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January 31, 1997

TO : Honorable Dirk Kempthorne
Attention: Gary Smith

FROM : American Law Division

SUBJECT : Whether the Administrator of the National Highway Transportation Safety Board Has the Authority to Amend, Alter, Change or Otherwise Supplement the Test Procedures for Automatic Restraints Set Out in Paragraph S10(b)(1) of Federal Motor Vehicle Safety Standard 208 (49 C.F.R. § 571.208, ¶ S10(b)(1))

You are concerned that the current testing of vehicle airbags has led to a standard for airbag deployment which may in some situations actually imperil vehicle occupants, and would, therefore, like for the Administrator of the National Highway Transportation Safety Administration (NHTSA) to order tests to determine whether and to what extent airbag deployment pressure might be reduced. The Administrator has informed you that it is his belief that he is prohibited from doing so. Accordingly, you have asked that we review a memorandum prepared by the law firm, Mayer, Brown & Platt, which concludes that the Administrator does have the authority to amend the vehicle safety standard which sets forth the test dummy positioning procedures for crash-testing motor vehicles (Federal Motor Vehicle Safety Standard (FMVSS) 208 ¶ S10(b)(1), Occupant crash protection, 49 C.F.R. § 571.208 ¶ S10(b)(1)). For the reasons discussed below, we conclude that there is ample evidence to support that conclusion; and further, that there may not be any need to amend the language of the referenced paragraph.

Background

In 1966, Congress determined that it was necessary to "establish motor vehicle safety standards" in order to protect the public against "unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles [or the] *unreasonable risk of death or injury to persons in the*

event accidents do occur."¹ The same Act required the Secretary of Transportation

to establish by order *appropriate* Federal motor vehicle safety standards.²

and further authorized the Secretary

by order [to] amend or revoke any Federal motor vehicle safety standard established under this section . . . [taking into consideration] relevant available motor vehicle safety data, including the results of research, development, testing and evaluation activities conducted pursuant to this Act.³

In response, the Secretary, through the Administrator of NHTSA,⁴ promulgated Part 571 of 49 C.F.R., "Federal Motor Vehicle Safety Standards,"⁵ which include FMVSS 208, Occupant crash protection.⁶ The stated purpose for promulgating the Standard was "to reduce the number of deaths of vehicle occupants, and the severity of injuries ..."⁷

In the "National Highway Traffic Safety Administration Authorization Act of 1991,"⁸ Congress directed the Secretary of Transportation

¹ Preamble to and § 102(1) of the "National Traffic and Motor Vehicle Safety Act of 1966," (emphasis added). P.L. 89-563, now codified at 49 U.S.C. § 30101, which has condensed the language in the original statute to read: y"to reduce traffic accidents and deaths and injuries resulting from traffic accidents."

² P.L. 89-563, § 103(a), originally codified at 15 U.S.C. § 1392(a), recodified at 49 U.S.C. § 30111(a) to direct the Secretary of Transportation to "prescribe motor vehicle safety standards [that are] practicable, meet the need for motor vehicle safety" (Emphasis added).

³ P.L. 89-563, §§ 103(e),(f)(1), originally codified at 15 U.S.C. § 1392(e), recodified at 49 U.S.C. § 30111(d); in addition, 49 U.S.C. § 30111(e) directs the Secretary to "establish and periodically review and update on a continuing basis a 5-year plan for testing motor vehicle safety standards prescribed under this chapter that the Secretary considers capable of being tested." On June 6, 1967, President Lyndon Johnson issued Executive Order No. 11357 to order that the provisions of the "National Motor Vehicle Safety Act" be carried out through the National Highway Safety Bureau and its Director."

⁴ 49 C.F.R. § 1.50 delegates to the Administrator, National Highway Traffic Safety Administration the authority to "carry out the National Traffic and Motor Vehicle Safety Act of 1966, as amended."

⁵ 49 C.F.R. § 571.1.

⁶ 49 C.F.R. § 571.208.

⁷ 49 C.F.R. §571.208 ¶ S2.

⁸ Title II, Part B of the "Intermodal Surface Transportation Efficiency Act" (ISTEA), P.L. 102-240.

to promulgate, *in accordance with the National Traffic and Motor Vehicle Safety Act of 1966* ... an amendment to [FMVSS] 208 to provide that the automatic crash protection system for the front outboard designated positions of [certain described vehicles] ... shall be an inflatable restraint [*i.e.*, an airbag]⁹

The same section states that it "revises, but does not replace [FMVSS] 208," merely extending the "automatic crash protection" requirement to "trucks, buses, and multipurpose vehicles."¹⁰

FMVSS 208 ¶ S10(b)(1), which sets forth the way in which "automatic restraints" are to be tested, states that

In a vehicle equipped with an automatic restraint at each front outbound seating position ...each test dummy is not restrained during one frontal test ... *by any means that require occupant action*. If the vehicle has a manual seat belt provided by the manufacturer ... then a second frontal test is conducted ... and each test dummy is restrained both by the automatic restraint system and the manual seat belt

Discussion

As the Mayer, Brown memorandum correctly states, "[g]eneral principles of administrative law recognize that administrative agencies 'must be given ample latitude to adapt their rules and policies to the demands of changing circumstances,' as long as the changed policy is accompanied by a 'reasoned analysis for the change.'"¹¹ Only in the case of a mandate in which Congress has specified some or all of the specifics to be included in an Agency's promulgations would an Agency be precluded from altering or amending those specifics; the statute which first required that motor vehicle safety standards be enacted contained only the directive to the Secretary of Transportation that he promulgate "appropriate Federal motor vehicle safety standards," and further gave the Secretary the authority to "by order amend or revoke any Federal motor vehicle safety standard established under this section." Accordingly, it would appear that the Administrator of NHTSA not only has the authority to amend his own agency's safety standards, but may be expected to do so whenever he is in possession of "relevant available motor vehicle safety data."

That the provision which requires airbags does not envision that "automatic crash protection" is to be construed as "protection afforded in the absence of a seat belt" is illustrated by the further requirement that

⁹ Section 2508 of P.L. 102-240, codified at 49 U.S.C. § 30127(b).

¹⁰ 49 U.S.C. § 30127(d).

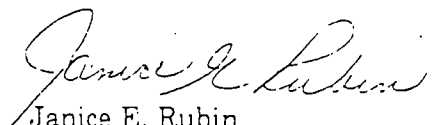
¹¹ Memorandum at 4, citing *Motor Vehicle Manufacturers' Ass'n. v. State Farm*, 463 U.S. 29, 42 (1983).

the owner manuals for passenger cars and trucks, buses, and multipurpose vehicles equipped with an inflatable restraint include a statement in an easily understandable format that

- (1) either or both of the front outboard seating positions ... are equipped with an inflatable restraint referred to as an 'airbag' *and* a lap and shoulder belt;
- (2) the airbag is a *supplemental* restraint;
- (3) lap and shoulder belts *also* must be used correctly, ... to provide restraint or protection¹²

The only statutory reference to "automatic" that our research has uncovered appears in the Conference Report that accompanied ISTEA: "the Senate notes that the current regulations of the Department of Transportation ... require that passenger cars be equipped with 'passive restraints,' which include either airbags or automatic seatbelts that do not require actions by the occupant in order to be engaged"(HOUSE CONF. REP. NO. 102-404 at 400). In other words, it appears that the statute which requires the installation of airbags as automatic, or passive, restraints neither envisions nor requires (because airbags are considered as "supplemental" restraints to be used in conjunction with seat belts) that they must be tested in unbelted conditions.

Finally, we note the improbability, given the language set out above to emphasize that airbags are to be considered only as a "supplemental" restraint, that FMVSS 208 ¶ S10(b)(1) requires that crash tests to evaluate airbag deployment pressure be conducted on completely unbelted test dummies in order to determine the pressure at which protection from frontal impact crashes would be available.


Janice E. Rubin
Legislative Attorney

¹² 49 U.S.C. § 30127(c) (emphasis added). The wording in the original statute was: "[the airbag] does not substitute for lap and shoulder belts ..."; the P.L. 103-272, which recodified Title 49 in order to consolidate various transportation statutes residing in disparate locations in the U.S. Code, and to eliminate excess or unnecessary verbiage, was not intended to substantively amend any of them (see, § 1(a) of P.L. 103-272).



Congressional Research Service • The Library of Congress • Washington, D.C. 20540-7410

April 8, 1997

TO : Honorable Dirk Kempthorne
Attention: Gary Smith

FROM : American Law Division

SUBJECT : Review of January 31, 1997 Memorandum Concerning
Authority of the National Highway Transportation Safety
Administration to Alter or Amend Certain of Its Crash-Test
Procedures; Comment on Draft Language to Mandate Such
Revision

You have asked that we review our January 31, 1997 memorandum to you, "Whether the Administrator of the National Highway Transportation Safety Administration Has the Authority to Amend, Alter, Change or Otherwise Supplement the Test Procedures for Automatic Restraints Set Out in Paragraph S10(b)(1) of Federal Motor Vehicle Safety Standard 208 (49 C.F.R. §571.208, ¶S10(b)(1))," in light of a subsequent letter sent to Senator Kempthorne from the Administrator of the National Highway Safety Transportation Administration (NHTSA), together with its attached Memorandum of Law, prepared by NHTSA's Acting General Counsel. In addition, you have asked that we comment on your draft legislation directed at requiring NHTSA to issue the revised crash-test standards (elimination of unbelted testing of automatic restraint systems, or "airbags") that the agency currently believes it has no authority to issue.

The February 27, 1997 NHTSA Memorandum of Law references our memorandum to Senator Kempthorne, summarizes the points articulated there (as well as those contained in an opinion prepared by the law firm of Mayer, Brown & Platt), and states that "[t]hese arguments do not cause us to change our analysis." Upon reflection, and rereading of our January 31, 1997 memorandum in light of the arguments put forth in the NHTSA Memorandum of Law, the American Law Division of the Congressional Research Service does not find sufficient basis to revise the conclusion reached in that document, that "it appears that the statute which requires the installation of airbags as automatic, or passive, restraints neither envisions nor requires (because airbags are considered as 'supplemental' restraints to be used in conjunction with seatbelts) that they must be tested in unbelted conditions."

Because you have been unsuccessful in persuading NHTSA that it already possesses the authority you would like to see exercised, you are contemplating

legislation to eliminate any discretion for NHTSA to maintain crash-test standards that require tests of automatic restraint systems to be conducted on unbelted vehicle occupants. Accordingly, the proposed legislation would, first, deem automobile manufacturers or distributors

to be in compliance with applicable performance standards for occupant crash protection if the motor vehicle meets the applicable requirements for testing with the simultaneous use of both an automatic restraint system [e.g., airbag] and a manual seat belt.

