



DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2020–0119]

Notice Regarding the Applicability of NHTSA FMVSS Test Procedures to Certifying Manufacturers

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice of interpretation; request for comments.

SUMMARY: The National Traffic and Motor Vehicle Safety Act (Safety Act) prohibits the sale, manufacture for sale, import or introduction into interstate commerce of a motor vehicle or item of motor vehicle equipment, unless fully compliant with all applicable Federal motor vehicle safety standards (FMVSS). The FMVSS set a threshold of performance that a vehicle or equipment item must attain, at a minimum, to meet the need for safety. The Safety Act also requires a manufacturer or distributor of a motor vehicle or motor vehicle equipment to certify that the vehicle or equipment complies with applicable FMVSS. This notice reestablishes NHTSA’s longstanding position that the FMVSS test conditions and procedures apply to NHTSA’s compliance testing, and that manufacturers are not required to ensure that their vehicles are designed in such a manner as to ensure that the vehicles are capable of being tested pursuant to such standards as a condition of self-certification. This notice also discusses NHTSA’s enforcement with respect to vehicles with novel or innovative designs that preclude them from being tested for FMVSS compliance using NHTSA’s FMVSS test procedures. This notice supersedes prior contrary statements the Agency has made—including those in NHTSA’s 2016 letter of interpretation to Google, Inc.—stating that manufacturers could not validly certify FMVSS compliance unless NHTSA could verify compliance using the FMVSS test procedures.

DATES: NHTSA is inviting public comment on this document. The comment closing date is **[insert date 30 days after date of publication in the FEDERAL REGISTER]**. NHTSA will post a public response to major concerns raised in the comments.

You may submit comments to the docket number identified in the heading of this document by any of the following methods:

- Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- Mail: Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue S.E., West Building Ground Floor, Room W12-140, Washington, D.C. 20590-0001.
- Hand Delivery or Courier: 1200 New Jersey Avenue S.E., West Building Ground Floor, Room W12-140, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays. To be sure someone is there to help you, please call (202) 366-9322 before coming.
- Fax: 202-493-2251.

Regardless of how you submit your comments, please be sure to mention the docket number of this document.

Instructions: For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation section of this document.

Note that all comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. Please see the Privacy Act discussion below regarding documents submitted to the agency's dockets.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> or the street address listed above. Follow the online instructions for accessing the dockets.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an organization, business, labor union, etc.). You may review DOT's complete Privacy Act statement in the *Federal Register* published on April 11, 2000 (Volume 65, Number 70; Pages 19477-78) or you may visit <http://www.dot.gov/privacy.html>.

FOR FURTHER INFORMATION CONTACT: Daniel Koblenz or Kerry Kolodziej, Office of Chief Counsel, Telephone: 202-366-2992, Facsimile: 202-366-3820. The mailing address for these officials is: National Highway Traffic Safety Administration, 1200 New Jersey Avenue S.E., Washington, D.C. 20590.

SUPPLEMENTARY INFORMATION:

I. Introduction

The National Traffic and Motor Vehicle Safety Act¹ (the Safety Act) requires that motor vehicles meet two separate requirements before they may be sold or otherwise introduced into interstate commerce in the United States: (1) they must be compliant with the FMVSS, and (2) they must be certified as compliant by a manufacturer exercising reasonable care.² In a 2016 letter of interpretation to Google, Inc.,³ NHTSA stated, without substantive discussion, that manufacturers could not validly certify vehicles as compliant with FMVSS unless the vehicles were capable of being tested using the test procedures associated with those standards.⁴ This interpretation imposed major design restrictions on motor vehicles, because it effectively required manufacturers not only to certify that a motor vehicle complies with the substantive

¹ 49 U.S.C. 30101, *et seq.*

² 49 U.S.C. 30112, 30115.

³ Letter to C. Urmson, Google (Feb. 4, 2016), <https://www.nhtsa.gov/interpretations/google-compiled-response-12-nov-15-interp-request-4-feb-16-final>.

⁴ For purposes of this notice, the term “test conditions and procedures” refers to the preparatory steps NHTSA takes prior to measuring the performance of a motor vehicle or item of motor vehicle equipment when checking for FMVSS compliance. NHTSA designs test conditions and procedures both to ensure that vehicle performance is measured under realistic driving conditions (representative of the real-world situation posing the safety risk), and to eliminate or control variables that reduce the objectivity of the compliance test. Test procedures are incorporated into the regulatory text alongside the performance requirement with which they are associated. NHTSA's Enforcement office publishes test procedures on NHTSA's website to provide more detail into how NHTSA conducts a compliance test. <https://www.nhtsa.gov/vehicle-manufacturers/test-procedures>

requirements of all applicable FMVSS, but also to design the vehicle in such a way that NHTSA would be able to conduct each element of each test procedure specified within each applicable regulation.

It should be noted the 2016 Google interpretation addressed a situation involving a novel, theoretical design of a vehicle that lacked driving controls, including the absence of a steering wheel and a brake pedal. Heretofore, the FMVSS were designed such that their threshold requisite levels of performance were defined in the context of the test procedures and conditions set forth in the standards,⁵ measured under those procedures and conditions, and applied to the vehicle in the assessment of compliance. However, in the situation presented by the Google inquiry, certain test conditions or procedures could not be conducted on the vehicle as specified in the FMVSS. For example, in FMVSS No. 126, *Electronic stability control*, the test procedures specify the use of a steering machine test device that makes precise movements of the steering wheel in order to perform the “sine with dwell” maneuver. This is not possible to do on a vehicle with no steering wheel.

Faced with the question of how such procedures are implicated by novel designs, the 2016 Google interpretation determined that it is not possible for a manufacturer to certify compliance with a standard if NHTSA does not “have a test procedure or other means of verifying such compliance.”

Upon further consideration of the question of what the Safety Act requires of certifying manufacturers, NHTSA believes the 2016 Google Interpretation construed the certification requirement too restrictively, and was not in full accordance with the Safety Act or prior Agency interpretations of the statute. Previous NHTSA interpretations of the Safety Act held that manufacturers are not required to test a vehicle’s performance using the test conditions and procedures in an FMVSS to certify compliance with a standard. Rather, interpretations held the

⁵ Some FMVSSs also specifically require certain items of equipment, such as a sun visor (FMVSS No. 201) or a brake pedal (FMVSS No. 135).

test conditions and procedures in an FMVSS simply establish the means by which the Agency would evaluate compliance with an applicable FMVSS. Manufacturers were free to use other methods to certify the compliance of their products, provided that the vehicles met the standards when NHTSA tests the vehicles using the procedures, and under the conditions specified in the FMVSS.

