The Notice Regarding the Applicability of NHTSA FMVSS Test Procedures to Certifying Manufacturers is procedurally deficient, distorts NHTSAâ€™s history of interpreting the applicability of FMVSS with factual error/omission, and ignores the plain text of NHTSAâ€™s regulations that require vehicles to be capable of passing the tests established in each FMVSS under 49 CFR 571. Additionally, this notice appears to weaken NHTSAâ€™s ability to enforce its regulatory requirements and is not in the interest of public safety. NHTSA should treat this comment as a petition to withdraw or modify this guidance document.

PROCEDURAL DEFICIENCIES
NHTSA requests comment in section V of the notice â€œGiven the importance of the issues addressed in this notice, and consistent with the requirements in 49 CFR part 5.41 and Executive Order 13891, â€œPromoting the Rule of Law Through Improved Agency Guidance Documentsâ€¦â€ This request indicates that NHTSA recognizes the notice to be a â€œsignificant guidance documentâ€ as defined in the executive order. Review of both 49 CFR 5.41 and Executive Order 13891 show that the Department of Transportation (DOT) and NHTSA have failed to abide by the requirements of Executive Order (EO) 13891, which states: â€œAmericans deserve an open and fair regulatory process that imposes new obligations on the public only when consistent with applicable law and after an agency follows appropriate procedures.â€ Americans would expect that DOT and NHTSA abide by the spirit of the statement, but they have failed to update 49 CFR 5.41 to implement the requirements of the EO. Specifically, EO 13891 Sec 4 (https://www.federalregister.gov/d/2019-22623/p-24) requires:

â€œWithin 300 days of the date on which OMB issues an implementing memorandum under section 6 of this order, each agency shall, consistent with applicable law, finalize regulations, or amend existing regulations as necessary, to set forth processes and procedures for issuing guidance documents. The process set forth in each regulation shall be consistent with this order and shall include:

(i) a requirement that each guidance document clearly state that it does not bind the public, except as authorized by law or as incorporated into a contract;

(ii) procedures for the public to petition for withdrawal or modification of a particular guidance document, including a designation of the officials to which petitions should be directed; and

(iii) for a significant guidance document, as determined by the Administrator of OMB's Office of Information and Regulatory Affairs (Administrator), unless the agency and the Administrator agree that exigency, safety, health, or other compelling cause warrants an exemption from some or all requirements, provisions requiring:

(A) a period of public notice and comment of at least 30 days before issuance of a final guidance document, and a public response from the agency to major concerns raised in comments, except when the agency for good cause finds (and incorporates such finding and a brief statement of reasons therefor into the guidance document) that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest; [â€¦]â€

OMB issued the required memo, Memorandum M-20-02, on October 31, 2019. NHTSA and DOT have failed to update their rules to be consistent with EO 13891. Additionally, NHTSAâ€™s notice contains no statement that this guidance does not bind the public, and it does not indicate whether this is a draft guidance document or a final guidance document. Under the processes outlined in EO 13891 and Memorandum M-20-02, NHTSA should treat this notice as a notice of draft guidance and respond to comments from the public, including the comments below on the substantive errors outlined below. OMB stated in Memorandum M-20-02:

â€œAgencies should follow best practices for collecting and responding to public comments associated with their significant guidance documents. An agency should publish a notice in the Federal Register announcing the availability of a significant guidance document and should also make the draft guidance document available on the agency's website; â€¦ After reviewing the public comments on a draft guidance document, agencies should incorporate any suggested changes as appropriate into a final version and then make the final guidance document available to the public. Agencies should also provide a public response-to-comments document that is similar to the response-to-comments that typically appears in the preamble to a final rule. The response to comments may appear in the final guidance document itself or in a companion document.â€

This does not appear to be NHTSAâ€™s intent with this notice, and NHTSA should clarify how it intends to respond. NHTSA also has not conformed to 49 CFR 5.41(a)â€™s requirement for publishing draft guidance for comment in

advance and has not justified exclusion from the process under 49 CFR 5.41(b).