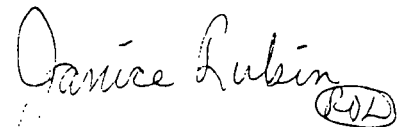
The proposed legislation then clearly states that

In no case shall a manufacturer or distributor use, for the purpose of ... certification ..., a test that provides for the use of an automatic restraint system without the use of a manual seat belt.

The final provision requires that the Secretary of Transportation (whose duties under the National Motor Vehicle Safety Act of 1966 were delegated to the Administrator, NHTSA by 49 C.F.R. §1.50)

shall issue such revised standards under section 30111 of title 49, United States Code [which section directs that the Secretary of Transportation 'shall prescribe motor vehicle standards'] as are necessary to conform with the requirement [set out above].

It would, thus, appear that the language of your proposed legislation is sufficiently clear and unambiguous as to achieve the desired result you have indicated to us, that the Administrator, NHTSA revise current crash-test standards so as to eliminate the requirement that automatic restraint systems be tested on unbelted vehicle occupants.


Janice E. Rubin
Legislative Attorney

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M E M O R A N D U M

January 22, 1997

TO: Phillip D. Brady

FROM: Erika Z. Jones

RE: NHTSA's Authority to Repeal or Suspend the Unbelted Test
in FMVSS 208

You asked for a legal analysis of the question of whether NHTSA could lawfully repeal or suspend the current requirement in Federal Motor Vehicle Safety Standard 208 requiring manufacturers to certify compliance in both the belted and unbelted conditions. We conclude that there are no legal constraints on NHTSA's authority to do so.

BACKGROUND

FMVSS 208 (49 C.F.R. Section 571.208) specifies performance standards for occupant protection in crashes. Among its requirements, FMVSS 208 currently requires manufacturers to certify compliance with the performance standards in two conditions: first, with the crash test dummy belted with the manual three-point safety belt, and second, with the dummy unbelted. See S10(b)(1) of FMVSS 208.

In 1991, Congress enacted the Intermodal Surface Transportation Efficiency Act (ISTEA) (Pub.L. 102-240). Part B of the ISTEA, cited as the National Highway Traffic Safety Administration Authorization Act of 1991, included Section 2508 which mandated that the Secretary of Transportation shall amend FMVSS 208 to provide that "the automatic occupant crash protection system" of each new passenger car and light truck "shall be an inflatable restraint complying with the occupant protection requirements under section 4.1.2.1" of FMVSS 208. The

section continued that it "supplements and revises, but does not replace, Federal Motor Vehicle Safety Standard 208, including the amendment to such Standard 208 of March 26, 1991 [citation omitted] extending the requirements for automatic crash protection ... to trucks, buses and multipurpose passenger vehicles."

In 1994, Congress enacted Public Law 103-272 on July 5, 1994. Section 1 of that Act explained that general and permanent "laws related to transportation ... are revised, codified, and enacted ... without substantive change." Thus, the codification Act transferred the provisions of the former National Traffic and Motor Vehicle Safety Act from Title 15 to Title 49. In the process of the codification, most provisions of the Act were restated, with some omitted as unnecessary or amended for clarity, although none of the omissions or amendments was intended to introduce substantive change.

The air bag mandate in the ISTEA found itself codified at 49 U.S.C. § 30127, "Automatic Occupant Crash Protection and Seat Belt Use." The codified language reads as follows:

"(b) Inflatable restraint requirements.--(1) ... The amendment shall require that the automatic occupant crash protection system for both of the front outboard seating positions for [passenger cars and light trucks] be an inflatable restraint (with lap and shoulder belts) complying with the occupant protection requirements under section 4.1.2.1 of Standard 208."

The codification also retains most of the statement of intent that originally appeared as part of the air bag mandate. The original statement of intent asserted that "[t]his section supplements and revises, but does not replace, Federal Motor Vehicle Safety Standard 208 ...". In the codification, however, the new placement of this provision is in § 30127(f), now stating that "[t]his section revises, but does not replace, Standard 208 as in effect on December 18, 1991, ...". The reference to "supplement[ing]" FMVSS 208 was omitted in the codification, apparently due to a view that it was unnecessary.

In addition, the codification did not substantively change the ISTEA provisions that instructed NHTSA to amend FMVSS 208 to require that each owners' manual explain that "the 'air bag' is a supplemental restraint and is not a substitute for lap and shoulder belts" and that "occupants should always wear their lap and shoulder belts, if available, or other safety belts, whether or not there is an inflatable restraint." §30127(c)(2) and (4).

* * *

The evidence suggests that the requirement for FMVSS 208 certification in the unbelted condition is dictating air bag inflation output that is greater than would be necessary if the unbelted certification test were eliminated or suspended. NHTSA has recently acknowledged that the substantial inflation output of current air bags designs can pose risks to some front seat occupants, particularly children and small statured adults. For example, NHTSA's recent rulemaking notices extending the air bag cutoff switch option in certain vehicles, proposing to permit depowering of air bags and proposing to authorize disconnection of air bags by dealers all contain substantial discussions of the "adverse effects of current air bag designs." See 62 Fed. Reg. 798 - 844 (January 6, 1997).

In its original incarnation, FMVSS 208 was intended primarily to protect unbelted adult occupants, because safety belt use was very low. In 1984, when FMVSS 208 was reinstated, NHTSA observed that driver safety belt use in the front seat was approximately 14% nationwide. Today, however, adult safety belt use in the front seat is estimated to be close to 70%, due in large measure to the success of state safety belt usage laws, all of which were enacted within the last thirteen years. Today, all states but one require safety belt usage by vehicle occupants, and these requirements, coupled with seat belt usage education efforts, have been successful in raising safety belt usage to levels far in excess of those contemplated in 1984.

Of at least equal significance, there is no sign that Congress considered any evidence of the risks to children and small adult front seat occupants from air bags designed to meet the requirements of FMVSS 208 when the ISTEA was enacted in 1991.

* * *

NHTSA has now concluded that the ISTEA air bag mandate, as codified in Title 49, requires the agency to retain the unbelted compliance test because its repeal would eviscerate the requirement for "automatic occupant crash protection system[s]." In a letter dated January 13, 1997 to Senator Dirk Kempthorne, NHTSA Administrator Martinez explained the agency's reasoning as follows:

"If the unbelted test were eliminated from FMVSS No. 208, such that vehicles only had to satisfy the performance requirements of the standard with the manual belts attached, there would be no way to ensure that the air bags would in fact provide "automatic" protection to front seat occupants."

NHTSA thus advised Senator Kempthorne that it "lack[s] legal authority to eliminate the unbelted test".

For reasons discussed in more detail below, we do not concur that NHTSA is so constrained in its authority to interpret the statute and the standard. In particular, NHTSA retains authority to interpret the statute and the standard in a manner that achieves the safety objectives of FMVSS 208 and the ISTEA mandate for an automatic crash protection system -- which is an air bag as a supplemental restraint.

ANALYSIS

General principles of administrative law recognize that regulatory agencies "must be given ample latitude to adapt their rules and policies to the demands of changing circumstances," as long as the changed policy is accompanied by a "reasoned analysis for the change." *Motor Vehicle Manufacturers' Ass'n. v. State Farm*, 463 U.S. 29, 42 (1983) (internal quotations and citations omitted). Therefore, unless there is an explicit or implicit restriction in the Vehicle Safety Act^{1/}, as amended by ISTEA, precluding NHTSA from responding to the newly acknowledged information about safety risks posed by current air bag designs, NHTSA retains "ample latitude" to amend FMVSS 208 to remove the unbelted test.

1. The Vehicle Safety Act Does Not Explicitly Preclude NHTSA From Repealing or Suspending the Unbelted Test

Nothing in 49 U.S.C. § 30127 or in § 2508 of ISTEA explicitly precludes NHTSA from repealing or suspending the unbelted certification test in FMVSS 208.

First, nothing in ISTEA § 2508 amends, restricts or otherwise affects NHTSA's plenary authority to amend safety standards, authority which is incorporated in the general rulemaking authority to "prescribe" motor vehicle safety standards in 49 U.S.C. Section 30111(a).^{2/} In fact, the ISTEA

^{1/} The codification of NHTSA's rulemaking and enforcement authority is now contained in Chapter 301 of Title 49 of the United States Code. Although the National Traffic and Motor Vehicle Safety Act was technically repealed by the codification, this memorandum will refer for convenience to the provisions of Chapter 301 as the "Vehicle Safety Act."

^{2/} While the original Vehicle Safety Act contained explicit authority to "amend or revoke" any Federal Motor Vehicle Safety Standard (former 15 U.S.C. § 1392(e)), the codification deleted that explicit reference in favor of the more generic authority to "prescribe" motor vehicle safety standards. The Report of the House Committee on the

(continued...)

language carefully states that the amendment "supplements and revises, but does not replace" FMVSS 208. And, as discussed above, administrative law principles recognize the authority agencies have to amend their rules to reflect changed circumstances. Absent an explicit Congressional direction limiting that plenary authority in the case of FMVSS 208, NHTSA retains its general authority to amend its safety standards.

Second, when Congress wishes to "freeze" a regulation in place, it knows how to do so. For example, Section 216(7) of the Clean Air Act (42 U.S.C. § 7550(7)) "froze" the then-existing EPA definitions for certain terms for purposes of the emission standards established by that Act, in the following way:

The terms "vehicle curb weight," "gross vehicle weight rating" (GVWR), "light-duty truck" (LDT), "light-duty vehicle," and "loaded vehicle weight" (LVW) have the meaning provided in regulations promulgated by the Administrator and in effect as of November 15, 1990. The abbreviations in parentheses corresponding to any term referred to in this paragraph shall have the same meaning as the corresponding term. 42 U.S.C. § 7550(7).

Since no such explicit restriction "freezing" the 1991 edition of FMVSS 208 in general, or S4.1.2.1 in particular, was incorporated into the ISTEA amendments, NHTSA is not precluded by statute from amending FMVSS 208, or interpreting it in such a way as to repeal or suspend the unbelted compliance test.