The certification requirement set out in the Safety Act, states that “[a] manufacturer or distributor of a motor vehicle or motor vehicle equipment shall certify to the distributor or dealer at delivery that the vehicle or equipment complies with applicable motor vehicle safety standards prescribed under this chapter.” It also states that “[a] person may not issue the certificate if, in exercising reasonable care, the person has reason to know the certificate is false or misleading in a material respect.”⁶ In NHTSA interpretations prior to the 2016 Google interpretation, the Agency had interpreted this certification requirement such that manufacturers were permitted to certify vehicles using means other than that specified in an FMVSS at issue. NHTSA specifies test conditions and procedures in the FMVSS and on NHTSA’s website to provide transparency, clarity and notice as to how NHTSA will measure the requisite performance in its compliance tests. For example, if a standard establishes performance requirements specifying that a vehicle must provide occupant crash protection by limiting the crash forces measured by a particular test dummy used in a crash test specified in the standard, the standard’s test procedures provide the conditions and procedures NHTSA will use to assess conformance to the performance requirements.

Test procedures, and the conditions under which they are conducted, serve an important role in the FMVSS: they provide context to the performance requirement and provide notice to the industry of NHTSA’s methodology for determining compliance with the minimum performance standards established in the FMVSS. However, they are not performance requirements themselves. Although performing the test in the manner the FMVSS directs is one

⁶ 49 U.S.C. 30115.

path a manufacturer may follow when certifying compliance with an FMVSS requirement, manufacturers are not required to use the test conditions and procedures in the standard to certify compliance. A manufacturer may base its certification on, for example, simulations or engineering analyses if it exercised reasonable care in certifying that the vehicle would meet the standard when tested by NHTSA using the standard's test conditions and procedures.⁷

The issue addressed by this notice, and by the 2016 Google interpretation, regards the situation where NHTSA is not able to test a vehicle in accordance with the FMVSS test conditions and procedures due to its design. The Agency stated, in part, that a manufacturer cannot validly certify a vehicle as compliant unless NHTSA can perform compliance testing using its FMVSS test conditions and procedures. The impact of this new interpretation was effectively to convert the FMVSS test conditions and procedures from the method by which NHTSA validates FMVSS compliance to the only valid method of certification. In other words, per the 2016 Google Interpretation, vehicles on which the FMVSS test conditions or procedures cannot be run, such as vehicles that operate using an Automated Driving System (ADS)⁸ and that are not equipped with conventional manual controls necessary for testing, could not be certified as FMVSS compliant. Instead, the 2016 Interpretation concluded that manufacturers of these unique vehicles would either have to pursue an exemption from certain FMVSSs or wait until the Agency issued amendments to the FMVSS test conditions and procedures accommodating the new designs.

Following the issuance of 2016 Google Interpretation, some manufacturers continued to certify as compliant vehicles that are unable to be precisely tested in accordance with NHTSA's

⁷ NHTSA has also stated that the reasonableness of the basis for certifying depends on many factors, including the resources available to the manufacturer. For example, a small manufacturer's efforts to certify compliance might not be held to the same level as a large manufacturer's efforts to ascertain its vehicles' compliance.

⁸ For purposes of this notice, Automated driving system (ADS) means the hardware and software that are collectively capable of performing the entire dynamic driving task on a sustained basis, regardless of whether it is limited to a specific operational design domain. SAE International (SAE) J3016, "Taxonomy and Definitions for Terms Related to On-Road Motor Vehicle Automated Driving Systems." ADS refers to SAE driving automation levels 3, 4, and 5.

test procedures, while other manufacturers felt restricted from doing so.⁹ Thus, NHTSA decided that it was important to revisit this issue.¹⁰

As discussed in today's notice, NHTSA has revisited the issues raised in the 2016 Google Interpretation, and determined that some of the views articulated in that interpretation were premised on an erroneous reading of the Safety Act's certification requirement. While the manufacturer of a motor vehicle must produce vehicles that comply with all applicable FMVSS and must exercise reasonable care in certifying compliance, the Safety Act does not require that a manufacturer ensure that NHTSA can validate the manufacturer's certification through the FMVSS test conditions and procedures when it certifies the vehicle.¹¹

Accordingly, NHTSA is rescinding the portions of the 2016 Google Interpretation stating that manufacturers must ensure that NHTSA could conduct the FMVSS test procedures on the vehicle using the test conditions and procedures specified in the standard. Instead, the Agency clarifies that for those vehicles with designs that preclude testing under existing FMVSS test conditions and procedures, a manufacturer acting in good faith and exercising reasonable care may certify the vehicle as compliant even if the Agency cannot conduct the exact test procedure set forth in the standard. NHTSA's decision to rescind portions of the 2016 Google Interpretation, and a brief explanation of how NHTSA may continue to enforce the requirements of the Safety Act and regulations with respect to vehicles that cannot be tested using NHTSA's test procedures, are discussed below.

II. Background

a. Safety Act

The Safety Act authorizes NHTSA to regulate the performance of motor vehicles and motor vehicle equipment through the issuance and enforcement of FMVSS. The Safety Act

⁹ See Nuro, Inc.; Grant of Temporary Exemption for a Low-Speed Vehicle With an Automated Driving System, 85 FR 7826, 7834-36 (Feb. 11, 2020) (discussing request from Nuro, Inc. for an exemption from portions of FMVSS No. 111 test procedures).

¹⁰ *Id.* at 7834-35 (indicating that "NHTSA intends to clarify the application of test procedures in a subsequent notice").

¹¹ See 49 U.S.C. 30115(a).

defines a “motor vehicle safety standard” as “a minimum standard for motor vehicle or motor vehicle equipment performance.”¹² Per the Safety Act, each standard must be practicable, meet the need for motor vehicle safety, and be stated in objective terms.¹³ Currently, there are in force more than 60 FMVSS that regulate a wide variety of aspects of vehicle performance. These standards are codified at 49 CFR part 571.

While all FMVSS necessarily set performance standards that vehicles or equipment must meet, the FMVSS also include test conditions and procedures that provide context to the required performance. For example, in the FMVSS No. 208 occupant protection requirements for the 50th percentile adult male dummy belted test (S5.1.1), the performance standard is the maximum permissible level of certain injury metrics (e.g., chest deflection) that are experienced by a dummy in a crash of up to 35 mph, whereas the test conditions and procedures describe the circumstances under which NHTSA will measure these metrics. The test conditions and procedures describe how NHTSA prepares a vehicle for compliance testing and measures its performance to determine whether it complies with the standard. NHTSA designs test conditions and procedures to ensure that vehicle performance is measured under realistic operating conditions representative of the real-world situation posing the safety risk, that tests and test results are repeatable and reproducible, that manufacturers are provided with notice of how tests will be performed, and to maintain the objectivity of the Agency’s compliance testing.

It is critical that the FMVSS set forth procedures that are designed so that “the question of whether there is compliance with the standard can be answered by objective measurements and without recourse to any subjective determination.”¹⁴ Clear, objective test procedures ensure that the same results are produced from lab-to-lab and from vehicle-to-vehicle, “and that compliance is based upon readings obtained from measuring instruments as opposed to the

¹² 49 U.S.C. 30102(a)(10).

¹³ 49 U.S.C. 30111(a).

