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May 7, 1996

The Honorable Larry Pressler
Chairman
The Honorable Ernest F. Hollings
Ranking Minority Member
Committee on Commerce, Science, and Transportation
United States Senate

The Honorable Thomas J. Bliley, Jr.
Chairman
The Honorable John D. Dingell
Ranking Minority Member
Committee on Commerce
House of Representatives

Subject: Light Truck Average Fuel Economy Standard, Model Year 1998

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the National Highway Traffic Safety Administration (NHTSA), Department of Transportation, entitled "Light Truck Average Fuel Economy Standard, Model Year 1998" (RIN 2127-AF16). We received the rule on April 22, 1996. It was published in the Federal Register as a final rule on April 3, 1996. 61 Fed. Reg. 14680.

Section 32902(a) of title 49, United States Code, requires the Secretary of Transportation to prescribe by regulation, at least 18 months in advance of each model year, average fuel economy standards (known as "Corporate Average Fuel Economy" or "CAFE" standards) for non-passenger automobiles manufactured in that model year. Under subsections 32902(a) and (f), the standard is to be the maximum feasible average fuel economy level that the Secretary decides manufacturers can achieve in that model year taking into consideration technological feasibility, economic practicability, the effect of other Government

motor vehicle standards on fuel economy, and the need of the United States to conserve energy.[1]

The light truck CAFE standard for model year 1997 was established at 20.7 miles per gallon (mpg). During the development of the CAFE standard for model year 1998, the Department of Transportation and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-50 (Nov. 15, 1995), 109 Stat. 436, was enacted. Section 330 of the Appropriations Act, 109 Stat. 457, provides:

> "None of the funds in this Act shall be available to prepare, propose, or promulgate any regulations pursuant to title V of the Motor Vehicle Information and Cost Savings Act (49 U.S.C. 32901, et seq.) prescribing corporate average fuel economy standards for automobiles, as defined in such title, in any model year that differs from standards promulgated for such automobiles prior to the enactment of this section."

NHTSA interprets section 330 of the Appropriations Act as requiring it to prescribe the same light truck CAFE standard for model year 1998 that applies to model year 1997. Accordingly, the rule continues the 20.7 mpg standard for 1998.

Enclosed is our assessment of NHTSA's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. As discussed in the enclosure, NHTSA did not follow many of the steps that ordinarily would apply to the rule, based in part on its interpretation that section 330 of the Appropriations Act required it to fix the 1998 standard at 20.7 mpg and thereby deprived the agency of any discretion over the standard. NHTSA's interpretation of section 330, while not necessarily the only plausible approach, is supported by the language and legislative history of this provision. Nevertheless, we do not view section 330 as exempting the rulemaking from the requirements referred to in 5 U.S.C. § 801(a)(1)(B)(i) through (iv), particularly the analysis called for by 49 U.S.C. § 32902.

If you have any questions about this report, please contact Henry R. Wray, Senior Associate General Counsel, at (202) 512-8581. The official responsible for GAO's

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[1]Authority to prescribe fuel economy standards under section 32902 has been delegated by the Secretary to the Administrator of NHTSA.

evaluation work relating to the Department of Transportation is John H. Anderson, Director of Transportation and Telecommunications Issues. Mr. Anderson can be reached at (202) 512-2834.

Sincerely yours,

Robert P. Murphy
General Counsel

Enclosure

cc: Ms. Nancy E. McFadden
General Counsel
Department of Transportation

ENCLOSURE

ANALYSIS OF NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION 1998 LIGHT TRUCK CAFE STANDARD RULE UNDER 5 U.S.C. § 801(a)(1)(B)(i)-(iv)

(i) Cost-benefit analysis

On January 3, 1996, NHTSA published a notice of proposed rulemaking which proposed a 1998 standard of 20.7 mpg. See 61 Fed. Reg. 145. The Supplementary Information accompanying the proposed rule contains a discussion and assessment of the economic impacts of the proposed standard, including its potential costs, benefits, and alternatives. In addition, NHTSA prepared a Preliminary Regulatory Evaluation of the proposed standard, which was included in the docket for the rulemaking and contained more detailed analyses of these and other affects of the proposed standard. The agency did not prepare a Final Regulatory Impact Analysis in connection with the final rule "because of the restrictions imposed by Section 330 of the FY 1996 DOT Appropriations Act." 61 Fed. Reg. at 14682.