Although some may argue that the language in the codified Vehicle Safety Act referring to a revision to FMVSS 208 "as in effect on December 18, 1991" is tantamount to a "freezing" of the requirements of FMVSS 208 as stated on that date, such an argument cannot survive. First, the quoted language did not appear in the ISTEA itself. Since the codification expressly stated that it was not intended to introduce any substantive change, the inclusion of the December 18, 1991 effective date in the codification (but not the original enactment of ISTEA) cannot have any substantive meaning, and surely cannot convey an intent by Congress in 1991 or 1994 to "freeze" FMVSS 208 in the context of the December 18, 1991 provisions. Second, the quoted language does not appear in the substantive requirements for air bag installation, which appear in subsection (b) of Section 30127. Rather, the quoted reference to the December 18, 1991 version of

2/(...continued)

Judiciary accompanying the codification explained that "[t]he words 'amend or revoke' in [former section 1392(e)] are omitted because they are included in [the term] 'prescribe.'" H.R.Rept. 103-180 at 156, 103d Cong., 1st Sess., 1993.

FMVSS 208 appears in subsection (f) of that section, which states that the air bag mandate "revises, but does not replace, Standard 208 as in effect on December 18, 1991." In that context, the citation to the December 18, 1991 version of Standard 208 is nothing more than a reference point, rather than a legislative desire to "freeze" the requirements. Finally, NHTSA has already compromised any theory that the December 1991 provisions of FMVSS 208 are legally "frozen"; for example, NHTSA has already amended FMVSS 208 to allow air bag cutoff switches which clearly affect the "automatic" nature of the protection afforded by the air bag.

The ISTEA, as codified in Title 49, thus does not explicitly limit NHTSA's plenary authority to amend Standard 208 to respond to the concerns about air bag inflator output in general, or to repeal the unbelted test in particular.

2. The Vehicle Safety Act Does Not Implicitly Preclude NHTSA From Repealing or Suspending the Unbelted Test

For several reasons, there is no implicit constraint on NHTSA's authority to amend FMVSS 208, including S4.1.2.1 if necessary, to eliminate the requirement for certification with an unbelted test dummy.

First, as noted above, there was no express constraint included in ISTEA or the codified Vehicle Safety Act on NHTSA's authority to amend FMVSS 208 in any respect. As long as the proposed amendment otherwise satisfies the Vehicle Safety Act's criteria for rulemaking (objectivity, practicability, safety necessity), nothing precludes NHTSA from promulgating such an amendment, particularly in light of Congressional intent to consider air bags as supplemental restraints, as well as the more recent acknowledgement by the agency that current air bag designs may pose safety risks for some small front seat occupants.

Second, nothing precludes NHTSA from electing to test compliance with FMVSS 208 with a belted (as opposed to an unbelted) test dummy. In enacting ISTEA, Congress expressed a preference -- indeed, a mandate -- for an occupant protection system that included both an air bag and a "lap/shoulder belt", which NHTSA has interpreted to mean a manual, three-point seat belt. NHTSA has ample authority to revise FMVSS 208 to reflect this Congressional preference to consider the air bag as supplemental occupant protection, and to decide to evaluate compliance in accordance with this Congressional preference, i.e., with air bags in combination with manual three-point seat belts. The literal language of the codified Vehicle Safety Act strongly supports this interpretation, noting that the automatic protection shall "be an inflatable restraint (with lap and shoulder belts)." (Emphasis supplied).

Third, even if NHTSA were not persuaded that it should interpret the ISTEA mandate to authorize (indeed, prefer) testing the air bag as a supplemental restraint in combination with lap/shoulder belts pursuant to the currently prescribed belted test, NHTSA has substantially overstated the concern (as expressed in the letter to Senator Kempthorne) that elimination of the unbelted test would mean that there would be "no way to ensure that the air bags would in fact provide 'automatic' protection to front seat occupants. If NHTSA wished to assure that the air bag was providing some additional "protection" over and above the lap/shoulder belt, then the agency could modify the standard to evaluate *in the belted test* the incremental protection provided "automatically" (i.e., separately) by air bags. There is no legal reason why such a separate evaluation has to be an unbelted test measuring the same four injury criteria currently in force. For example, NHTSA could add to the *belted test* some injury criterion which likely could not be met in a vehicle without an air bag. NHTSA has not taken, and could not take, the position that it is without authority to change the injury criteria by which air bag performance is measured. Indeed, NHTSA is proposing elsewhere to do exactly that -- revise the injury criteria for thorax acceleration -- although that is being proposed for other reasons.

While it is true that NHTSA could not, consistent with the ISTEA mandate, amend FMVSS 208 in such a way as to eviscerate the air bag mandate entirely, an amendment of FMVSS 208 to eliminate the unbelted test would not be such a radical change to the standard. Indeed, there is nothing in ISTEA to suggest that Congress subscribed to the original FMVSS 208 notion that the occupant protection afforded by air bags should necessarily be evaluated without manual safety belts. The Congressional mandate that lap/shoulder belts (interpreted by NHTSA to mean manual three-point safety belts) be provided along with air bags -- a substantial enlargement of the original requirements of FMVSS 208, which would have protected unbelted occupants -- along with the mandate for owner's manual revisions regarding air bags as supplemental restraints, all suggest instead that Congress understood the modern view that air bags are supplemental, not primary, occupant protection and must be used along with manual safety belts for optimal protection. Given that Congress directed this substantial revision to FMVSS 208 as part of the ISTEA amendment, it would be entirely reasonable for NHTSA to conclude that compliance with the new FMVSS 208 requirements should be evaluated with a belted, not an unbelted, test dummy.

3. NHTSA's Own Recent Rulemaking Actions Show That The Agency Retains Substantial Discretion to Amend FMVSS 208, Including With Respect to the Air Bag Mandate

NHTSA has recently adopted an amendment to FMVSS 208 extending the previously authorized cutoff switch to vehicles

manufactured after the effective date of the ISTEA mandate for "automatic" protection. This amendment belies any proffered limitation on NHTSA's authority to change the nature of the "automatic" protection provided under FMVSS 208. Indeed, if NHTSA could not lawfully eliminate the unbelted compliance test, because it would leave unevaluated the Congressional mandate that "automatic" protection be provided by means of "inflatable restraints," then how could NHTSA permit cutoff switches, which permit the "automatic" protection to be eliminated altogether when the switch is activated?

In fact, NHTSA is not constrained by ISTEA or the codified Vehicle Safety Act from adopting an amendment that eliminates the unbelted compliance test, if the rulemaking record justifies doing so. NHTSA's amendment of FMVSS 208 to permit cutoff switches is an implicit acknowledgement of the agency's authority to revise FMVSS 208 to reflect contemporary developments in motor vehicle safety.

NHTSA's recent proposals to amend the test conditions of FMVSS 208 in other respects, such as by raising the thorax injury criterion to 80 G's, from the current level of 60 G's, further reflect the agency's acknowledgement of its plenary authority to revise FMVSS 208 to reflect modern understandings of motor vehicle safety needs.

* * *

Nothing in the ISTEA or the codified Vehicle Safety Act explicitly or implicitly constrains NHTSA's authority to repeal the unbelted compliance test for certification with FMVSS 208.

Although the statute indisputably requires "automatic" protection by means of "inflatable restraints," NHTSA retains full authority to define what the protection criteria will be, and how the protection will be evaluated. Congress did not evidence any intention of constraining NHTSA's authority and responsibility to do so.

MEMORANDUM

February 13, 1997

TO: Charles Lockwood

FROM: Patrick M. Raher 
James C. Chengel 

RE: FMVSS 208 Unbelted Airbag Test

Pursuant to your request we have researched the issue of whether the National Highway Traffic Safety Administration (NHTSA) may amend Federal Motor Vehicle Safety Standard (FMVSS) 208 to repeal or suspend the current requirement for manufacturers to certify compliance with both the belted and unbelted test conditions for occupant crash protection. Based on our research, we have concluded that NHTSA has the legal authority to suspend the unbelted test requirement. Our analysis and the basis for the foregoing conclusion are set forth below. 1/

BACKGROUND

FMVSS 208 sets forth the standard for occupant crash protection. This standard includes requirements for testing of crash protection systems, such as airbags, with both belted and unbelted anthropomorphic crash test dummies. See FMVSS 208, S10(b)(1).

In June 1991, Congress enacted the Intermodal Surface Transportation Efficiency Act, Pub.L. 102-240, (ISTEA). Among the many provisions of this law was a provision entitled the National Highway Traffic Safety Administration Authorization Act of 1991. This Act mandated that the Secretary of Transportation promulgate amendments to FMVSS 208 to require airbags in certain new trucks, buses, multipurpose passenger vehicles (e.g., sport utility vehicles), and all new passenger cars based on a schedule to begin September 1, 1996. The airbags were to comply with S4.1.2.1 of FMVSS 208. The Act, however,

1/ In a January 22, 1997, memorandum from Erika Jones to Phillip Brady, Ms. Jones reaches the same conclusion. Our analysis identifies some of the same arguments but develops the strength of the argument in more detail based on relevant case law and legislative history.

made clear that the provisions requiring airbags were meant to "supplement and revise, but not replace" FMVSS 208. Pub.L. 102-240, section 2508(a). In addition, the Act also required modifications to the owner's manuals of vehicles equipped with airbags. Under the Act, manufacturers had to place information about airbags in the owner's manuals of vehicles equipped with airbag systems including: (1) that the vehicle was equipped with an airbag as well as lap and shoulder seat belts; (2) that the airbag was a supplemental restraint; (3) that the airbag did not substitute for using the lap and shoulder seat belts, which must be used to provide protection to occupants in the event of a crash; and (4) that all occupants should wear seat belts regardless of the presence or absence of an airbag. Pub.L. 102-240, section 2508(a)(2).

In 1994, Congress enacted Public Law 103-272. This law was enacted to "revise, codify, and enact without substantive change certain general and permanent laws, related to transportation . . ." (emphasis added). Part of the revision and codification was the transfer of the National Highway Traffic Safety Administration Authorization Act of 1991 from Title 15 to Title 49 of the U.S. Code. The provisions mandating airbags in certain new vehicles were codified at 49 U.S.C. § 30127(b). The owner's manuals requirement was codified at 49 U.S.C. § 30127(c). The provisions regarding revising, but not replacing FMVSS 208 were codified at 49 U.S.C. § 30127(f).

Over the course of the past year, considerable attention has been focused on airbags and the adverse effects resulting from airbag deployment. Specifically, NHTSA has determined that passenger side airbags have directly caused the death of 32 children and/or infants in relatively low speed collisions. Eighteen of those deaths occurred in 1996. As a result of these deaths and growing concern over the hazards posed by airbags, NHTSA issued a notice of proposed rulemaking on January 6, 1997. 62 Fed. Reg. 798 (1997). In that notice, NHTSA proposed a series of steps to address the concerns raised about airbags and airbag deaths. One of the proposals included depowering airbags by 20%-35%.