¹⁴ *Chrysler Corp. v. Dep’t of Transp.*, 472 F.2d 659, 675 (6th Cir. 1972) (citing House Report 1776, 89th Cong. 2d Sess.1966, p. 16).

subjective opinions of human beings.”¹⁵ The test conditions and procedures both assist in providing notice of what performance is required under an FMVSS,¹⁶ and, if written into regulatory text, establish by regulation how NHTSA will establish whether a vehicle complies with the FMVSS in the context of a compliance investigation.¹⁷ However, manufacturers that otherwise have a good faith basis for certification are not required to test to the FMVSS when they certify a product or follow the test conditions and procedures in an FMVSS if testing is part of their certification process.

Per the Safety Act, new motor vehicles must meet two requirements before they are sold or otherwise introduced into interstate commerce in the United States. First, the vehicle must meet all applicable FMVSS that are in effect on the date of manufacture.¹⁸ Second, the vehicle must be covered by a manufacturer certification issued under 49 U.S.C. 30115. By certifying a vehicle under § 30115, a manufacturer assumes responsibility for compliance with all applicable FMVSS. For vehicles, the manufacturer affixes a certification label on the vehicle, and for equipment the FMVSS generally require the manufacturer to provide its certification by marking the equipment with the letters “DOT” in a prescribed location.

The Safety Act requires NHTSA to establish through rulemaking the requirements for compliance with the FMVSS, i.e. by setting performance standards.¹⁹ However, in addition to requiring actual compliance with applicable FMVSS, the Act itself expressly established a separate requirement that manufacturers exercise “reasonable care” when certifying compliance.²⁰ Specifically, a manufacturer may not certify a vehicle under Section 30115 if, in exercising “reasonable care,” the manufacturer has reason to know the certification is false or misleading in any material respect.²¹

¹⁵ *Ibid.*, at 676.

¹⁶ *See, United States v. Chrysler Corp.* 158 F.3d 1350 (D.C. Cir. 1998).

¹⁷ When it is possible for NHTSA to perform the FMVSS test conditions and procedures with a vehicle, the results of testing the vehicle using the test conditions and procedures form the basis for any noncompliance finding.

¹⁸ 49 U.S.C. 30112.

¹⁹ 49 U.S.C. 30111.

²⁰ 49 U.S.C. 30115.

²¹ *Id.*

Under the system of self-certification established by the Safety Act, NHTSA does not pre-approve vehicles, through testing or other means, before they can be sold or otherwise introduced into interstate commerce. Instead, as described above, vehicles must be certified as compliant by the manufacturer. NHTSA's enforcement of the FMVSS typically involves the Agency purchasing already-certified new vehicles to test for compliance with the FMVSS. In addition, NHTSA conducts other enforcement activities to help ensure compliance with other legal requirements in the Safety Act.

b. NHTSA's Longstanding Interpretation of the Certification Requirement

Prior to 2016, NHTSA repeatedly stated the FMVSS test procedures are for NHTSA's own use, and need not be used by manufacturers, who may instead use different test conditions and procedures or non-testing methodologies (such as engineering analyses) as a reasonable basis for certification.²² NHTSA has held this position since at least the early 1970s, when it stated: "The National Traffic and Motor Vehicle Safety Act does not require a manufacturer to test vehicles by any particular method. ... [The manufacturer] is under no obligation to repeat the procedures of the standards."²³

NHTSA repeated the position on numerous instances over the decades that followed, including in both rulemaking notices and letters of interpretation, that "reasonable care"²⁴ does not

²² See, e.g., letter to F. Smidler, Wabash Nat'l Corp. (Apr. 29, 1997), <https://isearch.nhtsa.gov/files/13241-2.pja.html> ("The test procedures in the standard describe how NHTSA will test guards for compliance with the standard's requirements, and are not binding upon guard manufacturers. They may certify their guards based on other kinds of testing or even engineering analysis, if these provide a reasonable basis for certification."); letter to K. Manke, Dakota Manufacturing (Apr. 15, 2008), <https://isearch.nhtsa.gov/files/07-005971as%20override%20guards.htm>. ("Keep in mind that the test procedures in FMVSS No. 223 describe how NHTSA will test guards for compliance with the standard's requirements, and are not binding upon guard manufacturers. A manufacturer is not required to use the standard's procedures when certifying compliance with the standard.")

²³ See, e.g., 39 FR 40858 (Nov. 21, 1974) ("The National Traffic and Motor Vehicle Safety Act does not require a manufacturer to test vehicles by any particular method . . . [the manufacturer] is under no obligation to repeat the procedures of the standards."); see also 38 FR 12935 (May 17, 1973) ("Manufacturers should understand that they are not required to test their products in any particular manner, as long as they exercise due care that their products will meet the requirements when tested by the NHTSA under the procedures specified in the standard."); 36 FR 5856 (Mar. 30, 1971) ("Manufacturers have the responsibility of insuring, by any methods that constitute due care, that their products meet the requirements at the stated level. Normally this is done by setting their own test conditions slightly on the 'adverse side' of the stated level.")

²⁴ In 1994, the Safety Act was recodified and the statutory language was modified "without substantive change" from "due care" to "reasonable care." PUB. L. 103-272.

require manufacturers to perform the FMVSS test procedures to certify a vehicle or equipment.²⁵

Expanding on this issue in one such interpretation, NHTSA explained:

Vehicle manufacturers certifying compliance with the safety standards are not required to follow the compliance test procedures set forth in the applicable standard. The standards specify the procedures NHTSA would use in compliance testing. However, vehicle manufacturers must exercise reasonable care in certifying that their products meet applicable standards. It may be simplest for a manufacturer to establish that it exercised ‘reasonable care’ if the manufacturer has conducted testing that strictly followed the compliance test procedures set forth in the standard. However, ‘reasonable care’ might also be shown using modified test procedures if the manufacturer could demonstrate that the modifications were not likely to have had a significant impact on the test results. In addition, it might be possible to show ‘reasonable care’ using engineering analyses, computer simulations, and the like.²⁶

It should be noted, however, that in past Agency interpretations, NHTSA could generally conduct the FMVSS test procedure on the vehicle to assess compliance. Thus, the past letters often pointed out that manufacturers may use a basis other than the testing specified in the FMVSS for their certification, but are responsible for ensuring that the vehicle or equipment meets the FMVSS when testing by NHTSA in accordance with the standard.²⁷

Nonetheless, NHTSA has repeatedly made clear that “[t]esting, as provided in the FMVSS, is not required as a matter of law to certify a vehicle.”²⁸ The Safety Act requires only

²⁵ See, e.g., 76 FR at 15905, 15908 (Mar. 22, 2011) (“[M]anufacturers are not required to test their products in the manner specified in the relevant safety standard, or even to test the product at all, as their basis for certifying that the product complies with all relevant standards. A manufacturer may evaluate its products in various ways to determine whether the vehicle or equipment will comply with the safety standards and to provide a basis for its certification of compliance. Depending on the circumstances, the manufacturer may be able to base its certification on actual testing (according to the procedure specified in the standard or some other procedure), computer simulation, engineering analysis, technical judgment or other means manufacturers can use their judgment, including engineering or technical judgment, to certify vehicles. Testing, as provided in the FMVSS, is not required as a matter of law to certify a vehicle. Instead, sound judgment may be used.”) (footnote omitted). See 71 FR at 28183-84 (Sept. 1, 2006), letters to S. Trinkl, DEKRA Automobil GmbH (Dec. 30, 2004), https://isearch.nhtsa.gov/files/Trinkl.1.html_F, Anderson, BrakeQuip Int’l, Inc. (Aug. 12, 2003), <https://isearch.nhtsa.gov/files/GF005279.html>, to D. Dawkins, Chrysler Corp. (Oct. 2, 1992), <https://isearch.nhtsa.gov/files/7714.html>, to D. Cole, Nat’l Van Conversion Ass’n, Inc. (Nov. 1, 1988), <https://isearch.nhtsa.gov/files/3140o.html>.