NHTSA and DOT have failed to establish means to request petition for withdrawal or modification of a particular guidance document, and NHTSA should treat this comment as a petition to withdraw or modify this guidance document.

DISTORTIONS OF NHTSAâ€™s HISTORICAL POSITION
This notice states that it is a â€œreaffirmation of NHTSA's position on certification,â€ but it goes beyond NHTSAâ€™s position that manufacturers are not obligated to perform test procedures - this position is accurate and longstanding. Instead, the notice attempts to expand that position such that a vehicle that is unable to be tested may still be certified. The notice provides no evidence that NHTSA has ever held this position, and, indeed, the notice is contrary to NHTSAâ€™s longstanding position throughout interpretations, including the 2016 interpretation that NHTSA is now rescinding. A vehicle must be able to be tested to a standardâ€™s test procedures by NHTSA when the standard provides applicable test procedures, conditions, etc.

In a 1977 interpretation (https://www.nhtsa.gov/interpretations/77-118), NHTSA responded to a situation where Blue Bird, a bus manufacturer, indicated that it may not be feasible to test their design according to FMVSS 222â€™s established standard. NHTSA responded and stated:

â€œ[T]he requirement that the seating conform as it is installed does not prohibit a manufacturer from using a different test procedure from that specified, in view of the NHTSA's expressed position on the legal effect of its regulations. To certify compliance, a manufacturer is free to choose any means, in the exercise of due care, to show that a vehicle (or item of equipment) would comply if tested by the NHTSA as specified in the standard. Thus, the NHTSA test procedures need not be duplicated by each manufacturer or compliance test facility. Blue Bird, for example, is free to conduct its test on a test fixture outside the bus as long as it can certify that its vehicle would comply if tested by the NHTSA according to the standard.

In view of this disposition of your requests, the agency does not intend to undertake modification of Standard No. 222 at this time. The NHTSA will continue to monitor the results of tests conducted to determine compliance with the head and kneeform contact area requirements of the standard and will modify the standard if warranted.â€

This response is NHTSAâ€™s longstanding position - manufacturers do not need to follow NHTSAâ€™s procedures, but if NHTSA conducts a test according to the test procedure provided, it MUST comply. This response also indicates the appropriate approach for regulatory action - i.e. NHTSA should revise test procedures to permit alternate designs rather than broadly exempting novel designs from FMVSS as this notice attempts to do.

In 1978, NHTSA issued an interpretation in response to a manufacturer that did not believe they could find an environmental chamber large enough to test their vehicle within a reasonable timeframe (https://www.nhtsa.gov/interpretations/nht78-24). Despite the fact that these were military vehicles and not subject to FMVSS, NHTSA responded stating:

â€œThe National Highway Traffic Safety Administration (NHTSA) does not issue approvals of manufacturer's plans for compliance with agency standards. Standard No. 124 mandates that a vehicle shall meet the requirements of the standard at any temperature between -40o F. and 125o F. When the agency tests for compliance with the standard, it finds a chamber sufficiently large to accommodate the entire vehicle and tests according to the standard. Any manufacturer deviation from this accepted test procedure carries with it certain risks that a vehicle may not conform to the requirements.â€

NHTSA did not suggest that it would omit certain aspects testing due to difficulty in executing a test, it stated that the test procedure would be conducted according to the standard.

In a 1994 interpretation (https://www.nhtsa.gov/interpretations/nht94-193), NHTSA stated:

â€œManufacturers must have some independent basis for their certification that a product complies with all applicable safety standards. This does not necessarily mean that a manufacturer must conduct the specific tests set forth in an applicable standard. Certifications may be based on, among other things, engineering analyses, actual testing, and computer simulations. Whatever the basis for certification, however, the manufacturer must certify that the product complies with a standard as it is written, i.e., that the vehicle will pass all applicable requirements if it is tested exactly according to the standard's test conditions and other specifications.â€

