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Filed via regulations.gov

January 28, 2020

National Highway Traffic Safety Administration
Docket Management Facility
1200 New Jersey Avenue S.E.
West Building Ground Floor, Room W12-140
Washington, D.C. 20590-001

Re: Docket No. NHTSA-2019-0121: Notice of Proposed Rulemaking: Replica Motor Vehicles; Vehicle Identification Number (VIN) Requirements; Manufacturer Identification; Certification

Dear Sir or Madam:
Vehicle Services Consulting, Inc. submits the attached comments in response to the Replica Law Notice of Proposed Rulemaking published at 85 FR 792 (Jan. 7, 2020).

Sincerely,

Lance Tunick

Lance Tunick
President

VSCI COMMENTS ON NHTSA REPLICA NPRM

1. In general

a. Imports

- 49 USC 30114(b)(1)(A) directs NHTSA to exempt up to "325 replica motor vehicles per year that are manufactured or imported by a low-volume manufacturer". The regulations must therefore consistently refer to "manufacturing in the United States *or importing*."
- NHTSA has stated that replica vehicles manufactured by a foreign manufacturer may only be imported by their fabricating manufacturer. NHTSA should clarify that a designated USA subsidiary of the fabricating foreign replica car manufacturer (and only one such subsidiary) may import the replica vehicles under the Replica Law and Part 586.

b. The 325 vehicle per year limit:

- It should be clarified that:
    - NHTSA can grant each registered low-volume manufacturer an exemption to manufacture in the United States (including import) up to 325 replica vehicles per calendar year, regardless of how many replica or other vehicles such manufacturer produces outside of the US, as long as the statutory world-wide production cap of 5000 is respected.
    - The Replica Law exempts a maximum of 325 replica vehicles per year that are manufactured in the US (including imported) by a given low-volume manufacturer, but the Replica Law does not prohibit domestic production or imports above the 325 limit by such low-volume manufacturer as long as all production and imports exceeding such limit comply with all applicable FMVSS and other standards exempted under the Replica Law.

2. Definitions

a. Replica motor vehicle and the meaning of the word "resemble"

- For 50 years, NHTSA has looked to dictionary definitions when seeking to determine the meaning of words not defined in a statute. Here, the word "resemble" is not defined in the Replica Law. According to Merriam-Webster, "resemble" means to be like or similar to". Merriam Webster further defines "similar" as 1 **:** having characteristics in common; 2 alike in substance or essentials; 3 **:** not differing in shape but only in size or position.
- By referring to the above dictionary definitions, we can conclude that NHTSA would be incorrect if it were to require that *"The documentation must demonstrate that the replica vehicle has the same length, width, and height as the original ...."* Emphasis added.
- There is, however, an approach which would be in keeping with Merriam Webster. Rather than requiring "the same length, width, height", NHTSA should adopt the California Air Resources Board's size-related language found in the Board's replica car emissions certification rules. CARB states as follows:

    > "[The replica vehicle must] resemble the body of a motor vehicle, on an overall 1:1 scale (+/- 10 percent) of original body lines, excluding roof configuration, ride height, trim attached to the body, fenders, running boards, grille, hood or hood lines, windows, and axle location, …"

    We further note that requiring a replica vehicle to have the same height, width, and length of original would indeed be unreasonable for replica cars already in production for markets outside the USA – NHTSA's approach would require a significant redesign. It would also be

unreasonable if, for drivetrain packaging or safety reasons, the original dimensions of the design had to be increased by, for example, the 10% allowed by CARB.

- NHTSA would be exceeding its authority under the Replica Law and would be mistaken if it were to adopt the following language:
    - "*We interpret the Act's reference to "body" to mean any part of the vehicle that is not part of the chassis or frame. Therefore, NHTSA interprets "body" to include, but not be limited to: the exterior sheet metal and trim, the passenger compartment, trunk, bumpers, fenders, grill, hood, interior trim, lights and glazing"*

  The term "body" as used in the Replica Law must be interpreted according to its plain meaning, which is more limited than the above NHTSA language. As NHTSA notes elsewhere in the NPRM, the word "body" refers to the "outward appearance or exterior" of a vehicle. (See 85 FR at 796.) The resemblance requirement under the Replica Law therefore extends only to a vehicle's "body styling [and] shape." Id. NHTSA should limit its "resemblance determination" only to an examination of "the overall shape of the body of the vehicle." Id.
- In view of the above, NHTSA must remove the word "**closely**" from proposed section 586.5(e). The statute says "resemble", not "closely resemble".
- NHTSA also proposes that the replica vehicle must resemble the body of another motor vehicle which was manufactured "for consumer sale" not less than 25 years before the manufacture of the replica. It should be clarified that it is permissible for the replicated vehicle to have been manufactured "for consumer sale somewhere in the world" (i.e. not necessarily in the USA).