²⁶ Letter to A. Ughini Jr., Marcopolo SA (June 24, 2002) <https://isearch.nhtsa.gov/files/24423-2.html>.

²⁷ For example, in the letter to A. Ughini Jr., Marcopolo SA (June 24, 2002), NHTSA also stated: “Please note that, while the exercise of ‘reasonable care’ may relieve a manufacturer of liability for civil penalties in connection with the manufacture and sale of noncomplying vehicles, it does not relieve a manufacturer of the responsibility to discontinue sales of vehicles or notify purchasers of the noncompliance and remedy the noncompliance without charge to the purchasers, if either the manufacturer or this agency determines that vehicles do not comply with all applicable safety standards.” <https://isearch.nhtsa.gov/files/24423-2.html>.

²⁸ 76 FR 15903, 15908 (Mar. 22, 2011), Response to petition for reconsideration, *Roof crush resistance*.

that vehicles comply, and that manufacturers certify, using reasonable care, that a motor vehicle complies. The test conditions and procedures in the FMVSS are not themselves motor vehicle safety standards as that term is defined in the Safety Act.²⁹

c. 2016 Google Interpretation

NHTSA's position regarding manufacturer obligations to certify a motor vehicle had been consistent for several decades, until NHTSA responded to a 2016 interpretation request from Google asking the Agency to clarify how the FMVSS would apply to a vehicle that lacks manual driving controls and is exclusively operated by an Automated Driving System (ADS).³⁰
³¹ As noted above, with most past Agency interpretations, NHTSA could conduct the FMVSS test procedure to assess compliance, so the Agency could determine compliance and compare its results to that of the manufacturer. Thus, the Google interpretation request presented a novel issue in that the Google vehicles could not be tested for compliance to certain FMVSS because their advanced designs lacked traditional controls used in the FMVSS test conditions and procedures.

NHTSA responded to Google's request in an interpretation letter dated February 4, 2016. In this letter, NHTSA stated that if the Agency was unable to verify a vehicle's compliance using the existing FMVSS test conditions and procedures, NHTSA would consider that standard as not "allowing" a manufacturer of an ADS vehicle to certify compliance with it. The interpretation's discussion of FMVSS test conditions and procedures reasoned that "[a]s self-driving technology moves beyond what was envisioned at the time when standards were issued, NHTSA may not be able to use the same kinds of test procedures for determining compliance."³² The letter stated

²⁹ The Safety Act defines "motor vehicle safety standard" to mean "a minimum standard for motor vehicle or motor vehicle equipment performance." 49 U.S.C. 30102. Test conditions and procedures are not aspects of motor vehicle or motor vehicle equipment performance; they are steps NHTSA takes to prepare a motor vehicle or motor vehicle equipment to have its performance measured.

³⁰ Google's interpretation request and NHTSA's response can be found here: <https://www.regulations.gov/document?D=NHTSA-2016-0009-0001>

³¹ The Google interpretation uses the term "Self-Driving System" or "SDS" rather than the more-current term "ADS."

³² Letter to C. Urmson, Google (Feb. 4, 2016), <https://www.nhtsa.gov/interpretations/google-compiled-response-12-nov-15-interp-request-4-feb-16-final>.

that “since the Safety Act creates a self-certification system for compliance, NHTSA’s verification of a manufacturer’s compliance . . . is based on our established test procedures.”³³

On reconsideration of the Google interpretation, NHTSA believes it incorrect in some respects. Although the letter recognized that test procedures are for NHTSA’s use in compliance testing, it stated that “in order for NHTSA to interpret a standard as *allowing* certification of compliance by a vehicle manufacturer, NHTSA must first have a test procedure or other means of verifying such compliance.”³⁴ The letter repeated similar assertions in its discussion of specifically applicable standards, and suggested that, for Google to certify its vehicles with designs that prevented compliance testing using the test conditions and procedures specified in the FMVSS, Google must seek exemptions under 49 CFR part 555.

Under NHTSA’s 2016 Google Interpretation of NHTSA’s authority, a manufacturer of an ADS vehicle without the manual controls necessary to conduct some FMVSS compliance tests cannot certify it as FMVSS compliant. Therefore, to the extent that, for example, a conventional steering wheel may be needed for compliance testing, the Google Interpretation is design restrictive and compels use of certain controls or attributes as a condition of certifying the vehicle meets all applicable FMVSS. On reconsideration, NHTSA does not believe the Safety Act requires that manufacturers ensure that their vehicles are equipped to accommodate portions of certain test procedures as a condition of certification. After further examination, the Agency concludes that this approach stifles innovation and unfairly punishes manufacturers seeking to implement innovative technologies, without the safety or other justification that would be required to support a design-specific standard.

III. Reaffirmation of NHTSA’s Position on Certification

³³ *Id.*

³⁴ *Id.* (Emphasis added.) We note that, in addition to the fact that the interpretation appeared to establish a policy not based in NHTSA’s statutory authority, the interpretation should have cited 49 U.S.C. § 30115—not the standards promulgated pursuant to the Safety Act—as the legal provision that allows or disallows certification. This quoted sentence attempts to give the FMVSS agency (in this case, meaning power or effect) they lack over what is required for a valid certification.

With this notice, NHTSA is reestablishing its previous position that the Safety Act requires that a manufacturer exercise “reasonable care” in certifying that the vehicle meets the performance criteria in the FMVSS; certification by the manufacturer does not require the manufacturer ensure that NHTSA is able to verify compliance by performing the test procedures established in the FMVSS. NHTSA’s statement in the 2016 Google Interpretation that a vehicle cannot be certified unless the vehicle is designed in such a way that NHTSA can perform the test procedures or replicate the test conditions in the FMVSS, is inconsistent with the Safety Act’s certification requirement. Accordingly, that aspect of the 2016 Google Interpretation is rescinded.

A manufacturer may certify compliance with the FMVSS in a manner that differs from the test described in the FMVSS. If the manufacturer’s basis for certification demonstrates that the manufacturer exercised “reasonable care” in making its certification, it may so certify, even if the vehicle were designed in such a way that the FMVSS test conditions and procedures cannot be performed. FMVSS test conditions and procedures provide notice to the public of the parameters of the procedures NHTSA will undertake to determine compliance with the performance standards. Above all, however, the vehicle must comply with the standard. As discussed later in this notice, if NHTSA cannot conduct the test, the Agency will pursue other means to determine whether the vehicle meets the need for motor vehicle safety identified in the standard.

