

January 21, 2021

Office of the Administrator  
c/o Steven Cliff, Deputy Administrator

National Highway Traffic Safety Administration  
Docket Management Facility  
U.S. Department of Transportation  
1200 New Jersey Avenue SE  
West Building, Ground Floor, Room W12-140  
Washington, DC 20590-0001

Submitted electronically via [www.regulations.gov](http://www.regulations.gov)

**RE: Notice of Interpretation, Request for Comments, Applicability of NHTSA FMVSS Test Procedures to Certifying Manufacturers, Docket No. NHTSA-2020-0119**

Deputy Administrator Cliff:

The Center for Auto Safety, Advocates for Highway and Auto Safety, Consumer Federation of America, and Consumer Reports appreciate the opportunity to provide comments on the December 21, 2020, notice of interpretation by the National Highway Traffic Safety Administration (“NHTSA” or “agency”) regarding the applicability of Federal Motor Vehicle Safety Standard (FMVSS) test procedures to motor vehicle and equipment manufacturers. This notice of interpretation relates to a November 12, 2015, letter from the Google Self-Driving Car Project (later renamed Waymo) to NHTSA requesting clarity on FMVSS test procedures as they apply to autonomous vehicles, and NHTSA’s February 4, 2016, letter to Google in response.<sup>1</sup>

All of our organizations work to reduce the death and injury toll caused by vehicle crashes and are optimistic about the role advanced technology can play in mitigating these events, which lead to more than 36,000 deaths and over \$800 billion in economic damage in the U.S. on an annual basis. A well-defined and vigorously enforced safety regulatory program designed to protect all drivers, passengers, and pedestrians/cyclists is critical to reduce this terrible toll. We are concerned that NHTSA’s unnecessary December 21, 2020, reinterpretation risks creating significant damage to a regulatory scheme that has saved at least 600,000 lives,<sup>2</sup> and as many as

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<sup>1</sup> See Letter from Paul A. Hemmersbaugh, Chief Counsel, NHTSA, to Chris Urmson, Director, Self-Driving Car Project, Google, Inc., Feb. 4, 2016, at: <https://isearch.nhtsa.gov/files/Google%20-%20compiled%20response%20to%2012%20Nov%20%2015%20interp%20request%20-%204%20Feb%2016%20final.htm>.

<sup>2</sup> NHTSA, *Lives Saved by Vehicle Safety Technologies and Associated Federal Motor Vehicle Safety Standards, 1960 to 2012*, Jan. 2015, at: <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812069>.  
NHTSA, *Lives Saved by Vehicle Safety Technologies and Associated Federal Motor Vehicle Safety Standards, 1960 to 2012*, Jan. 2015, at: <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812069>.

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4.2 million lives,<sup>3</sup> since the passage of the Motor Vehicle Safety Act in 1966. We ask that NHTSA rescind this reinterpretation.

Stringent and consistent FMVSS test procedures compose the bedrock of our country's vehicle compliance and certification system. These procedures have long provided professionals in the automotive industry, testing organizations, and NHTSA's Office of Vehicle Safety Compliance (OVSC) with the metrics required to ensure that new vehicles entering dealership lots conform to minimum performance standards designed to ensure safe operation. The existence of these procedures, and the knowledge that NHTSA's OVSC is overseeing compliance, provide the public a level of confidence in the safety of new vehicles. NHTSA's FMVSS test procedures only become effective after completion of a well-established, public notice-and-comment process. This process, while lengthy at times, provides clarity and certainty as to the rule of law and the means for compliance with such standards—both for the motor vehicle industry and the public.

It is therefore concerning that NHTSA leadership under an outgoing administration chose to make such an abrupt and dramatic departure from previous guidance on the applicability of FMVSS test procedures. It is highly problematic that the means for such a 180-degree change comes in the form of a reinterpretation of the agency's previous response to Google, rather than in the form of a rulemaking. Further, while this reinterpretation purports to primarily address non-testable novel, theoretical designs of automated driving system (ADS) features, this reinterpretation could potentially be applied to all vehicles, thus presenting significant legal and safety concerns.