(ii) Agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607 and 609

Section 603: Initial regulatory flexibility analysis

The Supplementary Information accompanying the proposed rulemaking includes a certification, pursuant to section 605(b) of title 5, that the proposal would not have a significant impact on a substantial number of small entities, thereby exempting the proposed rule from the requirement for an initial regulatory flexibility analysis. The certification was accompanied by a statement that few, if any, light truck manufacturers subject to the proposed rule would be classified as small businesses. See 61 Fed. Reg. at 155.

Section 605(b) states that the certification and statement shall be provided to the Chief Counsel for Advocacy of the Small Business Administration (SBA). According to Department of Transportation officials, the certification and statement were not separately provided to the SBA Chief Counsel for Advocacy. They stated that, in accordance with the Department's practice, publication of section 605(b) certifications in the Federal Register is treated as providing notice to SBA. An SBA official confirmed that some agencies follow this practice, and that SBA has not objected to it. The official indicated, however, that SBA's policy may change since future certifications will need to be justified more specifically and will be subject to judicial review.

Section 604: Final regulatory flexibility analysis

NHTSA did not conduct a final regulatory flexibility analysis under section 604, nor did it make a section 605(b) certification, in connection with the final rule. The agency viewed such an analysis as "unnecessary" in light of its lack of discretion with respect to the rule, but stated that past evaluations indicated few if any small businesses would be affected. See 61 Fed. Reg. at 14682.

Section 605: Avoidance of duplicative or unnecessary analysis

As noted above, NHTSA invoked the exemption from the initial regulatory flexibility analysis requirement with respect to the proposed rule.

Section 607: Preparation of analysis

As noted above, NHTSA did not prepare an initial or final regulatory flexibility analysis.

Section 609: Participation by small entities

The requirements of section 609 are inapplicable to this rule since NHTSA did not determine that it would have a significant impact on a substantial number of small entities.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

Since the standard appears to constitute a federal mandate resulting in aggregate annual private sector expenditures of $100 million or more, it would be subject to the requirements of section 202 of the Act (Statements to Accompany Significant Regulatory Actions). Neither the proposed nor the final rulemaking expressly refers to the Unfunded Mandates Reform Act or includes the statements required by section 202. The Supplementary Information accompanying the proposed rule does include some of the information covered by section 202.

The rule also appears subject to section 205 of the Act, relating to consideration of regulatory alternatives. While NHTSA did not explicitly address section 205, it complied in substance with the requirements of this section. Potential alternatives were considered and discussed at the proposed rulemaking stage, and the final rulemaking describes NHTSA's determination that there was no alternative to the standard adopted.

The requirements of section 203 (Small Government Agency Plan) and section 204 (State, Local, and Tribal Government Input) appear to be inapplicable to the rule.

(iv) Other relevant information or requirements under Acts and Executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

The rule was promulgated through the general notice of proposed rulemaking procedures of the Act, 5 U.S.C. § 553. NHTSA afforded interested persons the opportunity to comment on the proposed rule. The final rulemaking, however, does not address comments.

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

The rule does not refer to information collection requirements subject to the Act, and, according to NHTSA, the rule imposes no such requirements.

National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq.

NHTSA did not conduct an evaluation of the impacts of the rule under the National Environmental Policy Act. The Supplementary Information accompanying the final rule states in this regard:

> "There is no requirement for such an evaluation where Congress has eliminated the agency's discretion by precluding any action other than the one announced in this notice." 61 Fed. Reg. at 14682.

Statutory authorization for the rule

The Supplementary Information accompanying the final rule discusses at length its legal basis. Section 32902(a) of title 49, United States Code, requires that light truck CAFE standards be prescribed for each model year in accordance with the "Maximum feasible" criteria specified in that subsection and subsection 32902(f). However, section 330 of the Appropriations Act effectively prohibited issuance of any CAFE standard "that differs from standards promulgated . . . prior to the enactment of this section." According to NHTSA's legal analysis detailed in the Supplementary Information, section 330 of the Appropriations Act precluded the agency from prescribing any CAFE standard different from the most recent standards prescribed at the time of its enactment--those applicable to model year 1997. Thus, according to NHTSA, section 330 deprived the agency of the discretion it otherwise would have under section 32902 to determine the applicable standard under the criteria set forth therein. NHTSA concluded that while section 330 superseded the section 32902 criteria, it did not supersede the section 32902 mandate that there be CAFE standards for model year 1998.