Per 49 U.S.C. 30115, a manufacturer is required to certify that a vehicle complies with “applicable *motor vehicle safety standards* prescribed under [the Safety Act]” (emphasis added). The Safety Act defines the term “motor vehicle safety standard” as “a minimum standard for motor vehicle or motor vehicle equipment *performance*.” 49 U.S.C. 30102(a)(9) (emphasis added). Fundamentally, the reason the 2016 Google Interpretation is inconsistent with the Safety Act is that, by maintaining that manufacturers must ensure that compliance with the FMVSS can be verified using the specific test conditions and procedures in the FMVSS, it effectively

required those manufacturers to follow those specific conditions and procedures to certify the vehicle. Test conditions and procedures are not minimum performance criteria; they are a set of preparatory actions that are taken to set up a scenario for one way *in which* performance will be measured.

For those vehicles whose design and configuration allow NHTSA to conduct testing employing existing test conditions and procedures, the Agency is bound by that specific method of measuring performance, which provides the regulated industry with fair notice of how the Agency will test for compliance. *See United States v. Chrysler Corp., supra.*³⁵ Manufacturers are not so bound as to their basis for certification. It is for this reason that, as noted earlier, NHTSA has long stated that manufacturers could use methods such as engineering analysis or computer simulations, which do not involve physically running the FMVSS test procedures, to provide a basis for certification. The FMVSS test procedures do not foreclose other methods of exercising reasonable care in certifying that a vehicle complies with applicable minimum performance standards.

Requiring that vehicles be designed in such a way that the FMVSS compliance test can be run fundamentally alters the statutory scheme from one where the Agency sets “minimum standard[s] for motor vehicle or motor vehicle equipment performance” to one in which the agency is dictating designs that accommodate a particular method of testing, without expressly stating as much when establishing the FMVSS through rulemaking. To the extent that test procedures introduce design constraints not found in the standard’s performance requirements, interpreting test procedure compatibility as a mandatory requirement hinders innovation of all types, including innovative technological methods of meeting or exceeding the actual performance standards that constitute the FMVSS. Such an approach undermines the safety-innovation goals behind the Safety Act’s self-certification approach.

³⁵ *See also* 49 CFR 5.69 (“Notice to the regulated party is a due process requirement.”)

In addition to these legal and practical reasons, NHTSA is also rescinding the portions of the 2016 Google Interpretation related to the application of the FMVSS test procedures to certifying manufacturers based on procedural concerns. The 2016 Google Interpretation did not acknowledge that it represented a change.³⁶ The Agency's longstanding position that manufacturers do not have to test using the FMVSS test procedures to certify their products undoubtedly engendered serious reliance interests that should have been taken into account when considering a change.³⁷

IV. Implications of this Return to NHTSA's Position on Certification

a. Certification of Vehicles and Equipment with Innovative Designs

By clarifying that manufacturers are not required to ensure that the test conditions and procedures in the FMVSS can be performed when they certify the vehicle, this notice confirms that manufacturers have more flexibility than described in the 2016 Google Interpretation to certify vehicles with innovative designs, including ADS vehicles that are not equipped with manual controls or other features that are referenced in the FMVSS test conditions or procedures. Importantly, however, NHTSA distinguishes the situation where the FMVSS specifies a substantive performance or other requirement that the vehicle cannot meet because of an innovative design from one where the innovative design omits a feature that is an instrumental means to satisfying such performance requirement. In the former situation, manufacturers are not permitted to certify vehicles as compliant if they do not meet all applicable performance standards, including any particular section of a performance standard or subcomponent thereof. For example, FMVSS No. 135, "Light vehicle brake systems," specifically requires that service brakes be activated by means of a foot control (S5.3.1). Today's notice reaffirming the Agency's position on certification would not permit the manufacturer of a vehicle without a

³⁶ See *FCC v. Fox*, 556 U.S. 502, 515 (2009) ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.").

³⁷ See *id.*

brake pedal to certify the vehicle as compliant, because such a vehicle would not meet the substantive requirement of S5.3.1. Unless and until NHTSA conducts a rulemaking to remove or modify that requirement, a manufacturer must seek an exemption from S5.3.1 if that manufacturer wishes to build a vehicle not equipped with a foot control. If, however, FMVSS No. 135 did not specifically require in S5.3.1 that the service brakes be actuated by a foot control, a manufacturer would be able to certify a vehicle without that foot control even though the *Road test procedures and performance requirements* in S7 of the standard require that certain forces be applied to the brake pedal in the course of testing.

The 2016 Google Interpretation restricted the extent to which manufacturers of ADS vehicles could incorporate innovative design features into these vehicles, since it effectively required manufacturers either to equip a vehicle with all motor vehicle equipment referenced in an applicable FMVSS test procedure, or seek an exemption.³⁸ By reestablishing that manufacturers can certify their vehicles as compliant even if one or more FMVSS test procedures cannot be performed, NHTSA confirms that manufacturers have flexibility in designing vehicles to meet the FMVSS. This also reduces the need for a manufacturer to seek exemptions from FMVSS test procedures under 49 U.S.C. 30113.

The impact this return to NHTSA's prior position will have on the ability of manufacturers of ADS vehicles without some manual controls to certify FMVSS compliance can be illustrated using FMVSS No. 126, "Electronic Stability Control for Light Vehicles." FMVSS No. 126 requires that most light vehicles be equipped with an electronic stability control (ESC) system that automatically adjusts the vehicle's brakes to prevent loss of vehicle control. The performance criteria in the standard require that the vehicle cannot exceed certain limits on the yaw rate and lateral displacement of the vehicle's center of gravity when the vehicle is tested in accordance with the standard's test conditions and procedures. However, because the standard's

³⁸ See 85 FR 7826, 7834-36 (Feb. 11, 2020) (discussing request from Nuro, Inc. for an exemption from portions of FMVSS No. 111 test procedures).

test conditions state that “a steering machine programmed to execute the required steering pattern must be used” to execute the FMVSS test procedures,³⁹ it would not be possible to run the compliance test on a vehicle that is not equipped with a conventional steering wheel compatible with existing steering machines. Thus, under the 2016 Google Interpretation, a manufacturer would not be permitted to certify such a vehicle to FMVSS No. 126 absent an exemption—even if the vehicle’s ESC system would meet the standard when tested on an otherwise identical vehicle with manual controls.

By contrast, under today’s return to NHTSA prior position, a manufacturer will be able to certify an ADS vehicle without a steering wheel as compliant with FMVSS No. 126 if the manufacturer has, pursuant to 49 U.S.C. 30115, exercised reasonable care to ensure that the vehicle complies with the performance requirements in the standard. A valid basis for certification does not require that the manufacturer recreate the exact test conditions and use the exact methods described in the FMVSS No. 126 test procedures. Rather, the manufacturer must ensure that its basis for certifying compliance with the standard reasonably demonstrates that the vehicle’s ESC system achieves the performance levels required. A basis for certification could consist of simulation, testing performed with alternative ways of controlling the vehicle, or even alternative testing scenarios that demonstrate that the ESC maintains vehicle stability to the same degree as a compliant vehicle tested in accordance with the test procedures.

b. Enforcement

The return to NHTSA’s position on certification may have implications for NHTSA’s enforcement with respect to vehicles that it is unable to test using the FMVSS test conditions and procedures. NHTSA is confirming that such vehicles may be certified as compliant by a manufacturer exercising “reasonable care,” notwithstanding circumstances where the Agency is unable to use all aspects of the FMVSS test procedures to verify compliance independently.