On January 9, 1997, the Senate Commerce Committee held hearings on airbags. During the course of that hearing, Senator Dirk Kempthorne proposed an amendment to FMVSS 208 that would not only depower airbags, but also eliminate the unbelted test requirement from the standard. Senator Kempthorne stated that he believed that the need to meet the unbelted test requirement was the source of the excessive power in current airbags. ^{2/} NHTSA Administrator Ricardo

^{2/} In a January 31, 1997, memorandum to Senator Dirk Kempthorne, the American Law Division stated that the airbag provisions of ISTEA do not prohibit NHTSA from amending the vehicle safety standard which sets forth the test dummy positioning procedures for crash testing motor vehicles. In fact, the American Law Division strongly suggests that NHTSA must amend the standard in

Martinez, however, stated that the 1991 ISTEA prevented NHTSA from eliminating the unbelted test contained in FMVSS 208.

NHTSA'S LEGAL ANALYSIS

In a letter from Administrator Martinez to Senator Kempthorne, dated January 13, 1997, NHTSA outlined the legal reasons why the Agency believes that ISTEA prohibits it from eliminating the unbelted test requirement contained in FMVSS 208. According to NHTSA, section 2508(a)(1) of ISTEA directs the Agency to amend FMVSS 208 "to provide that the automatic occupant protection for the front outboard designated seating positions shall be an inflatable restraint complying with the occupant protection requirements under section 4.1.2.1 of such Standard." NHTSA interprets this provision to mean that each vehicle must have an airbag that provides "automatic occupant protection." NHTSA reasons that if the unbelted test were eliminated from FMVSS 208, vehicles would only need to comply with the belted portion of the test. The result would be that NHTSA would have no way of ensuring that airbags would provide "automatic" protection to front seat occupants. As set forth below, NHTSA's interpretation of ISTEA is simplistic and ignores relevant legislative history that demonstrates that the Agency may modify FMVSS 208 to comply with the safety mandate of ISTEA.

ANALYSIS

A. Statutory Interpretation

The Supreme Court has held that when interpreting the provisions of a federal statute, federal agencies and courts must first determine whether Congress has spoken directly to the precise question at issue. "If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron v. Natural Resources Defense Council, Inc., et al., 467 U.S. 837, 842 (1984). In order to determine Congressional intent, courts will first examine the plain language of the statute. If the statute is not clear, courts will look to the legislative history of the statute. Blum v. Stenson, 465 U.S. 886, 896 (1984); see also, National Labor Relations Board v. Bell Aerospace Company, 416 U.S. 267, 274 (1974) (legislative history is important in construing statute); Tidewater Oil Company v. United States, 409 U.S. 151, 157 (1972) (While the clear meaning of statutory language is not to be ignored, it is essential that works of a statute be placed in their proper context by resort to legislative history).

order to take into account the latest safety information regarding airbags and the dangers from airbags to infants and children. (attached).

NHTSA's position is that the phrase "automatic occupant protection" used in the ISTEA mandate is precise and the agency need not go any further in interpreting its authority. The very Congressional purpose behind this provision of ISTEA demonstrates, however, that this language is not so precise as to eliminate the need for a full review of legislative history clearly demonstrating the Agency's ability to revise the unbelted test requirements of FMVSS 208.

The reason for Congressional action in ISTEA regarding FMVSS 208 is clear and precise in one sense. Congress wanted to mandate one technology for FMVSS 208; the airbag. The airbag mandate of ISTEA is clear. Congress definitively stated that airbags must be installed in vehicles on an established schedule. NHTSA, however, confuses the mandate of technology, which is not uncommon in Congressional action, with a mandate for compliance procedures, which is not a common Congressional action. ISTEA does not definitively state that airbags must provide the sole means of occupant protection in the event of a crash, thereby requiring a test or performance procedure to demonstrate that airbag equipped vehicles comply with FMVSS 208 without the use of belts. Accordingly, a concrete question of legislation interpretation exists for NHTSA and eventually for a court. Did Congress intend to mandate airbags only, or did it intend to mandate airbags that would protect in a totally passive manner without any occupant action? This question can only be resolved through a review of the legislation history of ISTEA.

B. Airbag Provisions of ISTEA

NHTSA's sole premise for the conclusion that ISTEA prohibits elimination of the unbelted test is the mandate that NHTSA amend FMVSS 208 "to provide that the automatic occupant protection for the front outboard designated seating positions [of certain vehicles] shall be an inflatable restraint complying with the occupant protection requirements under section 4.1.2.1 of such Standard." The key portion of this statement is the phrase "that the automatic occupant protection . . . shall be an inflatable restraint." NHTSA focuses on the term "automatic" and interprets the requirement for "automatic" protection under the standards of S4.1.2.1 as requiring airbags to provide complete protection for front seat occupants. NHTSA's interpretation of these provisions, however, is inaccurate.

Congress' use of the term "automatic" was not as specific as NHTSA purports. Instead, the term "automatic" was part of the phrase that was intended to describe the type of passive restraint system installed in vehicles. Under FMVSS 208, NHTSA mandates that vehicles have passive restraint systems in place according to a set schedule. Specifically, NHTSA required manufacturers to install restraint systems in their vehicles that did not require any action by a vehicle occupant to engage (i.e., automatic occupant protection). These restraint systems could have been seat belts that engaged once a vehicle occupant entered a vehicle (i.e., automatic belts) or airbags which inflated during an accident. Either method

provided "automatic occupant protection." When Congress enacted ISTEA, it was fully aware of the requirements of FMVSS 208 and the options available to vehicle manufacturers. Congress, however, was not in favor of passive belt systems and wanted to ensure the safety of occupants in the event of an accident through installation of airbags. Congress therefore drafted ISTEA with the provision requiring airbags to be the type of "automatic" or passive restraint system mandated by FMVSS 208, S4. This interpretation is supported by the (1) plain language of ISTEA its (2) legislative history, and (3) two bills that were introduced shortly after enactment of ISTEA.

1. Airbags vs. Automatic Belts

Shortly after enactment of ISTEA, the Senate passed the airbag provisions of ISTEA as part of S.1012, a bill to reauthorize NHTSA, and as S.591, a stand-alone bill. Although the bills were never enacted, the legislative history of both bills provide insight into the Senate's intent regarding the airbag provisions contained in ISTEA since both bills and ISTEA were sponsored by the same group of Senators. In each bill, the Senate explicitly cited the benefits of airbags over alternative forms of passive restraints such as automatic belts.

We know that automatic seat belts are not as effective as airbags in protecting people in front-end crashes. We also know that many automatic seat belts are so poorly designed that they are often disconnected. Airbag equipped cars are unquestionably safer. . . Although either option is available to manufacturers, statistics prove that airbags provide superior protection. So-called automatic seat belts have not substantially increased belt use rates. . . Airbags are enormously effective in saving lives and reducing serious injuries. Unfortunately, the other passive systems are not very effective. The vast majority of motorized and nonmotorized [automatic] seat belts are either disconnected or are being used improperly.

137 Cong. Rec. S2933 (March 7, 1991) (statement of Senator Richard H. Bryan introducing S.591).

The problem with the current rule [regarding installation of passive restraint systems] is that it permits manufacturers to choose between two forms of passive restraints, even though it is beyond dispute that airbags provide the best protection to occupants. . . There also is evidence that some of the automatic seat belts used by manufacturers to comply with DOT's current passive

restraint rule are awkward and not well accepted by the consumer.

S. Rep. No. 70, 102d Cong., 1st Sess. 2 (1991). The foregoing language clearly demonstrates that the "automatic" airbag language in ISTEA was meant to convey that Congress was mandating installation of airbags as the type of automatic protection in vehicles. Congress did not intend to imply any additional meaning to that phrase as NHTSA alleges.

2. Airbags are Supplemental Restraints

In fact, Congress explicitly recognized the opposite to be true -- that airbags were a supplemental restraint system to seat belts. This recognition is supported by the provision in ISTEA which requires NHTSA to amend FMVSS 208 to require owner's manuals for vehicles equipped with airbags to include statements about the supplemental nature of airbags. See ISTEA, section 2508(a)(2). Congress' emphasis on the supplemental nature of airbags is further bolstered by its express finding that all States "adopt and enforce mandatory seat belt use laws and for the Federal Government to adopt and enforce mandatory seat belt use rules." ISTEA section 2508(a)(3). Had Congress' intent been that airbags provide the sole means of occupant crash protection, it would not have placed such emphasis on the supplemental nature of airbags nor the importance of mandatory seat belt use.

The legislative history of ISTEA also supports Congressional intent that airbags act as supplemental restraints. During debate on an amendment to ISTEA, the Senate Commerce Committee explicitly recognized the importance of airbags and seatbelt use.

There now is general agreement that airbags with manual seat belts offer occupants superior protection to any other system . . . (emphasis added).

137 Cong. Rec. S7549 (1991) (testimony of Senator Richard H. Bryan). The House also recognized the supplemental nature of airbags during its consideration of the ISTEA Conference report.

Airbags are not substitute for belt use and the conference substitute makes that clear. I applaud that. Safety belts are needed to hold the occupants in the proper or correct seating position in order for an airbag to be most effective and to provide restraint in the type of accidents where airbags do not work. For example, airbags may not be effective in side and rear impact and rollover accidents. . . I am also quite pleased to see that the conference

substitute recognizes fully that the airbag is only a supplemental device and that it does not suffice for the properly worn lap and shoulder belt. (emphasis added).

137 Cong. Rec. H11667 (1991) (testimony of Representative John Dingell). In addition, this intent was reflected in S.591 and S.1012, which, as stated earlier, were bills sponsored by the same members of the Senate Commerce Committee that sponsored the ISTEA airbag provisions.

Testimony at the Consumer Subcommittee hearing on S.591 demonstrated a consensus among DOT and other auto safety experts such as the Center for Auto Safety, Public Citizen, the Insurance Institute for Highway Safety (IIHS), and the Institute for Injury Reduction that airbags, together with seat belts, provide better protection for the occupant in a frontal or head-on crash than do seat belts alone. (emphasis added).

S. Rep. No. 70, 102d Cong., 1st Sess. 2 (1991).

All experts, including the National Highway Traffic Safety Administration and the industry agree that airbags are the best occupant protection in a frontal crash when used with a seatbelt. (emphasis added).

137 Cong. Rec. S9323 (1991) (testimony of Senator Ernest F. Hollings).

Given the extensive legislative history regarding airbags, there can be no question that Congress recognized the importance airbag as the type of "automatic" restraint system to be installed in vehicles, so long seat belts were used in conjunction with the airbags. Consequently, Congress never intended for airbags to act as the sole means of vehicle occupant restraint as NHTSA suggests. Since Congress never intended airbags to be the sole means of vehicle occupant protection in the event of a crash, there can be no basis for NHTSA to assert that ISTEA mandates vehicle compliance with an unbelted test.