b. Manufacture under license for intellectual property rights

- The only intellectual property (IP) rights which a replica car manufacturer must possess under the Replica Law are those IP rights needed to replicate the body of a car produced at least 25 years earlier. Put another way, the IP issue is limited to the external appearance of the car being replicated. We agree with the NHTSA decision "not to "to require that manufacturers also obtain rights associated with vehicle mechanics, electronic components or other interior aspects of a vehicle…. That said, we are concerned with the proviso added to the end of that sentence, which proviso states "unless implicated by the reproduction or otherwise necessary to ensure that the outward facing appearance of the replica vehicle." We believe that the proviso is redundant, vague, and would raise more issues than it will resolve.
- NHTSA correctly states that a replica must be produced either under a license or "manufactured by a current owner of such intellectual property, including, but not limited to, product configuration trade dress, trademark, and patent rights." NHTSA therefore properly interprets the licensing requirement to apply only when a manufacturer intending to produce replica vehicles does not itself own the intellectual property rights to the original vehicle (which is being replicated).
- When a license is required, a replica car manufacturer must obtain all IP rights (if any) necessary to replicate the original vehicle body, and must obtain such rights (if any) from the original manufacturer, its successes or assignees, or current owner of such rights. The "if any" in the preceding sentence is crucial. As NHTSA notes, sometimes "intellectual property rights for the original vehicle are no longer protected" (85 FR at 798).
- In view of the above:
    - The definition of replica motor vehicle should be amended as follows:
      (3) Is one of the following:
      (i) Manufactured under a license for all of the intellectual property rights of the motor vehicle that is intended to be replicated, including, but not limited to, product configuration, trade dress, trademark, and patent, from the original manufacturer, or its successors or assignees; or,

(ii) Manufactured by a current owner of such intellectual property, including, but not limited to, product configuration trade dress, trademark, and patent rights; or
(iii) A motor vehicle whose intellectual property rights are no longer protected.

- Section 586.6(b)(4) should read as follows:

A certification stating one of the following:

- the manufacturer has determined the intellectual property rights required and obtained all licenses and permissions necessary to legally produce the replica; or
- the intellectual property rights are no longer protected; or
- the manufacturer is the current owner of such intellectual property, including, but not limited to, product configuration trade dress, trademark, and patent rights.

- NHTSA has also proposed to require that "in addition to the required certification, the manufacturer also must provide supporting documentation that sets forth a description of the types of intellectual property that are necessary to produce the replica vehicle, addressing the status of each of those rights." We maintain that under the Replica Law, it is sufficient for the replica car manufacturer simply to certify that it has the needed IP rights. The certification is made under penalty of perjury. If there is a dispute about the IP rights, there are proper forums to resolve the dispute – such as the courts, the Patent and Trademark Office, the US International Trade Commission. NHTSA would not have the IP expertise to examine IP documentation or to make a decision regarding the sufficiency or validity of IP documentation.

3. Safety Requirements

- Other than requiring compliance with *equipment* FMVSS, it would be beyond the scope of NHTSA's authority under the Replica Law to promulgate safety standard requirements applicable to replicas.

4. Registration requirements

- It would be beyond NHTSA's authority under the Replica Law to promulgate a regulation providing that "manufacturer whose registration is not approved or denied within the [statute's] allotted time, who believes its registration is thus deemed approved, must obtain confirmation of the approval from NHTSA." Let us be perfectly clear – this "deemed approved" requirement was written into the Replica Law precisely because Congress – as well as much of the public – knows NHTSA's history of missing deadlines. NHTSA's proposed "confirmation" requirement would eradicate the statute's clear mandate that NHTSA decide within the allotted timeframe or accept that the registration is deemed granted.[1] NHTSA's concern that a replica car "manufacturer might assume its registration was deemed to be approved when in fact it was never received by NHTSA" is unrealistic. If, as proposed in Part 586, replica car manufacturer registrations will only be submitted on-line and the manufacturer will receive from NHTSA a confirmation email of submission, then there will be no room for doubt in this process. Further, if, somehow, NHTSA does "lose" a properly-submitted registration, it is simply inappropriate for NHTSA to disregard the "deemed approved" language in the statute. Rather, NHTSA should avail itself of its right to revoke a registration that is improper. 49 U.S.C. 30114(b)(5)

[1]. Indeed, NHTSA's proposal does not even state how the "confirmation" would be obtained (requested?), nor does it state how long NHTSA has to respond to any confirmation request.