³⁹ 49 CFR 571.126, S6.3.5.

However, while this may impact how NHTSA exercises its oversight, it does not relieve a manufacturer of such vehicles of any obligations under the Safety Act or NHTSA regulations.

NHTSA reemphasizes that the Safety Act requires that vehicles must both comply with all applicable FMVSS and be certified as compliant by a manufacturer exercising reasonable care before they may be sold or otherwise introduced into interstate commerce.⁴⁰ NHTSA enforcement actions commonly address the requirement of actual compliance and result in recalls independent of any finding that the manufacturer's certification was improper.⁴¹

As explained above, the Safety Act requires that every vehicle must comply with applicable FMVSS regardless of design. If a vehicle does not comply with these applicable performance standards, due to its design or for any other reason, it is noncompliant and generally may not be sold or otherwise introduced into interstate commerce.⁴² In the case of a vehicle whose advanced design impairs NHTSA's ability to apply all FMVSS test procedures and conditions outlined within the FMVSS, the minimum performance standards in the FMVSS still apply and the manufacturer's obligations under the Safety Act remain unchanged. If the vehicle is determined, by the manufacturer or Agency, to be noncompliant, the Safety Act requires that the manufacturer notify owners, purchasers and dealers, and remedy the noncompliance without charge--even if the manufacturer had certified compliance using reasonable care.⁴³

To be clear, the Agency's position as described in this notice does not render any FMVSS inapplicable to ADS vehicles, or any other vehicles. Manufacturers of such vehicles must determine, through the exercise of reasonable care, whether their vehicles comply with the FMVSS. If they do, they may certify the vehicles as compliant. Like all manufacturers, if they or NHTSA later determine that a vehicle does not in fact comply, they must recall it.

⁴⁰ 49 U.S.C. 30112, 49 U.S.C. 30115.

⁴¹ A recall is required when a manufacturer "decides in good faith that the vehicle or equipment does not comply with an applicable motor vehicle safety standard." 49 U.S.C. 30118(c)(2). NHTSA may also make a decision that a vehicle or equipment does not comply. 49 U.S.C. 30118(a)-(b).

⁴² A noncompliant vehicle, however, may be subject to a statutory exception or qualify for an exemption. *See* 49 U.S.C. 30112(b), 30113-14.

⁴³ 49 U.S.C. §§30118-30120.

Of course, NHTSA's inability to test a vehicle using an established FMVSS test condition or procedure does have some impact on the regulatory tools at the Agency's disposal to conduct oversight and enforcement activities. Independent verification of FMVSS compliance through testing has long been a backbone of NHTSA's enforcement program prior to the 2016 Google Interpretation, and will remain an integral part of its enforcement program subsequent to this interpretation. NHTSA enforces FMVSS compliance by conducting compliance testing. NHTSA decides what vehicles it will test to various FMVSS. The Agency contracts with independent laboratories to conduct compliance testing on its behalf, in accordance with the FMVSS test conditions and procedures. If an apparent noncompliance is found, NHTSA typically continues its investigation by asking the manufacturer various questions, including those relating to the manufacturer's basis for certification. Manufacturers have an opportunity to rebut any apparent noncompliance found by the Agency. If NHTSA does not believe that the manufacturer has rebutted an apparent noncompliance, the Agency pursues a recall.⁴⁴

NHTSA emphasizes that the FMVSS enforcement framework remains an effective and critical method of enforcing the Federal safety standards. While the Agency is returning to its longstanding position that manufacturers are not required to certify compliance using the test conditions and procedures in the FMVSS, NHTSA *will* hold a manufacturer responsible for a noncompliance when a vehicle fails a compliance test using those procedures. The compliance tests adopted into the FMVSS accurately and objectively demonstrate the vehicle's performance measured under the conditions and procedures to which it was subjected. A vehicle's failure of the FMVSS compliance test is *prima facie* evidence of noncompliance. The FMVSS test procedures are generally designed to replicate or represent the real-world circumstances giving rise to the safety need underlying the performance mandated by the FMVSS. The test assesses the performance of the vehicle relative to the minimum necessary to meet a safety need

⁴⁴ In most cases, a manufacturer agrees to conduct a recall without NHTSA taking additional formal steps. If the manufacturer does not agree to a recall, the Agency may send the manufacturer a recall request letter and may utilize the statutory process for ordering a recall. *See* 49 U.S.C. 30118(a)-(b).

determined through the rulemaking process. A failure of the FMVSS compliance test is evidence of a failure to attain the minimum level of performance set by the standard to meet the safety need. NHTSA can and generally will pursue a violation of the Safety Act for the nonconformance based on a failure of that test alone.

The traditional enforcement framework is applicable to vehicles that are designed in such a way that NHTSA can use its FMVSS test conditions and procedures fully. However, as explained above, the Safety Act permits manufacturers to certify vehicles as FMVSS compliant even if they are designed in a way that does not allow the Agency to use its existing FMVSS test procedures, such as vehicles without the manual controls that are needed for the test procedures. A gap between a manufacturer's ability to certify compliance and NHTSA's ability to verify compliance using the FMVSS test procedures has always been a possibility. However, since many of the manual controls referenced in FMVSS test procedures are not mandated equipment, it is only with the recent advent of ADS technology that manufacturers have realistically started to consider developing production vehicles without manual controls. As NHTSA expects that the Agency will confront this issue should manufacturers begin producing vehicles without such controls (until NHTSA amends its FMVSS test procedures to accommodate vehicles without manual controls), this notice is intended to provide transparency into the methods by which the Agency expects to exercise its oversight.

Specifically, for vehicles for which NHTSA cannot fully utilize its existing FMVSS test conditions or procedures, NHTSA first maintains that by choosing to introduce these new designs, manufacturers do so with knowledge that the Agency will likely be forced to adapt existing test procedures to novel vehicle configurations. Instead of, or in addition to testing, NHTSA may focus additional efforts on investigating the manufacturer's basis for certification. NHTSA may request information and documentation from a manufacturer regarding its method of certification. For example, if a manufacturer used alternate test procedures, NHTSA may review those procedures and test results to evaluate whether they demonstrate the vehicle

complies with the standard and/or whether the manufacturer exercised reasonable care. In addition to information gathering, NHTSA may perform other inquiries or analyses, such as testing in the same manner as the manufacturer, or applying the Agency's own engineering judgment in an investigation as to whether the vehicle complies with all applicable FMVSS and/or whether the manufacturer exercised reasonable care. If NHTSA finds an apparent noncompliance, and the manufacturer has not rebutted the apparent noncompliance, the Agency can and likely will pursue a recall. If a manufacturer's basis for certifying does not satisfy the requirement of "reasonable care" then, in general, it is not permitted to sell or otherwise introduce into interstate commerce its vehicles that lack a valid certification, and may be subject to civil penalties.⁴⁵

With respect to compliance, there are several methods by which NHTSA may continue to exercise its oversight over vehicles for which NHTSA cannot fully utilize its existing FMVSS test conditions or procedures. To the extent that NHTSA's FMVSS test conditions and procedures can enable the Agency to conduct a partial compliance test, it may do so. In other words, NHTSA may omit testing those aspects of a FMVSS for which its test procedures do not apply to a particular design, while otherwise using its established test procedures to conduct a compliance test.⁴⁶ In such cases, NHTSA will need to consider the extent to which various aspects of its test procedures are independent from the aspects that cannot be used with a

⁴⁵ See 49 U.S.C. 30112(a)(1). A manufacturer that violates the certification requirement is also liable for civil penalties and may be subject to additional action, as appropriate. 49 U.S.C. 30165(a)(1); see 49 U.S.C. 30163(a)(1) (actions to enjoin violations of the Safety Act).