CONCLUSION

It is clear that NHTSA has the authority to amend FMVSS 208 to eliminate the unbelted test requirement. Despite NHTSA's position that the airbag provisions of ISTEA require airbags to provide automatic protection for vehicle occupants, ISTEA does not explicitly address this issue. The provisions of ISTEA regarding airbags merely require that airbags be the type of supplemental automatic protection installed in certain vehicles. The legislative history of ISTEA supports this interpretation.

- Congress was aware that there were two types of supplemental restraints that vehicle manufacturers could install in their vehicles, airbags or automatic belts.
- Congress' use of the term "automatic" was part of a phrase that was intended to identify the type of supplemental restraint system that should be installed in vehicles (i.e., airbags).
- Congress mandated use of airbags over automatic belts because of the greater protection afforded by airbags.
- Congress never intended that airbags act as the sole means of vehicle occupant protection in the event of a crash. In fact, Congress explicitly recognized the supplemental nature of airbags both in the airbag provisions of ISTEA and the legislative history.

If you have any questions or comments regarding this memo, feel free to contact Pat (202/637-5682) or Jim (202/637-5713).

Attachment

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AIR BAG SAFETY

HEARING

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED FIFTH CONGRESS

FIRST SESSION

JANUARY 9, 1997

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that the National Highway Transportation Safety Administration had done enough to warn consumers of the dangers of the air bags to children, in particular?

Mr. HALL. In looking back I would have to agree with the Administrator. Looking back at this I think clearly everyone could have done a better job, because the record is very clear, people were aware that there was a problem. NHTSA did put out a consumer awareness bulletin in 1991, but regrettable it took the actual deaths of children on the highways to occur before this was brought to everyone's attention, and as soon as it came to our attention we tried to do what we could, and I am sure NHTSA has been trying to do so in terms of addressing the problem.

Air bags, as we all know, appeared to be a panacea, and I think everybody took it from the driver's side over to the passenger's side and did not fully look at all the risk, and that, of course, is the situation Dr. Martinez is trying to address now.

Senator SNOWE. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Kempthorne.

Senator KEMPTHORNE. Mr. Chairman, thank you very much.

Dr. Martinez, I want to focus again on the fact that this regulation is causing the death of children. Now, in your discussion with Dr. Frist, Senator Frist, you talked about a 45 percent effectiveness factor for individuals that use their seat belts, is that correct?

Dr. MARTINEZ. Yes, sir.

Senator KEMPTHORNE. You have referenced that you have done a number of studies, and included in those studies, and I think in fact, Dr. Martinez, this may be some of the graphs that you presented to me when we met previously, the effectiveness in saving lives of the current air bag for children has a minus 28 factor, is that correct?

Dr. MARTINEZ. It has a negative factor. We have not had the exact numbers, but yes, it has a negative factor on children under 12, yes.

Senator KEMPTHORNE. Does that mean that it is killing more children than it is saving?

Dr. MARTINEZ. In our evaluation, yes, sir.

Senator KEMPTHORNE. And based on all of your studies, the long history which Senator Snow has brought out, is this predictable?

Dr. MARTINEZ. Has that been known?

Senator KEMPTHORNE. Yes.

Dr. MARTINEZ. That it could kill kids, yes. Whether it is known that anyone, and you can ask the people in the industry what their perspective is, but my perception is, having inherited this situation, that people did not estimate the magnitude of the problem.

Senator KEMPTHORNE. And, Dr. Martinez—

Dr. MARTINEZ. Yes, sir.

Senator KEMPTHORNE [continuing]. Last March of last year, in front of this same committee, the same topic, did you not discuss the death of 15 children?

Dr. MARTINEZ. Yes, sir, I did.

Senator KEMPTHORNE. Dr. Martinez, here we are today, 10 months later, now we are discussing 32 dead children.

Dr. MARTINEZ. Yes, sir.

Senator KEMPTHORNE. What in the world is causing us from declaring this an urgent crisis and dealing with it?

Dr. MARTINEZ. We are, sir. That is the issue here, is that you are talking about a technological solution that takes time and takes longer versus educational solutions, and so we have combined to do both. At the time we had this meeting here in March we had already been well underway and started our research program to begin to define what exactly the problem was. As I told you in our meeting earlier, people were not even clear what was causing these injuries. There are rear-facing seats, and that is one kind of injury from one mechanism, and then there are the forward-facing children who have been unbelted, and that is a different mechanism. Before you can decide how you fix the problem you have to clearly define it.

Then we looked through all the different possible types of solutions. The one that really looked to us as a good possibility given the situation we are in today—I want to repeat that—given the situation we are in today, because it is not clear to me that we have to be in the situation we are in today, we thought that depowering had the best promise.

But that question of depowering, what exactly is depowering? Is it 10 percent? Is it 15 percent? 20 percent? 40? 70? 80? 90? And what happens when you do that? And so we think that you need to be able to define that to some degree in order to take appropriate action.

What we have done is by leading the research on this we have come to agreement that the depowerment of 20 to 35 percent is probably the best course of action.

Senator KEMPTHORNE. OK, and I am going to come back to that.

Dr. MARTINEZ. Please.

Senator KEMPTHORNE. Because that is a key point. I just want to reference, too, Dr. Martinez, I want to acknowledge, and I have told you face to face, I respect you immeasurably. You are an emergency room physician and I know your dedication to safety. You have also taken the Hippocratic oath, which part of that oath references never do harm to anyone.

Senator KEMPTHORNE. That is correct, sir.

Senator KEMPTHORNE. Unfortunately, you are now administering a standard that is doing harm, in fact death to children.

Now, Mr. Hall, I would like to say I agree with you, we should not go to a zero standard. I do not think anybody is recommending that. I certainly am not. In your opening statement I would like to quote, you said the Safety Board believes now that efforts to increase the public's use of seat belts have borne fruit. Air bag regulatory standards based on unrestrained occupants are no longer appropriate. Is that not in agreement with my proposal that we ought to suspend the unbelted standard?

Mr. HALL. That would be my understanding, Senator. The thing that we had recommended was that a new standard be put in place that allowed a depowered air bag.

Senator KEMPTHORNE. Based upon a standard for the belted individual.

Mr. HALL. Correct.

Senator KEMPTHORNE. Is it your belief, as the chairman of the National Transportation Safety Board, that that will reduce the risk of death to children and small statured people, women?

Mr. HALL. Yes.

Senator KEMPTHORNE. Then, Mr. Hall, do you think it would be appropriate for NHTSA to issue that as one of the proposals for public comment so that we can find out if that is a viable solution based on the public's reaction?

Mr. HALL. That is the Board's recommendation. Yes, sir.

Senator KEMPTHORNE. Dr. Martinez.

Dr. MARTINEZ. Yes, sir.

Senator KEMPTHORNE. Then I would like to ask you, in your capacity both as the Administrator but also as an emergency room physician and a father, are you ready to issue that proposal for public comment so it can be weighed with the other two proposals that you have already, and if so, will you do it immediately, and if not, why not?

Dr. MARTINEZ. Mr. Kempthorne, you wrote me a very eloquent letter requesting that we do that, and we want to address those issues through deliberations on that. We believe that our authority does not allow us to disregard congressional statute which specifically references the passive restraint system on it. But let me assure you that our approaches that we propose largely solve the problem by addressing it the same way you do. In short, we do not think we have the authority to get rid of the unbelted test.

We looked at that early on when we first started deliberations a long time back. We looked at that particular issue. Because of my meeting you and how impressed I was with your passion and concerns on this issue, I met with the staff again just this last week to go over these issues. Our belief is that we cannot do that unilaterally, but it takes congressional action.

Senator KEMPTHORNE. Dr. Martinez, I have not heard one word from your Agency telling me why you have chosen not to issue that. I totally disagree with the findings. You do have the authority. When we put this into the ISTEA, we codified the reference to section 208, but we did not put the verbatim words from 208 in code. You are now offering to change the current system. There also is a third viable solution.

So again, Dr. Martinez, will you issue that proposal which is supported by the National Transportation Safety Board, which is supported by others as a viable alternative that we ought to invite public comment for?

Dr. MARTINEZ. We have proposed a change to 208 retaining the congressional intent of the passive system, which is specifically referenced in the congressional statute. We believe that we do not have the authority to change congressional statutes. So therefore I cannot submit unilaterally that we get rid of the unbelted test that is specifically referenced in the rule.

So the reason you have not had your letter was because I actually wanted to accommodate you. I really do want to accommodate you, Senator Kempthorne. It is obvious you are passionate about this, obvious you are motivated for the right reasons, and so I wanted to make sure the letter was reviewed by me once again.

Let me just ask you this question, maybe state this: I believe our goals are the same. Our goals are the same, that we cannot kill children at the expense of saving the unbelted population. So we have made a proposal which accommodates that. You talk about doing no harm, we have asked over and over and over, what are the consequences of our actions? We have not heard much from all those we have asked to give us information. So we took taxpayer money to do it ourselves.

What we came up with from doing the research was that you can significantly decrease the risk to children and small-statured adults and still have protection for unbelted, but we will in our analysis—I hope you had a chance to look at it—but our analysis shows that we will not save the amount of people we are saving now, and most of those will be unbelted individuals.

So we agree with you, and I agree with you personally on a strong moral obligation.

Senator KEMPTHORNE. You see, I cannot do this as a father, so I am going to ask you to reexamine that, and to, Mr. Chairman, I know my time has expired, but you have said it: It should not be based upon the unbelted standard. That is why I am saying use the belted standard because going back to your earlier statement, is 10 percent enough, 15, 30? You are going to have to estimate. If you go with your proposals you are going to have to estimate. The proposal that I have, that the National Transportation Board has is based upon real world data of the belted standard.

And too, Dr. Martinez, because I am out of time, I appreciate you saying you want to accommodate me. I want us to accommodate the kids of this country that we now, because of this regulation, have at risk, and we have to declare it an emergency and deal with it immediately.

Dr. MARTINEZ. Mr. Kempthorne, I believe that we are on the same page on most all of this. We are discussing how you get there and not where you want to go. I really believe that if you look at our proposals we put out, if you look at our strategy we put out, it has gotten broad support, and I think it is time for us just to execute it, implement it, and get on with it, because it has to be done.

With regards to the unbelted, one of the other cautions that I throw out is that when we originally started having discussions back in January, February, March about getting rid of the unbelted test, that we began to look at the legal parameters. The response from many was they would depower by 70 to 80 percent. When you look at that—when you look at that—looking at do no harm, it did no help to depower an air bag that much.