It is unfortunate that in this interpretative document, as well as in multiple prior statements, NHTSA leadership has furthered a false dichotomy between the federal government allowing for automotive innovation and “dictating designs that accommodate a particular method of testing, without expressly stating as much when establishing the FMVSS through rulemaking.”<sup>4</sup> This either/or sentiment misses the point and serves no purposes other than building a strawman argument.

No reasonable observer is suggesting that NHTSA should be in the business of “dictating designs,” in part because to do so would be unnecessary. The Safety Act specifies that a NHTSA motor vehicle safety standard is “a minimum standard for motor vehicle or motor vehicle equipment performance” and must “be practicable, meet the need for motor vehicle safety, and be stated in objective terms”; accordingly, FMVSS are composed of performance requirements.<sup>5</sup> Also, there are already two existing legally permissible mechanisms to achieve the same purpose of this reinterpretation which do not violate good sense or established safety practices.

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<sup>3</sup> Center for Study of Responsive Law, *Safer Vehicles and Highways: 4.2 million U.S. Lives Spared Since 1966*, Nov. 30, 2020 at: <https://nader.org/wp-content/uploads/2021/01/AutoSafetyReport2021.pdf>.

<sup>4</sup> See *Notice Regarding the Applicability of NHTSA FMVSS Test Procedures to Certifying Manufacturers*, 85 FR 83143 at p. 82147; <https://www.federalregister.gov/documents/2020/12/21/2020-28107/notice-regarding-the-applicability-of-nhtsa-fmvss-test-procedures-to-certifying-manufacturers>

<sup>5</sup> 49 U.S.C. 30102 & 30111.

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The first mechanism would take up the suggestion of the Alliance for Automotive Innovation,<sup>6</sup> Honda Motor Company,<sup>7</sup> and a large group of public interest organizations,<sup>8</sup> and write new performance-based regulations. While many observers would prefer to see such regulations begin by creating a new vehicle class for ADS or self-driving features, NHTSA instead is in the midst of modifying FMVSS intended to apply to traditional motor vehicles. The recent submission to the Federal Register of a final rule<sup>9</sup> amending existing occupant protection rules to apply to vehicles with and without ADS functionality is only one example of misplaced priorities, and we welcome the temporary regulatory freeze announced by the White House on January 20, 2021.<sup>10</sup> We urge the agency to make a course correction as the moment seems ripe to proactively create strong new rules for vehicles with ADS.

Alternatively, a second mechanism would be for NHTSA to use its general exemption authority, which has been invoked in this very situation for Nuro, a company seeking to deploy a novel vehicle equipped with an automated driving system.<sup>11</sup> This process includes submitting sufficient information to the agency to determine whether the vehicle's safety is at least equal to that provided by the relevant FMVSS, or alternatively to the overall safety level of nonexempt vehicles, before approving an exemption. Instead, for unexplained reasons, NHTSA has chosen to use this new interpretation to create an exemption so broad as to allow for a proverbial (self-driving) truck to drive through it.

Letters of interpretation by NHTSA have an important role to play in the agency's regulatory toolkit. They are "both the fastest way to get an answer to a question and the narrowest in terms of scope and effect."<sup>12</sup> However, they "may not adopt a new position that is irreconcilable with or repudiates existing statutory or regulatory provisions."<sup>13</sup> Herein lies the problem. This overreaching interpretation is irreconcilable not only with existing regulatory provisions but also with existing agency precedent on the appropriate use of letters of interpretation.

The agency contention in the December 2020 interpretation is that vehicles may be certified to FMVSS even when the agency has no available means or metrics by which to analyze

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<sup>6</sup> See Alliance for Automotive Innovation, *Policy Roadmap to Advance Automated Vehicle Innovation*, at: <https://www.autosinnovate.org/innovation/AVRoadmap.pdf>.