⁴⁶ This approach has been codified in FMVSS No. 214, "Side impact protection," regarding the moving deformable barrier (MDB) test (S7). The MDB test is designed so that a 50th percentile male dummy is seated in the front outboard seating position on the side struck by the MDB, and with a 5th percentile adult female test dummy seated in the rear outboard seating position on the same struck side. In S5(b)(3), *General exclusions*, FMVSS No. 214 states that passenger cars, multipurpose passenger vehicles, trucks and buses are excluded from the MDB test as applied to the rear seat "for rear seating areas that are so small that [the 5th percentile adult female test dummy used in the test] cannot be accommodated according to the positioning procedure specified in S12.3.4 of this standard." For those vehicles where the rear seating position is too small to fit the 5th female dummy, the MDB test is nonetheless conducted with the 50th percentile male dummy in the front seat.

particular design. In addition, certain aspects of compliance may also be verified through visual inspections, without need for testing.⁴⁷

The Agency may also rely on other investigative techniques to evaluate a vehicle's compliance with the FMVSS. The Safety Act specifically contemplates that the Agency may make noncompliance (or safety-related defect) determinations through methods beyond testing and inspection. Specifically, the Act provides that NHTSA "shall notify the manufacturer of a motor vehicle or replacement equipment immediately after making an initial decision (through testing, inspection, investigation, or research carried out under this chapter, examining communications under section 30166(f) of this title, or otherwise) that the vehicle or equipment contains a defect related to motor vehicle safety or does not comply with an applicable motor vehicle safety standard prescribed under this chapter."⁴⁸ Should the Agency's research, information gathering, or other forms of investigation reveal an apparent noncompliance, the Agency would discuss the findings with the affected manufacturer. This information could result in a manufacturer "decid[ing] in good faith that the vehicle ... does not comply with an applicable motor vehicle safety standard," and thus initiating a recall.⁴⁹ Alternatively, the Agency could conduct further investigation, or proceed with ordering a recall based on the evidence it has collected.

As an example, if a manufacturer used an alternative test procedure to test its vehicles for compliance with the FMVSS, the Agency's evaluation of those test procedures might reveal a flaw in methodology, which could result in overstating the vehicle's performance. If the error was significant enough to impact the vehicle's compliance (i.e., the vehicle did not achieve the performance required by the standard), that error could result in a noncompliance determination or finding that the manufacturer failed to exercise reasonable care in certifying compliance.

⁴⁷ For example, a vehicle may be noncompliant because it lacks a required telltale, or an item of equipment may be noncompliant because it does not contain a required label.

⁴⁸ 49 U.S.C. 30118(a).

⁴⁹ *See* 49 U.S.C. 30118(c)(2).

As noted above, this notice has no impact on a manufacturer's obligations under the Safety Act to manufacture vehicles that fully comply with the FMVSS (absent an exception or exemption), and that are certified as compliant based on the exercise of reasonable care. NHTSA's oversight and enforcement of these requirements continues irrespective of whether it can fully test a vehicle based on its existing FMVSS test procedures. The Safety Act is premised on a system of self-certification. Vehicles with novel designs are held to the same performance standards as vehicles with traditional designs. NHTSA's enforcement program will continue to evaluate a wide variety of vehicles to verify their compliance.

Finally, NHTSA emphasizes that, where the Agency is able to evaluate compliance using the FMVSS test conditions and procedures—as is the case with almost all vehicles, the results of such a compliance test would be the basis for the Agency's compliance determination. The test conditions and procedures in the FMVSS remain the primary method by which NHTSA will assess compliance with the FMVSS. They were established through notice-and-comment rulemaking procedure and establish the threshold levels of safety required of vehicles. Therefore, if a vehicle fails to meet the minimum performance criteria when tested according to the test conditions and procedures established in the FMVSS, that failure is prima facie evidence of a noncompliance (evidence sufficient for a manufacturer to “decide[] in good faith that the vehicle or equipment does not comply with an applicable motor vehicle safety standard” (49 U.S.C. § 30118(c)(2))). It is only where NHTSA is unable to apply or reasonably adapt the established test conditions and procedures to a vehicle to assess compliance, such as due to the absence of traditional manual controls, that NHTSA would look to its other investigatory tools to form a basis for a noncompliance finding.

c. Motor Vehicle Safety as the Nexus between FMVSS and Defect Obligations

The Safety Act's compliance and defect authorities are complementary. Pursuant to the Safety Act, NHTSA is required to prescribe “*motor vehicle safety standards*” (FMVSS), which

must “meet the need for *motor vehicle safety*.”⁵⁰ Under the Safety Act, motor vehicles and motor vehicle equipment must not contain any “defect related to *motor vehicle safety*.” The recall and sale prohibition provisions of the Safety Act for noncompliance with FMVSS and when there exists a “defect related to motor vehicle safety” are effectively identical;⁵¹ the common use of “motor vehicle safety” is worthy of note. The Safety Act defines “motor vehicle safety” as “the performance of a motor vehicle or motor vehicle equipment in a way that protects the public against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident, and includes nonoperational safety of a motor vehicle.”⁵² This common term, which is the driving force behind both FMVSS-setting and defect determinations, acts to link NHTSA’s execution of its authorities against unreasonable safety risks inherently, both in setting FMVSS and in overseeing the safety of vehicle design, construction, and performance.

When NHTSA establishes a performance standard in the form of an FMVSS, the Agency is declaring the requisite minimum threshold metric to meet the need for motor vehicle safety in that aspect of performance. In so doing, the Agency bars itself from declaring a vehicle defective solely on performance meeting that specific and discrete threshold.⁵³ For instance, the side impact protection requirements of FMVSS No. 214 require each vehicle to meet vehicle-to-pole test requirements when tested under the conditions specified in the standard.⁵⁴ The requirements must be met when test dummies representing a 50th-percentile adult male and a 5th-percentile female are used in the test (S9.2). In the pole test, the vehicle’s side protection system must perform in a manner that limits the accelerations measured by the test dummy’s head in the test. When using the 50th-percentile male test dummy, the dynamic performance requirements that must be met in the test include a head injury criterion (HIC) that is not to exceed 1000

⁵⁰ 49 U.S.C. 30111(a) (emphasis added).