We have now found through science what we think is the best course of action, and with suggestions from the industry on how to speed that up through sled poles, we are moving forward with an expedited rulemaking in order to implement that.

I assume that the industry has a tremendous number of depowered air bags that they are ready to put into vehicles, because they told Canada that they were going to have them in the 1998 year model, and they told us that as soon as we gave them the signal they would start moving ahead. I am sure they want to get some of the fine points of the details of it, but I would assume

the proposed interim solutions, namely the disconnection issue, and what you all see as being the either pros or cons or potential problems with that approach.

Mr. CARD. The disconnect challenge is very, very significant. GM, Ford, and Chrysler are all working within their own corporations to develop a response to the disconnect challenge.

We have supported the option for manufacturers to allow a cutoff switch in those limited vehicles where there is no back seat, or a very small distance between the front seat and the back seat, and that is a policy that we continue to support as an option for the manufacturers, but with regard to the particular disconnect policy, as you know there are tremendous legal questions that are raised with regard to a disconnect policy as well as consumer satisfaction, and sometimes those are in conflict.

I think it would be best if I could ask each company to respond, since AAMA has not been given the parameters of a response on that particular issue.

Mr. CAMP. I am Lou Camp from Ford. Basically we believe by and large the fundamental message you are hearing today is that air bags work well, and we are fundamentally opposed to disconnection without any demonstrated safety need to do so.

We believe, therefore, that disconnection "on demand," as I call it, is really not warranted, but what we would prefer to see is a derivative of the current NHTSA procedure that basically allows disconnection upon demonstrated safety need. We would like to see that made a little bit more user friendly and reactive to allow these kinds of special cases to be disconnected.

We are very, very concerned about the possibility of opening this up for no demonstrated need at all. We do not believe that air bags work that poorly. We think they work very well, and would not want them to be disconnected "on demand."

Mr. PULLEY. Mr. Chairman, our group strongly opposes disconnect except in the cases where it is currently carrying them out. We think NHTSA is doing a good job right now overseeing these special situations, but have it done indiscriminately, we think by permitting the disconnection of passenger side bags has a potential risk for the entire family. We would like to see it very, very tightly controlled, such as NHTSA is doing right now.

Mr. LANGE. Mr. Chairman, if I may, Bob Lange from General Motors again. We also cannot enthusiastically support a broad-based disconnection policy. We believe that creates jeopardy for unaware occupants and for subsequent owners.

We would much prefer to devise mechanisms by which, on a case-by-case basis, where appropriate, after full disclosure, and owners are fully informed of the risk and benefits of air bags, should they choose to devise a mechanism or install a mechanism that would enable the disconnection of an air bag, we would like to do that with some kind of retrofit switching device that would cause them to be able to disable the bag or enable the bag, at their choice, for the particular trip that they are making.

Ms. CISCHE. Sue Cischke from Chrysler.

The CHAIRMAN. I think the question has been answered. Thank you very much.

Senator Kempthorne, and I apologize, but we are running a little late and we have a whole other panel to do, but I appreciate your being here—well, please go ahead.

Ms. Cischke, go ahead. I am sorry.

Ms. CISCHE. I was just going to mention, our focus has been on educating the public on the benefit of an air bag with the seat belt, and we believe that in a disconnect message that we would be sending the message that the air bag was not as effective, and it would be difficult to educate people when and when not to disconnect.

The CHAIRMAN. Thank you. Thank you very much.

Senator KEMPTHORNE.

Senator KEMPTHORNE. Mr. Card, how long will it take for the automobile manufacturers to have this next generation of air bag on the market to the consumer once the standard is changed?

Mr. CARD. If the standard is changed to allow for depowering, we will have it on the marketplace in 6 to 9 months. That is an advancement over the current opportunity that consumers have with regard to the advanced technologies that are talked about. I think you will find them coming into the marketplace over the next several years. The most advanced technologies probably have not been invented yet, and I would say that it will be an ongoing challenge for the industry to find better technologies. GM, Ford, and Chrysler are selectively sharing their resources to find better technology for the U.S. car, but I would say it is 5 years away before it would show up in the marketplace.

Senator KEMPTHORNE. But the safer air bag is 6 to 9 months once we change the standard?

Mr. CARD. Correct.

Senator KEMPTHORNE. So is it fair to say—

Mr. CARD. That would be beginning introduction into the marketplace, 6 to 9 months.

Senator KEMPTHORNE. So if NHTSA would have taken action after its March hearing last year it is feasible that we could have those new air bags that would be on the market today.

Mr. CARD. There are 1 million cars made every month and put into the marketplace in the United States. AAMA petitioned with the specifics of the sled test proposal, which is the most efficient way to bring depowered air bags into the marketplace, in August. I believe NHTSA could have approved that regulation as early as October, but clearly time is of the essence and we would like the Government to move as quickly as they can.

Senator KEMPTHORNE. OK. Mr. Card, did I understand you correctly to say that the car makers still have difficulty in depowering air bags unless the unbelted test is changed?

Mr. CARD. Yes, that is true.

There are two protocols that would allow for depowered air bags. One is the sled test protocol that we have proposed to the agency that is a test on an unbelted occupant, but the optimal way for us to design our vehicles to provide the greatest level of protection to the belted occupant and small statured adults and children would be to have the elimination of the unbelted test.

Senator KEMPTHORNE. Mr. Hutchinson, is the current unbelted standard keeping better technology off the market?

Mr. HUTCHINSON. I think that the current unbelted standard prevents you from tuning the system to take maximum advantage of both the belt and the bag.

For example, in Europe, when the air bags were introduced, and they do not have a standard over there, they had smaller bags that were tuned to very high seat belt usage, and so I would say yes, in terms of particularly the problem that we are concerned with about children, very much so.

Senator KEMPTHORNE. And Mr. Card, do you agree, from the American automobile manufacturers, that the current standard is keeping better technology off the market?

Mr. CARD. We think it would be easier to predict advanced technology with a belted standard because you can have a better sense of where the occupants of the car are seated and how they are seated.

Senator KEMPTHORNE. Mr. Pulley, is your industry a bit concerned when we so cavalierly use the term smart bag, because does that not send a signal to the consumer, once we have a smart bag everything will be fine?

Mr. PULLEY. We are concerned, Senator. We prefer them to call them smart occupant restraint systems, because it is the seat belt, it is the air bag, it is everything, and when air bags came in a lot of people say, oh, I have got an air bag. I do not need seat belts any more, and I am a little bit fearful they say, hey, it is smart. I can be as dumb as I want to be.

Senator KEMPTHORNE. Mr. Pulley, also would you give me just a little bit of your expertise, because I am not an expert in all of this, but I have been looking at Australia, for example.

They do not have a standard for air bags, and they have about 95-percent seat belt usage, but those cars that they do have equipped with air bags, I believe it is a larger air bag that creates more of an envelope around the occupant, which reduces injury to the side of the head and to the top of the head. Is that correct, and do you believe that that is a direction that your industry would go?

Mr. PULLEY. I do not know. Let me ask Tom. Can you comment on that, please?

Mr. LANGE. Senator Kempthorne, if I may, that is a GM product that is at question. The answer to your question as you phrased it no. However, we believe that the air bag product that GM offers in the Australian market is superior to the one we can offer here, because there is no unbelted test requirement. Those air bags are depowered from the air bags that we sell here in the United States because we can do that in Australia. We cannot do it here yet. They are better systems, but they are depowered from the current level we have here in the U.S.

Mr. HUTCHINSON. And yet, Senator, you should not assume the manufacturers are not introducing new technology. We have side impact air bags that are coming. One of our Korean manufacturers has introduced a knee-bolster air bag, and so there are very important developments that are being made, but I would subscribe to my colleague's comments here that by depowering we can optimize the seat belt-air bag system.

Ms. CLAYBROOK. Senator, can I comment on that? I would like to submit for the record the evaluation that has been done by the

agency, the National Highway Traffic Safety Administration, on the consequences of depowering, just so the record is completely clear.

The consumer organizations have agreed not to object to depowering in the short term because we do feel that immediate action has to be taken, and we are extremely concerned about these deaths and injuries. On the other hand, there are consequences to doing it, and I just think that that ought to be very clear.

The reason that all of us, I mean everyone at this table and everyone in this room I think are interested in advanced technologies is because we would like to see systems that do not have tradeoffs, and in all of these discussions there are concerns about tradeoffs.

Obviously, if we increased belt usage then those tradeoffs are produced, including child restraint usage, and children being properly restrained, and so I do want to make it clear that that is a concern.

Senator KEMPTHORNE. Ms. Claybrook, thank you very much.

The CHAIRMAN. That report will be made a part of the record.

[The information referred to follows:]

[NOTE: At the time of printing, no response to the above referred information had been received.]

The CHAIRMAN. Thank you very much, and I appreciate your patience, and thank you very much for your input. This may not be the last hearing we have on this issue.

The third and last panel will be Brian O'Neill, president of the Insurance Institute for Highway Safety, Ms. Janet Dewey, who is executive director of the Air Bag Safety Campaign, Ms. Kathleen Jones of Blacksburg, Virginia, and Mr. Robert Sanders who is with the Parents' Coalition for Air Bag Warnings of Baltimore, Maryland.

Mr. O'NEILL. Thank you, Mr. Chairman, members of the committee.

The CHAIRMAN. You can wait just a second, Mr. O'Neill, until we get the other witnesses up. I want to give you the attention that you and your testimony deserve.

Now, please proceed, Mr. O'Neill, and welcome to you and the other witnesses.

STATEMENT OF BRIAN O'NEILL, PRESIDENT, INSURANCE INSTITUTE FOR HIGHWAY SAFETY, ARLINGTON, VA

Mr. O'NEILL. Thank you, Mr. Chairman, and Mr. Chairman, what I would like to do is have my complete statement put in the record and just summarize a couple of the key points.

The CHAIRMAN. Without objection, all of the statements will be made a part of the record.

Mr. O'NEILL. I would like to address the issue of depowering in particular, and first I would like to point out that most of the air bag deaths have involved infants, children, and females of small stature. This has led to discussion and speculation that because the Government's air bag compliance test requires the use of fiftieth percentile adult male dummies, bags are being designed to protect adult males but not smaller occupants. This is not correct.