NHTSA noted that the only other possible interpretation of section 330 was to treat the phrase "standards promulgated . . . prior to the enactment of this section" as

encompassing any standard prescribed for any prior model year. In addition to the 20.7 mpg standard, nine other light truck standards--ranging from 17.5 to 21.0 mpg--were promulgated for prior model years.[1] However, NHTSA rejected this interpretation on the basis that it could also conflict with the "maximum feasible" criteria under 49 U.S.C. § 32902, and that it would be illogical to assume that Congress intended to arbitrarily limit the 1998 standard to one of these prior year levels even if some other level was determined to be the "maximum feasible" for model year 1998.

Accordingly, NHTSA concluded that the only legally permissible alternative was to establish the model year 1998 standard at 20.7 mpg. As a result, the agency did not complete its analysis to determine what the "maximum feasible" level actually would be for model year 1998 under the 49 U.S.C. § 32902 criteria.

NHTSA's legal interpretation is supported by the language and legislative history of section 330. As the analysis points out, the House Appropriations Committee report and a floor statement by the principal sponsor of section 330--Representative DeLay--describe section 330 as permitting NHTSA to establish a 1998 standard "identical to" the model year 1997 standard. The conference report describes section 330 as prohibiting the use of funds for "regulations that prescribe changes in" the CAFE standards.

On the other hand, we question whether NHTSA was compelled by section 330 to forego completion of the analysis otherwise mandated by 49 U.S.C. § 32902 to determine the "maximum feasible" level for model year 1998. The legislative history of section 330, taken as a whole, suggests that the fundamental purpose of this provision was to prevent an anticipated increase in the CAFE standards. Representative DeLay observed in his floor statement that NHTSA was engaged in a rulemaking "which could result in a sharp increase in the standards for light trucks and vans" and that "this action would be devastating to the Nation's economy." 141 Cong. Rec. H7605 (daily ed., July 25, 1995). He also stated that section 330 "imposes a 1-year freeze on the ability of NHTSA to increase the CAFE standards" and that "it was my intent that NHTSA would withhold any further action directed toward increasing CAFE standards . . .." Id. In this context, the references in the history to requiring an identical standard or precluding any changes for 1998 may have been based on the assumption that the outcome of any change would be an increase in the standard.

Completing the analysis under 49 U.S.C. § 32902 would have provided NHTSA more information on which to assess the relationship between that section and section

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[1]These standards are listed in a table included in the final rule. The 21 mpg standard was initially prescribed for model year 1985, but was amended to 19.5 mpg before the start of that model year

330. For example, if the analysis indicated that the "maximum feasible" level for 1998 was at or closer to one of the lower prior year standards than it was to the 1997 standard, prescribing that lower standard would not necessarily be impermissible. Such an action would give greater effect to 49 U.S.C. § 32902 than using the 20.7 mpg standard and would satisfy the plain terms of section 330. Nor is it clear that such action would conflict with the purpose underlying section 330. The history does not explicitly address the possibility that the 20.7 mpg standard might exceed the "maximum feasible" level for 1998 indicated under 49 U.S.C. § 32902.

Executive Order No. 12866

Based on its economic impact, the rule was determined to be a "significant regulatory action" within the meaning of Executive Order No. 12866. Consistent with the Executive order, the rule was initiated through an advance notice of proposed rulemaking published on April 6, 1994. 59 Fed. Reg. 16324. As noted previously, the proposed rulemaking published on January 3, 1996, includes a Preliminary Regulatory Evaluation. The final rule, however, does not include a Final Regulatory Impact Analysis. According to NHTSA, the Office of Information and Regulatory Affairs reviewed the rule at the proposed and final stages and suggested no changes.

Executive Order 12612

The Supplementary Information accompanying the proposed rule states that, based on an analysis of the principles and criteria contained in Executive Order No. 12612, NHTSA determined that the proposed rule would not have sufficient federalism implications to warrant preparation of a Federalism Assessment. 61 Fed. Reg. at 155. The Supplementary Information accompanying the final rule states that the final rule was not analyzed under Executive Order No. 12612 because of the NHTSA's lack of discretion with respect to the rule. It adds that prior light truck standards have not been viewed as having federalism implications warranting preparation of a Federalism Analysis. 61 Fed. Reg. at 14682.

NHTSA did not identify any other statutes or Executive orders imposing requirements relevant to the rule.