

February 8, 2019

Ms. Heidi King  
Deputy Administrator  
National Highway Traffic Safety Administration  
1200 New Jersey Avenue, SE  
Washington, D.C. 20590

## **PETITION FOR RECONSIDERATION**

### **Final Rule: Temporary Exemption from Motor Vehicle Safety and Bumper Standards Docket No.: NHTSA-2018-0103 83 Federal Register 66158 (December 26, 2018)**

This is a petition for reconsideration of the Final Rule promulgated by the National Highway Traffic Safety Administration (NHTSA, or Agency) amending the Agency's regulation on temporary exemptions from the Federal Motor Vehicle Safety Standards (FMVSS) and bumper standards.<sup>1</sup> This petition is filed by Advocates for Highway and Auto Safety (Advocates), Center for Auto Safety, Consumer Reports, Consumer Federation of America and Ms. Joan Claybrook (Petitioners) pursuant to 49 C.F.R. 553.35. All of the Petitioners work to protect consumers and reduce deaths and injuries on our Nation's highways, which includes reviewing and commenting on petitions for exemption filed with NHTSA.

Petitioners delineate below the numerous reasons why the Final Rule is not only against the public interest, but also either contravenes NHTSA's notice-and-comment obligations under the Administrative Procedure Act, or is in violation of the Agency's Direct Final Rulemaking procedures. In sum, the Final Rule hinders the public's ability to thoroughly review issues of great importance to safety, and imperils road users by allowing incomplete applications to move forward for exemptions from critical federal safety standards.

### **Regulatory History**

On December 26, 2018, NHTSA published a Final Rule in the Federal Register amending the regulation on temporary exemptions from the FMVSS and bumper standards to eliminate the requirement that the Agency determine a petition is complete before publishing a notice and seeking public comment about a request for exemption.<sup>2</sup> NHTSA did not issue a Notice of Proposed Rulemaking to seek public comments on this Agency action.<sup>3</sup> Therefore, either NHTSA violated the Administrative Procedure Act requirements for notice and comment, or the agency intended for this rulemaking to be considered a Direct Final Rule (DFR) as defined by

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<sup>1</sup> 83 F.R. 66158 (Dec. 26, 2018).

<sup>2</sup> 83 F.R. 66158.

<sup>3</sup> *Id.*

NHTSA and as conceived of by the Administrative Conference of the United States, but failed to identify it as such and to follow its own procedures on the matter.<sup>4</sup>

### **The Final Rule Contravenes the Agency's Direct Final Rulemaking Procedures**

In 2015, NHTSA established procedures for issuing Direct Final Rules (DFR).<sup>5</sup> The Agency explicitly stated: "...NHTSA will not use DFR procedures for amendments involving complex or controversial issues."<sup>6</sup> The subjects at issue in this Final Rule are both controversial and complex. Direct Final Rules may not be issued when they are likely to result in "adverse public comment."<sup>7</sup>

While no formal notice and comment period was provided, as evidenced by the filing of this petition, this drastic change in Agency procedure is controversial among the undersigned groups that represent public health and consumer safety interests, and thus would surely have resulted in comments critical of the provisions in the rule. Such criticism is defined, by regulation, as "adverse."<sup>8</sup>

Accordingly, based on NHTSA's own standard as announced in the Direct Final Rule procedures, the agency must proceed with a notice and comment period:

*"[T]he agency would be required by the procedures to respond to its receipt of any adverse comment or notice of intent to submit adverse comment by withdrawing the controversial provisions of the DFR [Direct Final Rule] and, if the agency chose to move forward with the action, proceed with a new notice of proposed rulemaking, with its attendant notice and comment period."<sup>9</sup>*

As such, since the Agency is in receipt of this petition, it should withdraw the Final Rule. If it chooses to proceed with this revision to its procedures, it must issue a Notice of Proposed Rulemaking with a public notice and comment period.

### **The Final Rule Issued by NHTSA is Not in the Public Interest**

The Final Rule deprives the public of the opportunity to thoroughly review issues of great importance to safety<sup>10</sup> and significantly imperils road users by permitting the agency to publish incomplete applications for exemptions from critical federal safety standards that have saved countless lives. As NHTSA notes in the Final Rule, the Agency is required by statute to

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<sup>4</sup> ACUS Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemaking*, 60 Fed. Reg. 43,110 (1995).

<sup>5</sup> 80 F.R. 36487 (Jun. 25, 2015).

<sup>6</sup> *Id.*

<sup>7</sup> 49 CFR 553.14(a)(4).

<sup>8</sup> 49 CFR 553.14(e).

<sup>9</sup> *Id.* at 36489.

<sup>10</sup> Lives Saved by Vehicle Safety Technologies and Associated Federal Motor Vehicle Safety Standards, 1960 to 2012: Passenger Cars and LTVs, NHTSA, Jan. 2015, DOT HS 812 069.

comprehensively evaluate applications for exemption.<sup>11</sup> The public should have the same opportunity. Without having the ability to evaluate the complete application, the public cannot provide meaningful input. Public comments often aid the Agency in making one of the statutorily required findings when evaluating an application for exemption. In fact, NHTSA has cited the comments received by Petitioners in previous rulemakings.<sup>12</sup>

Further, the Agency states that the Final Rule “does not impose any additional requirements on exemption applicants or the public.”<sup>13</sup> Petitioners strongly disagree, as this regulatory change would certainly impose additional burdens on the public, as they would be required to conduct significant independent research and investigation to obtain missing information not contained in an incomplete petition, in order to fully evaluate the application and its implications on safety. In addition, as applications become more complex with the advent of autonomous vehicles and the technologies leading to them, it is even more important that the public have the opportunity to review and comment on the entirety of an application. Finally, NHTSA has put forth no data or evidence in the Final Rule that the current requirement of waiting until the application is complete before publishing it in the Federal Register has caused undue delay or hardship on any applicant, the Agency, or the public.

## Conclusion

Petitioners request a stay of the effective date of the Final Rule until the Administrator can render a decision on this petition for reconsideration. The Final Rule is not in the public interest because it deprives the public of the opportunity to fully evaluate and provide meaningful input to NHTSA on applications for exemption from critical federal safety standards. Moreover, the Final Rule contravenes the Agency’s Direct Final Rulemaking procedures established in 2015. Pursuant to those procedures, if the agency wishes to pursue this issue, it must proceed with a new Notice of Proposed Rulemaking, with its attendant notice and comment period.

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<sup>11</sup> 83 F.R. 66158.

<sup>12</sup> *See, e.g.*, 77 F.R. 71163 (Nov. 29, 2012); 74 F.R. 22348 (May 12, 2009).

<sup>13</sup> 83 F.R. 66160.