity of the self-certification process. Secondly, these documented test procedures provide manufacturers with a thorough guidelines for ensuring that their products meet not only the Federal minimum performance standards but also for establishing their own product quality surveillance program by testing more stringently than required by government regulations. This ensures that there is an adequate margin of safety in all of their products.

Prior to the initiation of a compliance test on a specific vehicle or item of equipment, a contract laboratory must prepare and submit to NHTSA its own internal test procedure document for approval. The internal procedure must include a step-by-step description of the methodology that the laboratory will use. The contractor's test procedure must provide a complete listing of test equipment with make and model number and a detailed check-off sheet. The list of test equipment must also include instrument accuracy and calibration dates. All equipment must be calibrated in accordance with the manufacturer's instructions. There must be no contradictions between the agency's Laboratory Test Procedure document and the contractor's in-house test procedure.

Selecting Independent Contract Test Laboratories

NHTSA does not own or operate the testing facilities required to conduct its compliance tests. Instead, testing is contracted out to 21 independent testing laboratories located throughout the country (Arizona, California, Georgia, Michigan, Nevada, New Jersey, New York, Ohio, Tennessee, Texas, Virginia and Wisconsin). Proposals for conducting compliance testing to specific safety standards and regulations are solicited on a competitive basis from those organizations with the requisite technical expertise and capability in the vehicle or equipment-testing field. The proposals are evaluated in accordance with normal federal procurement procedures and a laboratory selection made on the basis of the proposer's capability to conduct all phases of compliance tests as outlined in the particular Federal Motor Vehicle Safety Standard as well as the quoted price per test.

The initial step in developing the annual compliance test program is to survey the makes, models, styles and types of vehicles and items of equipment that are available in the marketplace. Following this general information gathering process, specific vehicle and equipment selection matrices are developed which include new entries into the marketplace, new designs, past failures, consumer complaints, etc. Since it is not possible to test all vehicle makes and models or vehicle equipment, an effort is made to select new entries and high volume items. Vehicles are purchased directly from new vehicle dealerships with the equipment options that are specified by NHTSA safety compliance engineers. Separate equipment items are selected at random from manufacturing plants, distribution centers or retail stores. This approach is used by NHTSA to ensure that the test specimens selected are a true representation of the products that could be purchased by the consumer.

Test Tolerance and Accuracy

The conduct of compliance tests is materially different from research and development testing. In compliance testing, it is essential that the test be conducted within the precise conditions specified in the safety standard or regulation. Since the consequence of a test failure can lead to a costly owner notification and remedy campaign (recall) along with a severe civil penalty for the manufacturer, NHTSA must be certain that the test result can withstand thorough technical scrutiny. Consequently, NHTSA exerts great effort to ensure that its compliance test data are fair, accurate, and completely objective. As a general approach, test condition tolerances are set on the conservative side, and the width of the tolerance band in any compliance test is established based on the accuracy of test equipment utilized.

NHTSA safety compliance engineers conduct regular inspections of contract testing laboratories to make certain that the correct procedures are being followed and that test results are of the highest accuracy. This includes verifying that required instrumentation is in place, functional, and the calibration data is within specification and up to date, and that correct test protocols are implemented. This program helps to ensure that the laboratory's in-house testing procedures and equipment are fully capable of evaluating compliance with NHTSA safety standards and regulations.

Preliminary Evaluations and Compliance Investigations

The failure of a compliance test specimen may indicate a potential design or production problem. Test failures of this nature trigger a comprehensive technical investigation by NHTSA compliance engineers. One of the first actions taken is to notify the manufacturer of the test failure results. This permits the manufacturer to immediately take action to check the adequacy of the vehicles or items of motor vehicle equipment involved. The manufacturer then has the option of attending a technical review meeting at the test laboratory with a NHTSA compliance engineer. During this meeting, the manufacturer's technical representatives are afforded the opportunity to review the test procedure, test instrument calibration, detailed test results, examine the failed vehicle or equipment item, and question the laboratory personnel. This is followed by the initiation of a Preliminary Evaluation (PE) file. A PE letter is sent to the manufacturer requesting test data upon which the original certification was based along with inspection and other quality control information. A NHTSA compliance engineer conducts a detailed review and analysis of this information. After completion of this analysis, a technical meeting is held with the manufacturer's representatives to discuss any unresolved issues and any planned owner notification and remedy action to be taken by the manufacturer. Following this meeting, NHTSA makes a determination as to whether there is sufficient evidence of a regulatory non-compliance to proceed to the next level – an official Compliance Investigation (CI). A CI letter may be sent to the manufacturer requesting additional information. A retest also may be conducted using an identical vehicle or item(s) of motor vehicle equipment.

After all information is collected, NHTSA compliance engineers conduct an intensive analysis of the data with particular interest paid to the tests conducted by the manufacturer for the original certification and in-process quality control. In addition, the certification test procedures and equipment used by the manufacturer are reviewed. Any differences between the manufacturer's certification test results and the NHTSA compliance test results are analyzed and an attempt is made to ascertain the reasons for such differences.

Based on all of the information available, NHTSA's Director of the Office of Vehicle Safety Compliance makes a decision to either close the PE file or CI file if a noncompliance is not indicated or to proceed with the investigation. A letter is sent to the manufacturer notifying him that the agency is proceeding with the investigation and that the initiation of a recall campaign by the manufacturer is warranted. If there is no recall campaign announced by the manufacturer, then an initial determination of noncompliance is made by the Associate Administrator for Safety Assurance and the case is referred to the Chief Counsel's office for appropriate legal action.

Once the case is forwarded to the Chief Counsel's office, the processing procedure is more formal. In accordance with Public Law 89-563, the complete process requires that after the initial decision of noncompliance is made by the Associate Administrator for Safety Assurance, a public hearing is held to afford the manufacturer or any other interested party an opportunity to present their views and then a final determination of noncompliance may be made by the NHTSA Administrator.

Summary

A self-certification program exists in the United States. The NHTSA does not certify that vehicles or items of motor vehicle equipment meet the requirements of various Federal Motor Vehicle Safety standards and consumer regulations or issue approval stickers, labels, certificates, etc. Each year NHTSA randomly selects vehicles and items of motor vehicle equipment for compliance testing by approximately 21 independent contract testing laboratories to verify that the manufacturer's certification is valid. The NHTSA compliance-testing program is a strong incentive for manufacturers of vehicles and/or items of motor vehicle equipment to institute and maintain a strong quality control/product surveillance program.