The serious air bag inflation injuries are occurring primarily because of the occupant's positions when the bags begin to inflate, not

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Divider Title: _____

105TH CONGRESS
1ST SESSION

S. _____

IN THE SENATE OF THE UNITED STATES

Mr. KEMPTHORNE introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To ensure that certain crash-testing of motor vehicles is conducted in a manner that provides for the use of both an automatic restraint system and a manual seat belt and that commensurate Federal standards for occupant crash protection are based on the use of both an automatic restraint system and a manual seat belt.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1.**

4 (a) IN GENERAL.—Beginning on the date of enact-
5 ment of this Act, for purposes of certification under sec-
6 tion 30115 of title 49, United States Code, of compliance
7 with the motor vehicle safety standards under section
8 30111 of that title, a manufacturer or distributor of a

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DISCUSSION DRAFT

S.L.C.

2

1 motor vehicle shall be deemed to be in compliance with
2 applicable performance standards for occupant crash pro-
3 tection if the motor vehicle meets the applicable require-
4 ments for testing with the simultaneous use of both an
5 automatic restraint system and a manual seat belt. In no
6 case shall a manufacturer or distributor use, for the pur-
7 pose of the certification referred to in the preceding sen-
8 tence, a test that provides for the use of an automatic
9 restraint system without the use of a manual seat belt.

10 (b) REVISION OF STANDARDS.—The Secretary of
11 Transportation shall issue such revised standards under
12 section 30111 of title 49, United States Code, as are nec-
13 essary to conform with the requirement under subsection
14 (a).

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Divider Title: _____

(1) Protection against unreasonable risk of rollovers of passenger cars, multipurpose passenger vehicles, and trucks with a gross vehicle weight rating of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less.

(2) Extension of passenger car side impact protection to multipurpose passenger vehicles and trucks with a gross vehicle weight rating of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less.

(3) Safety of child booster seats used in passenger cars and other appropriate motor vehicles.

(4) Improved design for safety belts.

(5) Improved head impact protection from interior components of passenger cars (i.e. roof rails, pillars, and front headers).

SEC. 2504. RECALL OF CERTAIN MOTOR VEHICLES.

(a) NOTIFICATION OF DEFECT OR FAILURE TO COMPLY.—Section 153 of the National Traffic and Motor Vehicle Safety Act of 1966 (15 U.S.C. 1413) is amended by adding at the end the following new subsections:

“(d) If the Secretary determines that a notification sent by a manufacturer pursuant to subsection (c) of this section has not resulted in an adequate number of vehicles or items of equipment being returned for remedy, the Secretary may direct the manufacturer to send a second notification in such manner as the Secretary may by regulation prescribe.

“(e)(1) Any lessor who receives a notification required by section 151 or 152 pertaining to any leased motor vehicle shall send a copy of such notice to the lessee in such manner as the Secretary may by regulation prescribe.

“(2) For purposes of this subsection, the term ‘leased motor vehicle’ means any motor vehicle which is leased to a person for a term of at least four months by a lessor who has leased five or more vehicles in the twelve months preceding the date of the notification.”.

(b) LIMITATION ON SALE OR LEASE OF CERTAIN VEHICLES.—Section 154 of the National Traffic and Motor Vehicle Safety Act of 1966 (15 U.S.C. 1414) is amended by adding at the end the following:

“(d) If notification is required under section 151 or by an order under section 152(b) and has been furnished by the manufacturer to a dealer of motor vehicles with respect to any new motor vehicle or new item of replacement equipment in the dealer’s possession at the time of notification which fails to comply with an applicable Federal motor vehicle safety standard or contains a defect which relates to motor vehicle safety, such dealer may sell or lease such motor vehicle or item of replacement equipment only if—

“(1) the defect or failure to comply has been remedied in accordance with this section before delivery under such sale or lease; or

“(2) in the case of notification required by an order under section 152(b), enforcement of the order has been restrained in an action to which section 155(a) applies or such order has been set aside in such an action.

Nothing in this subsection shall be construed to prohibit any dealer from offering for sale or lease such vehicle or item of equipment.”.

SEC. 2505. STANDARDS OF COMPLIANCE TEST PROGRAM.

Section 103 of the National Traffic and Motor Vehicle Safety Act of 1966 (15 U.S.C. 1392) is amended by adding at the end the following:

“(j) The Secretary shall establish and periodically review and update on a continuing basis a 5-year plan for testing Federal Motor Vehicle Safety Standards that are capable, in the Secretary’s judgment, of being tested. In developing the plan and establishing testing priorities, the Secretary shall take into consideration such factors as the Secretary deems appropriate, consistent with the purposes of this Act and the Secretary’s other responsibilities under this Act. The Secretary may at any time adjust such priorities to address matters the Secretary deems of greater priority. The initial plan may be the 5-year plan for compliance testing in effect on the date of enactment of this subsection.”.

SEC. 2506. REAR SEATBELTS.

The Secretary shall expend such portion of the funds authorized to be appropriated under the Motor Vehicle Information and Cost Savings Act (15 U.S.C. 1901 et seq.), for fiscal year 1993, as the Secretary deems necessary for the purpose of disseminating information to consumers regarding the manner in which passenger cars may be retrofitted with lap and shoulder rear seatbelts.

SEC. 2507. BRAKE PERFORMANCE STANDARDS FOR PASSENGER CARS.

Not later than December 31, 1993, the Secretary, in accordance with the National Traffic and Motor Vehicle Safety Act of 1966, shall publish an advance notice of proposed rulemaking to consider the need for any additional brake performance standards for passenger cars, including antilock brake standards. The Secretary shall complete such rulemaking (in accordance with section 2502(b)(2)(B)(ii)) not later than 36 months from the date of initiation of such advance notice of proposed rulemaking. In order to facilitate and encourage innovation and early application of economical and effective antilock brake systems for all such vehicles, the Secretary shall, as part of the rulemaking, consider any such brake system adopted by a manufacturer.

SEC. 2508. AUTOMATIC CRASH PROTECTION AND SAFETY BELT USE.

(a) AMENDMENT OF STANDARD.—

(1) SPECIFICATIONS.—Notwithstanding any other provision of law or rule, the Secretary shall by September 1, 1993, promulgate, in accordance with the National Traffic and Motor Vehicle Safety Act of 1966 (to the extent such Act is not in conflict with the provisions of this section), an amendment to Federal Motor Vehicle Safety Standard 208 issued under such Act to provide that the automatic occupant crash protection system for the front outboard designated seating positions of each—

(A) new truck, bus, and multipurpose passenger vehicle (other than walk-in van-type trucks and vehicles designed to be exclusively sold to the United States Postal Service) with a gross vehicle weight rating of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less, and

(B) new passenger car,

manufactured on or after the dates specified in the applicable schedule established by subsection (b), shall be an inflatable restraint complying with the occupant protection requirements under section 4.1.2.1 of such Standard. This section supplements and revises, but does not replace, Federal Motor Vehicle Safety Standard 208, including the amendment to such Standard 208 of March 26, 1991 (56 F.R. 12472), extending the requirements for automatic crash protection, together with incentives for more innovative automatic crash protection, to trucks, buses, and multipurpose passenger vehicles.

(2) **REQUIREMENT.**—The amendment to such Standard 208 shall also require, to be effective as soon as possible after the promulgation of such amendment, that the owner manuals for passenger cars and trucks, buses, and multipurpose passenger vehicles equipped with an inflatable restraint include a statement in an easily understandable format—

(A) that the vehicle is equipped with an inflatable restraint referred to as an "airbag" and a lap and shoulder belt in either or both the front outboard seating positions;

(B) that the airbag is a supplemental restraint;

(C) that it does not substitute for lap and shoulder belts which must also be correctly used by an occupant in such seating position to provide restraint or protection not only from frontal crashes but from other types of crashes or accidents; and

(D) that all occupants, including the driver, should always wear their lap and shoulder belts, where available, or other safety belts, whether or not there is an inflatable restraint.

(3) **FINDING.**—The Congress finds that it is in the public interest for all States to adopt and enforce mandatory seat belt use laws and for the Federal Government to adopt and enforce mandatory seat belt use rules.

(b) **SCHEDULE.**—The amendment promulgated under subsection (a) shall establish the following schedule:

(1) **NEW PASSENGER CARS.**—The amendment shall take effect for 95 percent of each manufacturer's annual production of passenger cars manufactured on and after September 1, 1996, and before September 1, 1997, and for 100 percent of each manufacturer's production of passenger cars manufactured on and after September 1, 1997. Subject to the provisions of subsection (c), the percentage prescribed for passenger cars manufactured on and after September 1, 1997, shall be met entirely by inflatable restraints (accompanied by lap and shoulder belts) for both front outboard seating positions.

(2) **NEW TRUCKS, BUSES, AND MULTIPURPOSE PASSENGER VEHICLES.**—The amendment shall take effect for 80 percent of each manufacturer's annual production of trucks, buses, and multipurpose passenger vehicles described in subsection (a)(1)(A) and manufactured on and after September 1, 1997, and before September 1, 1998, and for 100 percent of each manufacturer's production of such trucks, buses, and multipurpose passenger vehicles manufactured on and after September 1, 1998. Subject to the provisions of subsection (c), the percentage prescribed for

such trucks, buses, and multipurpose passenger vehicles manufactured on and after September 1, 1998, shall be met entirely by inflatable restraints (accompanied by lap and shoulder belts) for both front outboard seating positions. The incentives or credits available under Standard 208 (as amended by this section) prior to September 1, 1998, shall not be available to the manufacturers to comply with the 100 percent requirement of this paragraph on and after such date.

(c) **TEMPORARY EXEMPTION FROM REQUIREMENTS.**—Upon application by a manufacturer, in such manner and containing such information as the Secretary shall prescribe in the amendment under this section to such Standard 208, the Secretary may at any time, under such terms and conditions and to such extent as the Secretary deems appropriate, temporarily exempt or renew the exemption of a motor vehicle from the requirements of subsection (a) or (b), or both, if the Secretary finds that there has been a disruption in the supply of any inflatable restraint component, or a disruption in the use and installation by the manufacturer of such component due to unavoidable events not under the control of the manufacturer, that will prevent a manufacturer from meeting its anticipated production volume of vehicles with such restraints. Each application for such exemption must be filed by the manufacturer affected, and must specify the models, lines, and types of vehicles actually affected, although the Secretary may consolidate applications of a similar nature of 1 or more manufacturers. Any exemption or renewal shall be conditioned upon the manufacturer's commitment to recall the exempted vehicles for installation of omitted inflatable restraints within a reasonable time proposed by the manufacturer and approved by the Secretary after such components become available in sufficient quantities to satisfy both anticipated production and recall volume requirements. Notice of each application shall be published in the Federal Register and notice of each decision to grant or deny a temporary exemption, and the reasons for granting or denying it, shall be published in the Federal Register. The Secretary shall require labeling for each exempted motor vehicle which can only be removed after recall and installation of the required inflatable restraint. If a vehicle is delivered without an inflatable restraint, the Secretary shall require that written notification of the exemption be delivered to the dealer and first purchasers for purposes other than resale of such exempted motor vehicle in such a manner, and containing such information, as the Secretary deems appropriate.