<sup>7</sup> See American Honda Motor Co., *Comment on Removing Regulatory Barriers for Vehicles with Automated Driving*, March 20, 2018. <https://beta.regulations.gov/comment/NHTSA-2018-0009-0103>

<sup>8</sup> Autonomous Vehicle (AV) Tenets, Nov. 30, 2020, at: <https://saferoads.org/wp-content/uploads/2020/11/AV-Tenets-11-24-20-1.pdf>. Note, all signatories to this comment were also signatories to that document.

<sup>9</sup> NHTSA, *Occupant Protection for Vehicles with Automated Driving Systems*, Final Rule, submitted to Federal Register Jan. 13, 2021. RIN 2127-AM06, Docket No. NHTSA-2021-0003.

<sup>10</sup> *Regulatory Freeze Pending Review*, at: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/regulatory-freeze-pending-review/>.

<sup>11</sup> Nuro, Inc., Grant of Temporary Exemption for a Low-Speed Vehicle with an Automated Driving System, Feb. 6, 2020, at: [https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/nuro\\_grant\\_notice\\_final-unofficial.pdf](https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/nuro_grant_notice_final-unofficial.pdf). Both the Center for Auto Safety (NHTSA-2019-0017-0024) and Advocates for Highway and Auto Safety (NHTSA-2019-0017-0026) submitted comments in opposition to the granting of because of public safety concerns as well significant deficiencies with the application.

<sup>12</sup> Understanding NHTSA's Regulatory Tools, page 2, at: [https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/understanding\\_nhtsas\\_current\\_regulatory\\_tools-tag.pdf](https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/understanding_nhtsas_current_regulatory_tools-tag.pdf).

<sup>13</sup> *Id.* at page 3.

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compliance. Prior NHTSA interpretations specifically suggest the opposite. For example, in 2004 the agency clearly indicated that vehicles need to be able to be tested by OVSC:

A manufacturer may choose any means of evaluating its products to determine whether the vehicle or item of equipment complies with the requirements of the safety standards (including submission to a testing laboratory), provided that the manufacturer assures that the vehicle or equipment will comply with the safety standards when tested by the agency according to the procedures specified in the standard.<sup>14</sup>

Other interpretations provide similar guidance.<sup>15</sup>

Instead of providing regulatory certainty by issuing new rules, NHTSA now seeks to establish an entirely untenable situation in which it has issued no rules regulating ADS operation or safety data collection and has only recently attempted to issue a rule that amends crashworthiness standards to account for unconventional designs in ADS-equipped vehicles.<sup>16</sup> The agency also has not required any developers or manufacturers of this technology to provide any type of proof of the safety of these modes of transportation before allowing them on America's streets. Now NHTSA proposes to modify a previous interpretation allowing developers of this new technology to determine the meaning of compliance, both creating a loophole for ADS manufacturers and opening the doors for weakening the agency's current authority over non-ADS, non-self-driving vehicles.

We object to the misplaced notion that the current FMVSS represent a barrier to technological development. Rather, it is NHTSA's well-documented failure to collect relevant data, issue timely rulemakings, or evaluate exemptions in a timely and transparent manner that should be discussed. In the last few years, the agency has not advanced auto safety in a reliable and predictable manner. Through this interpretation, NHTSA has continued on this misguided course by simply rescinding the obvious 2016 conclusion that if something could not be tested, it could not be determined to meet the minimum safety level envisioned by the standard.

Should a manufacturer or developer of self-driving technology be unable or unwilling to allow for FMVSS testing as part of a product's design, they should be required as part of certification to submit sworn, detailed documentation to the agency of testing sufficient to prove reasonable care in evaluating compliance, or they should file for a general exemption. There should be no discretion as envisioned under the December 2020 interpretation; all of this documentation should be reviewed by NHTSA's compliance operations in every case to assure safe operation. Otherwise, this interpretation creates the antithesis of a regulatory standards program, where NHTSA is unable to test vehicles or formally evaluate compliance. Furthermore, in order to ensure agency competence on new technologies, the agency must continually evaluate and

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<sup>14</sup> NHTSA Interpretation letter to S. Trinkl, Dec. 30, 2004, at: <https://isearch.nhtsa.gov/files/Trinkl.1.html>

<sup>15</sup> See e.g., NHTSA Interpretation letter to M. Plasil, Dec. 9, 2004, at: <https://isearch.nhtsa.gov/files/GF005146.html>; NHTSA Interpretation letter to F. Anderson, Aug. 12, 2003, at: <https://isearch.nhtsa.gov/files/GF005279.html>; NHTSA Interpretation letter to L.J. Sharman, Aug. 12, 1992, at: <https://isearch.nhtsa.gov/files/7450.html>.