⁵¹ See, e.g., 49 U.S.C. 30112 (a) and (c), 30116, and 30118-20 (emphasis added).

⁵² 49 U.S.C. 30102(a)(9).

⁵³ Note that other aspects of the vehicle or equipment design, construction or performance could lead to a defect determination.

⁵⁴ 49 CFR 214, S9.

(S9.2.1). If the test dummy used in a compliance test of a vehicle tested under the conditions of the standard records a HIC of 850, absent other information indicating the existence of an unreasonable safety risk, the Agency legally cannot declare the protection system defective based on that HIC value alone, as the vehicle satisfied the threshold the Agency has established as meeting the need for motor vehicle safety.⁵⁵

However, just as evidence of FMVSS compliance can serve as a logical constraint as to the existence of a potential defect, evidence of FMVSS *non*-compliance can serve as evidence of a defect. In other words, evidence that a vehicle would not likely meet a performance standard established in an FMVSS, even if the Agency could not precisely apply FMVSS test procedures, is evidence the vehicle failed to attain the minimum standard for motor vehicle performance set by NHTSA. Such a failure can demonstrate that the vehicle failed to “protect[] the public against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle,” or “against unreasonable risk of death or injury in an accident.” Such evidence is indicative of not only a noncompliance, but also the existence of a defect related to motor vehicle safety, which potentially can serve as the basis of a defect finding.

For instance, FMVSS No. 302 establishes requirements for the flammability resistance of certain materials in a vehicle’s interior compartment.⁵⁶ Material shall not burn, nor transmit a flame front across its surface, at a rate of more than 102 millimeters (4 inches per minute) (S4.3(a)). Under the standard’s test procedures, a specimen of material is tested in a metal burn cabinet. Each specimen of material to be tested must be a rectangle 102 millimeters (4 inches) wide by 356 millimeters (14 inches) long, wherever possible, to fit between two matching U-shaped frames (S5.2.1, S5.1.3). If NHTSA were unable to obtain a specimen from the vehicle

⁵⁵ Of course, evidence that the system fails sporadically, wears prematurely, or otherwise has problems, could be the basis for a defect determination.

⁵⁶ 49 CFR 571.302. The materials are: seat cushions, seat backs, seat belts, headlining, convertible tops, arm rests, all trim panels including door, front, rear, and side panels, compartment shelves, head restraints, floor coverings, sun visors, curtains, shades, wheel housing covers, and any other interior materials, including padding and crash-deployed elements, that are designed to absorb energy on contact by occupants in the event of a crash (S4.1). Child restraint systems also must meet FMVSS No. 302 (49 CFR 571.213, S5.7).

large enough to fit in the U-shaped frames, the Agency may not be technically capable of meeting specifics of the setup requirements of the test procedure. But in setting the standard's actual performance requirements, the Agency has declared the requisite threshold metric that meets the need for motor vehicle safety. If the Agency were to have reason to believe that a material used in a vehicle would transmit a flame front at a higher rate than specified in FMVSS No. 302 (e.g., in performing an examination, the Agency finds that the material combusts immediately), it has sufficient authority to pursue a recall of the vehicle based on its complementary compliance and defect authorities. The manufacturer's duty to ensure its vehicles comply with the standard, and is free from defects related to motor vehicle safety, is not affected by the Agency's ability to utilize the test procedures fully. Thus, if the vehicle does not comply with the standard, the manufacturer must fulfill its recall obligations. If the manufacturer does not do so, the Agency could investigate the apparent noncompliance, and if necessary, potentially use its defect authority to pursue a recall of the vehicle. In sum, in addition or as an alternative to evaluating a vehicle's compliance with the FMVSS and certification, in appropriate circumstances, the Agency may consider whether a particular vehicle poses an unreasonable risk to motor vehicle safety. In all circumstances, if the Agency has information that indicates a potential noncompliance or other safety concern with a vehicle, it will take appropriate action.

V. Request for Comment

Given the importance of the issues addressed in this notice, and consistent with the requirements in 49 CFR part 5.41 and Executive Order 13891, "Promoting the Rule of Law Through Improved Agency Guidance Documents," the Agency is requesting comments on the implications of this interpretation, which may inform future Agency rulemaking actions.

How long do commenters have to submit comments?

We are providing a 30-day comment period.

How do commenters prepare and submit comments?

- Comments must be written in English.

- To ensure that comments are correctly filed in the Docket, commenters should include the Docket Number shown at the beginning of this document in their comments.
- If persons are submitting comments electronically as a PDF (Adobe) File, NHTSA asks that the documents be submitted using the Optical Character Recognition (OCR) process, thus allowing NHTSA to search and copy certain portions of the submissions. Comments may be submitted to the docket electronically by logging onto the Docket Management System website at <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- Commenters may also submit two copies of their comments, including the attachments, to Docket Management at the address given above under ADDRESSES.

Commenters should note that pursuant to the Data Quality Act, in order for substantive data to be relied upon and used by the agency, the data must meet the information quality standards set forth in the OMB and DOT Data Quality Act guidelines. Accordingly, we encourage commenters to consult the guidelines in preparing comments. OMB's guidelines may be accessed at <http://www.whitehouse.gov/omb/fedreg/reproducible.html>. DOT's guidelines may be accessed at http://www.bts.gov/programs/statistical_policy_and_research/data_quality_guidelines.

How can commenters be sure that their comments were received?

If commenters wish Docket Management to notify them upon their receipt of their comments, they should enclose a self-addressed, stamped postcard in the envelope containing their comments. Upon receiving their comments, Docket Management will return the postcard by mail.

How do commenters submit confidential business information?

If a commenter wishes to submit any information under a claim of confidentiality, it should submit three copies of your complete submission, including the information claimed to be

confidential business information, to the Chief Counsel, NHTSA, at the address given above under FOR FURTHER INFORMATION CONTACT. In addition, commenters should submit two copies, from which they have deleted the claimed confidential business information, to Docket Management at the address given above under ADDRESSES. When they send a comment containing information claimed to be confidential business information, they should include a cover letter setting forth the information specified in NHTSA's confidential business information regulation.⁵⁷ To facilitate social distancing during COVID-19, NHTSA is temporarily accepting confidential business information electronically. Please see <https://www.nhtsa.gov/coronavirus/submission-confidential-business-information> for details.

Will the agency consider late comments?

We will consider all comments that Docket Management receives before the close of business on the comment closing date indicated above under DATES. To the extent possible, we will also consider comments that Docket Management receives after that date. If Docket Management receives a comment too late for us to consider, we will consider that comment as an informal suggestion for future consideration.

How can the public read the comments submitted by other people?

Persons may read the comments received by Docket Management at the address given above under ADDRESSES. The hours of the Docket are indicated above in the same location. Persons may also see the comments on the Internet. To read the comments on the Internet, go to <http://www.regulations.gov>. Follow the online instructions for accessing the dockets.

Please note that, even after the comment closing date, we will continue to file relevant information in the Docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that interested persons periodically check the Docket for new material.

⁵⁷ 49 CFR Part 512

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Jonathan Charles Morrison,
Chief Counsel.

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