This reaffirms NHTSAâ€™s longstanding position again - vehicles must be able to pass under the test procedure and conditions supplied in the standards. Slow regulatory processes or inaction on the part of NHTSA to update regulations do not justify the approach in this notice. In fact, NHTSA addressed this very subject in a 1995 interpretation (https://www.nhtsa.gov/interpretations/nht95-151) responding to a question about FMVSS 104 testing, stating:

â€œThe second issue raised by your question is whether NHTSA is required to use J942 in the agency's compliance tests. The answer is yes, as long as J942 is incorporated into the test procedure of Standard No. 104. When conducting its compliance testing, NHTSA must precisely follow each of the specified test procedures and conditions set forth in the safety standard. If a different procedure or condition is desirable, the agency must undertake rulemaking to amend the standard to incorporate the desired change.

You ask in your letter about the procedure for amending Standard No. 104. NHTSA has a process whereby you can petition for a change to the FMVSS, including Standard No. 104. The petitioning procedure is outlined at 49 CFR part 552 Petitions for rulemaking, defect, and noncompliance orders (copy enclosed).â€

As stated in the 1995 interpretation, NHTSA must precisely follow each of the specified test procedures and conditions set forth in the FMVSSs.

This was reaffirmed in 2007 (https://www.nhtsa.gov/interpretations/07-002869-21-aug-07) when NHTSA responded to questions about FMVSS 126, stating:

â€œWe note that the introductory paragraph of S5, Requirements, states that each vehicle must be equipped with an ESC system that meets the requirements specified in S5 under the test conditions specified in S6 and the test procedures specified in S7 of this standard. Thus, as a general matter, compliance with the requirements prescribed in S5 (of which S5.3 is a part) is evaluated under the test procedures specified in S7 (of which S7.10 is a part).â€

PLAIN TEXT OF THE REGULATIONS REQUIRE THAT VEHICLES BE ABLE TO PASS FMVSS TESTS AS WRITTEN
As in the last interpretation example, throughout 49 CFR 571, performance requirements within FMVSS are tied directly to test conditions and test procedures. There is no question that these performance requirements and procedures are inseparable in many cases, and a manufacturerâ€™s certification would have to involve reasonable care that implicitly acknowledges the applicability of the test procedures and conditions. Continuing with FMVSS 126, it states this quite plainly at 49 CFR 571.126 (S5):

â€œS5. Requirements. Subject to the phase-in set forth in S8, each vehicle must be equipped with an ESC system that meets the requirements specified in S5 under the test conditions specified in S6 and the test procedures specified in S7 of this standard.â€

NHTSA discusses FMVSS 126 within its notice, but fails to recognize that the requirements as simply stated incorporate the test conditions and test procedures. NHTSA cannot issue a blanket exemption from requirements such as this via guidance, and if NHTSA wishes to do so it must undertake rulemaking or formally evaluate exemption petitions under its authorities. Moreover, if it is true that NHTSAâ€™s position is that vehicles may be certified to FMVSS 126 even if those vehicles cannot be tested to the test procedures in FMVSS 126 under the test conditions specified in FMVSS 126, THEN, NHTSAâ€™s position must be revised to comply with its own regulations. Guidance, interpretation, or other actions by federal agencies must follow their own regulations. NHTSAâ€™s position stated in this notice does not.

NHTSA should rescind or revise this notice to recognize that vehicles and equipment must be capable of passing FMVSS test procedures under the test conditions specified in 49 CFR 571. It is procedurally deficiencies, contains factual error, and it is contrary to NHTSAâ€™s mission of public safety. These types of requirements exist throughout the FMVSS and may be difficult to meet with new technologies. Rather than throwing aside established test procedures to promote technological process, NHTSA should revise its test procedures. Despite this errant notice, NHTSA does appear to recognize the need FMVSS revision and has published proposed rules that are currently seeking comment on updating FMVSS (see dockets NHTSA-2020-0109 and NHTSA-2020-0106). Rulemakings are the appropriate means to ensure that test procedures keep pace with technological developments that may render them obsolete.