5. Certification and labeling

- As regards the permanent label, NHTSA proposes that the Part 567 certification label "must identify the specified standards and regulations from which the replica vehicle is exempt." This could prove unwieldly. If a replica were exempt from all vehicle FMVSS, the list would require an enormous label. NHTSA should therefore give the replica manufacturer the option to either identify the specified standards from which the replica is exempt, or to identify and clearly state that the replica is EXEMPT FROM ALL FMVSS *EXCEPT* FOR THE FOLLOWING ____. "

6. Federalism

- We do not agree with NHTSA's conclusions on pre-emption of state law.
    - First, § 30114(b)(9), does indeed state that nothing in the "exemption for low-volume manufacturers" subsection of the Act shall be construed to preempt, affect, or supersede any *State titling or registration law or regulation* for a replica motor vehicle, or exempt a person from complying with such law or regulation. But NHTSA has tentatively, and incorrectly, interpreted the above to mean that a State may have its own replica motor vehicle safety standards for such vehicles titled or registered in that State.

      This interpretation flies in the face of a core principle well-established under the Safety Act. Since the Act's inception more than more than 50 years ago, the Federal government has adhered to the idea that national uniformity is essential with regard to the regulation of vehicle safety. NHTSA has clearly said that the Safety Act "requires national uniformity of Federal and state safety standards." https://www.nhtsa.gov/interpretations/86-64 . Properly implemented national uniformity serves the important purpose of reducing the chances of a state-by-state patchwork of safety requirements. We therefore believe that a Part 586 exemption from an FMVSS preempts any state standard on a subject matter covered by such exemption.

      This interpretation is necessary in order to permit the Replica Law exemption to be usable and to implement the will of Congress. To repeat -- an exemption must preempt any state law concerning a subject matter covered by a Federal standard from which the replica car manufacturer is exempted. States can indeed have *titling or registration laws or regulations* for a replica motor vehicle – as long as those laws or regulations do not impose safety standard compliance which is covered by the federal exemption.

    - Second, NHTSA has also considered whether the proposed rule could or should preempt State common law causes of action (namely product liability). The agency has tentatively determined that State tort law would not be preempted because the proposed rule would "prescribe only a minimum safety standard". 85 FR at 809. NHTSA is mistaken.

      To begin, the Replica Law does not create a "safety standard" – it creates an exemption. And just like the other exemptions written into the Safety Act, the replica car exemption frees the exemption recipient of an obligation otherwise specified in the Act. This objective could not be achieved if an exemption recipient were nonetheless subject to state product liability claims related to noncompliance with a standard covered by a replica car exemption. If a plaintiff could use "noncompliance with an exempted standard" as part of its state tort claim, the Congressional purpose behind the Replica Law would be lost. Such a suit would impermissibly "conflict with the objectives" of the Replica Law. *Geier v. American Honda Motor Co*., 529 U.S. 861 (2000). Simply

put, the Replica Law exemption provides a degree of preemption similar to what the Supreme Court found in the Geier case.

Like in Geier, the absence of such preemption would present a clear impediment to the Federal law. As the Supreme Court concluded in Geier, a state "tort suit … would stand as an obstacle to the accomplishment and execution of [the federal] objective" and would be preempted.

7. NHTSA points with which we agree:

- Not requiring replica vehicles to have the **exact** same specifications as the original vehicles
- The alternative of allowing joint registrations from incomplete/intermediate/final stage manufacturers wishing to produce or import replica cars.
- To allow low-volume manufacturers to update the interiors to provide modern amenities and safety improvements
- Not to interpret the resemblance or licensing provisions in the FAST Act as requiring replica vehicle manufacturers to obtain rights to put on the replica vehicle all logos and emblems that were on the original vehicle.
- Not to propose any specific requirement that replica manufactures affirmatively obtain intellectual property rights for trademarked, or otherwise protected, make or model names.
- Not to interpret "body" to include chassis or frame components, so that a replica would not need to have the same engine, transmission or drive axles, or drive train as the original vehicle.
- That the interior of the replica vehicle does not need to ''resemble'' that of the original vehicle.
- Not to identify any specific intellectual property rights that must be obtained by a replica manufacturer.
- That NHTSA should not determine which intellectual property is required to produce a replica vehicle.
- That the IP licensing requirement apply only when a manufacturer producing replica vehicles does not own the intellectual property rights to the original vehicle (which is being replicated).
- That registrants may carry forward their registration by informing NHTSA in an annual report of their intent to continue manufacturing the vehicles covered by an approved registration, and need not formally re-register annually at the end of the calendar year concerning those covered vehicles
- To permit replica vehicles to be imported pursuant to 49 CFR 591.5(b); this means that importers can mark box "2A" on NHTSA's HS-7 declaration form
- To have the additions and changes in the NPRM effective immediately upon publication of the final rule in the Federal Register.
- That registrations and annual reports should only be filed via vPIC, online.