<sup>16</sup> Rule is subject to regulatory freeze. See FN 10.

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document potential non-conformances to support future AV rulemaking and enforcement activities.

Moreover, the complete and total unpredictability of which methods manufacturers choose for ‘reviewing and analyzing’ their data and processes for self-certification undercuts the purpose of a transparent regulatory scheme. The value of standards is that everyone, from manufacturers to the public, can understand what is necessary to ensure safe operation. Under the December 2020 NHTSA interpretation of the Safety Act, it is entirely at the agency’s discretion as to which manufacturers will have to prove their ability to comply with the law. In fact, by taking the approach envisioned by this interpretation, despite the vehicle theoretically needing to meet relevant FMVSS prior to being released to the public, in reality NHTSA would only be likely to extend oversight after a failure to meet a given standard manifests itself. NHTSA could become aware of a manufacturer’s failure to conform to a standard through its compliance testing, but it is also a distinct possibility that such a failure would come to light in a dangerous and defective manner and would put the safety of the public at risk.

Which leads to our next concern: Recalls are not regulations, nor are they sufficient substitutes for compliance testing. The agency uses both defect enforcement and compliance enforcement as a complementary force in ensuring that the vehicles reaching the nation’s roads meet minimum safety standards at the time of sale and that they operate safely as they are used. The reinterpretation appears to confuse the proper function of these authorities. Compliance enforcement is a prospective means by which the agency can evaluate new vehicles to ensure they meet minimum safety standards. NHTSA’s compliance program provides unambiguous standards and processes with which certifying manufacturers’ vehicles must align prior to vehicle sale, thus prospectively preventing dangers from reaching our roads. Defect enforcement occurs after failures occur in the field and is a reactive rather than preventative measure.

We acknowledge NHTSA’s statements in the December 2020 notice of interpretation reaffirming the critical role of the agency’s compliance testing, and—regardless of this interpretation—call on the agency to make compliance testing of ADS-equipped vehicles a priority, and to request sufficient funding from Congress to ensure it can do so without compromising its ability to test for compliance in more conventional vehicles.<sup>17</sup> Nevertheless, the interpretation still could have the perverse effect of reducing NHTSA’s compliance operations and replacing them with the agency’s already overwhelmed and inefficient defects investigation and enforcement activities. This outcome would come with severe risks to the public if it were to happen.

In conclusion, the December 21, 2020, notice of interpretation advanced by outgoing NHTSA leadership is an unnecessary and likely damaging legal reinterpretation, published at the 11<sup>th</sup> hour before a new administration. It fundamentally runs counter to the public interest and to the safety of the public. This legal reinterpretation was prioritized by former NHTSA leadership

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<sup>17</sup> See, e.g., 85 Fed. Reg. 83149, “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.”

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ahead of the proper and needed public regulatory process to examine current standards and create new standards as necessary to provide the public certainty in the safety of the vehicles on the road. The latest data suggests 2020 may have been the deadliest year on our roads in decades. NHTSA's top priority should be providing real-world answers to the unacceptable level of traffic fatalities facing all consumers, not providing answers to unasked questions about how to test nonexistent vehicles. We reiterate our request that NHTSA rescind this reinterpretation.

Thank you for the opportunity to present our views on this notice regarding the applicability of FMVSS test procedures to motor vehicle and equipment manufacturers, as well as NHTSA's reinterpretation of its views on the Safety Act as expressed to Google and the public in 2016.

Sincerely yours,

Center for Auto Safety  
Advocates for Highway and Auto Safety  
Consumer Federation of America  
Consumer Reports

cc: Secretary-Designate Pete Buttigieg, U.S. Department of Transportation