(d) **CONSTRUCTION.**—Nothing in this section shall be construed by the Secretary or any other person, including any court, as altering or affecting any other provision of law administered by the Secretary and applicable to such passenger cars or trucks, buses, or multipurpose passenger vehicles or as establishing any precedent regarding the development and promulgation of any Federal Motor Vehicle Safety Standard. Nothing in this section or in the amendments made under this section to Federal Motor Vehicle Safety Standard 208 shall be construed by any person or court as indicating an intention by Congress to affect, change, or modify in any way the liability, if any, of a motor vehicle manufacturer under applicable law relative to vehicles with or without inflatable restraints.

Conference substitute

Not later than December 31, 1993, the Secretary, in accordance with the National Traffic and Motor Vehicle Safety Act of 1966, shall publish an Advanced Notice of Proposed Rulemaking to consider the need for any additional brake performance standards for passenger cars, including antilock brake standards. The rulemaking is to be completed not later than 36 months from the date of initiation of the ANPRM, in accordance with clause 2502(b)(2)(B)(ii). In order to facilitate and encourage innovation and early application of economical and effective antilock brake systems for all such vehicles, the Secretary shall consider as part of the rulemaking, any brake system adopted by a manufacturer.

SECTION 2508—AUTOMATIC CRASH PROTECTION AND SAFETY BELT USE*House bill*

No provision.

Senate amendment

The Senate notes that the current regulations of the Department of Transportation (DOT) require that passenger cars be equipped with "passive restraints," which include either airbags or automatic seatbelts that do not require action by the occupant in order to be engaged. When fully effective, in model year 1994, these regulations will require that all cars have one of these forms of passive restraint on both the driver and passenger side of the front seat (i.e. the front outboard seating position). 49 C.F.R. 571.208.

The Senate notes that in March 1991, DOT issued a similar requirement for passive restraints in the "light truck" fleet, which includes minivans, small pickups, and sport utility vehicles. 56 Fed. Reg. 12472-12487 (March 26, 1991). These vehicles, which originally were used primarily for cargo or work purposes, now make up approximately one-third of the new passenger vehicles sold, and are increasingly used by families. Under the DOT rule, "light trucks" will be required to have "passive restraints" (automatic belts or airbags) on both the driver and passenger sides on the following schedule: 20 percent of the vehicles manufactured after September 1, 1994; 50 percent of those manufactured after September 1, 1995; 90 percent of those manufactured after September 1, 1996; and 100 percent after September 1, 1997. However, those manufacturers that install airbags instead of automatic seatbelts on the driver side are permitted through a credit system to delay installation of any airbags on the passenger side until September 1, 1998.

The Senate amendment addresses the fact that the current rule permits manufacturers to choose between two forms of passive restraints. The Senate notes that DOT has estimated that airbags could save over 9,000 lives and prevent 155,000 moderate to serious injuries each year as compared to the situation if no cars were equipped with airbags. 49 Fed. Reg. 28986 (July 17, 1984).

Section 214 of the Senate amendment sets out two requirements with respect to airbags in passenger vehicles.

First, subsection 214(a) requires that, to the extent practicable, the Secretary, in cooperation with the General Services Administration and heads of other federal agencies, insure that passenger

automobiles purchased for the federal fleet be equipped with airbags. Driver side airbags would be required for passenger cars acquired after September 30, 1991, and driver and passenger side airbags would be required for passenger cars acquired after September 30, 1993. If only one source of airbag-equipped vehicles is available, so that competitive bidding cannot occur, such purchase may not be practicable. However, since most manufacturers have announced plans to install airbags in their passenger car fleet in the mid 1990s, this problem is not likely to occur.

Second, subsection 214(b) requires that manufacturers equip all passenger cars and other passenger vehicles as defined in the section to include most multipurpose vehicles, with airbags on a phased-in schedule set out in the bill. Specifically, all passenger cars manufactured on or after September 1, 1995 must be equipped with airbags on both the driver and right front outboard seating positions. In addition, all trucks, buses and multipurpose passenger vehicles with a gross vehicle weight rating of 8,500 pounds or less and an unloaded vehicle weight of 5,500 pounds or less must have a driver side airbag if manufactured after September 1, 1996 and a passenger side airbag if manufactured on or after September 1, 1997.

Conference substitute

Paragraph (a)(1) requires the Secretary to issue a rule, by September 1, 1993, amending FMVSS 208 in a number of ways, including requiring the installation of an airbag that meets the requirements of FMVSS 208 on both the driver and front outboard passenger seating positions of passenger cars and MPVs and other light trucks. The issuance of a rule to accomplish mandatory airbags in the manner specified in this section is required notwithstanding any other provision of law or rule, but the rule is to be promulgated in accordance with the National Traffic and Motor Vehicle Safety Act of 1966 to the extent such Act is not in conflict with this section. This subsection requires a rule that supplements and revises but does not replace existing FMVSS 208, which was amended on March 26, 1991 to extend the standard's requirements to MPVs and other light trucks.

Paragraph (a)(2) requires that after the promulgation of the amendment in (a)(1), the Secretary shall require that owner's manuals contain specific language informing consumers about the need to wear seatbelts even in vehicles equipped with airbags. It states:

(A) that the vehicle is equipped with an inflatable restraint referred to as an "airbag" and a lap and shoulder belt in either or both the front outboard seating positions;

(B) that the airbag is a supplemental restraint;

(C) that the airbag does not substitute for lap and shoulder belts which must also be correctly used by an occupant in such seating positions to provide restraint or protection not only from frontal crashes but from other types of crashes or accidents; and

(D) that all occupants, including the driver, should always wear their lap and shoulder belts where available or other safety belts, whether or not there is an inflatable restraint.

Paragraph (a)(3) contains a finding that it is in the public interest for all States to adopt and enforce mandatory seat belt laws and for the Federal government to adopt and enforce mandatory seat belt rules. The conferees note that nine states have not yet adopted such a law. Also, the DOD and the Interior Department's Bureau of Land Management and National Park Service have adopted such rules.

Subsection (b) sets forth the following schedule for implementation of requirements of subparagraph (a)(1): (1) New Passenger Cars—95% of each manufacturer's production volume of cars manufactured on or after September 1, 1996 and before September 1, 1997, and 100% of all such production manufactured on or after September 1, 1997. (2) New MPVs and other light trucks and buses—80% of each manufacturer's production volume manufactured on or after September 1, 1997 and before September 1, 1998, and 100% of each manufacturer's production volume manufactured on or after September 1, 1998.

Subject to the provisions of subsection (c), the requirements for 100% coverage mean that all of these vehicles actually are equipped with airbags on both sides. This is not to be a mathematical calculation involving credits available under the 208 standard, as amended by this bill, from which the Secretary would derive 100% coverage. Rather, it is actual 100% coverage. The subsection provides that the incentives or credits available to the manufacturers under the amended Standard 208 are no longer available when the requirement for 100% coverage becomes effective.

Subsection (c) provides for a temporary exemption from requirements of this section due to supply and unavoidable disruptions. This exemption authority is permanent and is available even after the 100% requirement.

The Conferees intend that the temporary exemption be granted or renewed where there is a disruption of supply, or a disruption in the use and installation by the manufacturer of such component due to unavoidable events totally beyond the manufacturers' control. The Conferees expect that these exemptions will be rarely necessary. However, history shows that there have been supply problems in the past, as shown by a recent report of the General Accounting Office.

The Conferees expect that the Secretary will require written documentation of the facts that have made the inflatable restraint unavailable. The exemption is not intended to be available in situations in which vehicle production plans are interrupted or altered for reasons unrelated to the inflatable restraint, such as general economic conditions or work stoppages at the vehicle manufacturing plant.

In granting the exemption, the Secretary must require that the manufacturer recall the exempted vehicle and install the inflatable restraint within a reasonable time, which is to be proposed by the manufacturer subject to approval by the Secretary. Thus, each grant of exemption by the Secretary must include a requirement for vehicle recall and installation of the inflatable restraint, and a date by which that recall and installation must be completed.

The substitute directs the Secretary to require labeling for each exempted motor vehicle and to provide that the label can only be

removed after recall and installation of the airbag. If the vehicle is delivered to the dealer without an inflatable restraint the Secretary shall require that written notification of exemption be delivered to the dealer and first purchasers of such exempted motor vehicles in such manner and containing such information as the Secretary deems appropriate. The purpose of this notice requirement is to inform the dealer and the consumer once the vehicle has reached the showroom of the dealer. Such notice is not necessary if the exemption is granted for the vehicle, and the vehicle is not sold by the manufacturer to the dealer prior to installation of the airbag. The bill does not specify the contents of the label. However, the intent is to inform the prospective purchaser that the inflatable restraint is absent and will have to be installed within a specified period of time. It is, of course, the intention of the Conferees that, in the case of a label, it be conspicuous and that it not be removed by anyone until the restraint has been installed as required.

With respect to subsection (d), the Conferees, noting NHTSA's letter of November 7, 1991, do not want by this section to change the law on liability as it existed prior to enactment. This section is not intended to be a "sword" or a "shield" in litigation or otherwise.

Subsection (e) provides for the Secretary to report biannually on the actual effectiveness of occupant restraint systems.

Subsection (f) provides for the establishment of a program, consistent with applicable provisions of Federal procurement law and available appropriations, under which light duty vehicles acquired by the Federal Government, to the maximum extent practicable, will have driver and passenger-side airbags.

SECTION 2509—HEAD INJURY IMPACT STUDY

House bill

No provision.

Senate amendment

Section 205 of the Senate amendment requires the Secretary, within 12 months of enactment, to issue a final rule amending Federal Motor Vehicle Safety Standard (FMVSS) 214 to establish performance criteria for passenger cars, to provide improved occupant protection from head injury in a side impact crash.

The Senate notes that approximately 8,000 Americans die each year in side impact crashes, and approximately 23,000 suffer serious, nonfatal injuries. Thirty-five percent of the life-threatening automobile injuries occur in side crashes. After many years of work, NHTSA recently issued an upgraded side impact protection standard for passenger cars, to prevent injuries to the chest and pelvis in such crashes. The Senate notes that, at the same time, NHTSA indicated that it would continue its work to address head injury prevention in such crashes.

Conference substitute

The conferees understand that there are other head injury protection matters which are the subject of research at NHTSA and which are not covered by section 2503(5) of this bill. This could in-