August 22, 2005

Dr. Jeffrey Runge, Administrator
National Highway Traffic Safety Administration
U.S. Department of Transportation
400 7th Street, S.W.
Washington, D.C. 20590

Federal Motor Vehicle Safety Standards;
Designated Seating Positions and Seat Belt Assembly Anchorages;
70 FR 36094 *et seq.*, June 22, 2005; Docket No. NHTSA-2005-21600

Dear Administrator Runge:

Public Citizen welcomes the opportunity to comment on the National Highway Traffic Safety Administration's (NHTSA) notice of proposed rulemaking (NPRM) to amend the definition of "designated seating position" (DSP) in the Federal motor vehicle safety standards (FMVSSs), as well as change the procedure for determining the number of seating positions and the types of seats and vehicles to which it applies. We also comment on NHTSA's outrageous suggestion that its redefinition of the safety standard concerning DSPs should preempt state tort law.

Public Citizen is a national non-profit public interest organization with over 140,000 members nationwide, representing consumer interests through lobbying, litigation, regulatory oversight, research and public education. The president of Public Citizen, Joan Claybrook, was Administrator of NHTSA from 1977 to 1981 and has been advocating for improvements in highway and auto safety for forty years.

Automakers are required to identify DSPs in their vehicles. These designations are important for a variety of reasons, such as determining where manufacturers must install occupant crash protection systems. The NPRM represents an effort to prevent people from occupying seating areas other than DSPs because these occupants would not be adequately protected by safety belts or other crash protection systems.

NHTSA has seized the opportunity provided by this rulemaking in an attempt to undermine the protections available to consumers from state tort law. This proposal by the agency is extremely short-sighted as a matter of policy and far beyond the scope of the agency's legal authority. Indeed, the NPRM's summary assertions on preemption would impede improvements in safety, replacing the evolutionarily protective nature of the state tort law duty of care with a rigidly static system that will likely become outmoded by the failure to make timely additional upgrades to safety standards, by

industry influence over the content and development of standards, and by inevitable changes to both the design of vehicles and occupant behavior.

Moreover, NHTSA's proposed preemption would unfairly remove remedies for those injured by negligent conduct by manufacturers, conduct that could occur despite manufacturers' bare compliance with minimum federal standards.

As the Supreme Court held in *Geier et al. v. American Honda Motor Co., Inc.*, the Safety Act's "savings clause" preserves state tort actions from an express preemption claim, while state vehicle safety standards are expressly preempted.[1] NHTSA is therefore left with implied or conflict preemption as the applicable basis for its tort "deform" proposal. Yet the regulatory record does not sufficiently prove any specific conflict between general state tort liability and federal law in this instance. Moreover, NHTSA fails to show that it has authority to preempt state tort actions in rulemaking.

NHTSA's summary treatment of the legal issues on preemption falls far short of the specific findings that would be needed to support a court decision that state tort law conflicts with the federal law. Given the large areas left to manufacturer discretion in the rulemaking and the agency's finding of zero benefits for two of the compliance options, a reviewing court would likely find that there was in fact no conflict with the agency's rulemaking and that the compliance options are not, in this case, of comparable safety value. NHTSA's intervention in proposing to preempt state tort law would therefore decrease the safety of consumers by removing manufacturer incentives to choose the demonstrably safer, yet more expensive, option available for compliance under the rule.

Most importantly, the courts, and not NHTSA, are constitutionally empowered to make such decisions. NHTSA's overreaching here represents a grave incursion on both constitutional federalism and the separation of powers.

NHTSA's Assumptions about Vehicle Design and Behavior May Be Wrong or Become Anachronistic, While Tort Liability Would Highlight Deficiencies

While some of the proposed changes to the DSP regulations appear reasonable — particularly the proposal to require that all auxiliary and jump seats, which are generally side-facing, meet all requirements applicable to DSPs — the agency's assumptions about occupant behavior and vehicle design are in many cases bare assertions. In general, while clarifying the precise measurements for a DSP, the agency's proposal also creates new loopholes allowing manufacturers to escape responsibility for installing safety belt assemblies at those locations. The rule may therefore actually decrease safety.

The proposal's potential to improve the safety of larger vehicles was curtailed, it appears, to largely safeguard the cargo space in these vehicles. NHTSA proposes the use of a divisor of 450 (rather than 400) for seats with more than 1400mm of hip room, meaning that these seats will have three DSPs, instead of four. NHTSA claims that the benefits of redesigning these longer seats to accommodate four DSPs instead of three would be small, stating that the data "do not demonstrate a problem with 3-DSP seats

being occupied by four passengers, and does not demonstrate the potential for any benefit from such a requirement." *See* 70 F.R. 36097.

However, vehicle design and human behavior could change. More importantly, NHTSA observes that a requirement for four safety belt assemblies in these seats, mainly in SUVs, would require reinforcement of the seats with further anchorages to the vehicle structure. Rather than considering whether such reinforcements would improve safety in the more than 300,000 vehicles affected, NHTSA notes that the anchorages would reduce cargo space and ceases its inquiry. *See* 70 F.R. at 36099. The fact that the agency notes that applying the divisor of 400 to vehicles with seats of 1400 mm and longer would increase compliance costs about 3.4 times appears to indicate that this decision is largely cost-driven and not safety-driven.

For seats narrower than 1400 mm, the applicable divisor for determining the number of DSPs is 400. NHTSA allows manufacturers considerable discretion to choose from among three options with very different implications for safety:

> Based on the vehicles surveyed in the PRE [Preliminary Regulatory Evaluation], at seat width of 1007mm (39.5 inches) and more, three occupants were more likely to occupy a 2-DSP seat, unless a non-padded barrier was present. Requiring seats at least this width or wider to be designated as having three seating positions would present manufacturers several options for compliance. Manufacturers could comply by redesigning their seats to include the appropriate impediment, provide the necessary void between adjacent seat cushions, or by installing an addition seat belt assembly. *We anticipate that manufacturers would be more likely to redesign such seats, if needed, to incorporate an impediment or void as necessary. The potential vehicle packaging and marketing issues associated with the addition of a seat belt assembly, along with compliance implications (e.g., dynamic crash testing, cargo capacity, etc.) would make this option unlikely. Additionally, issues of comfort might arise as a result of three occupants being seated at the location. Space limitations make it difficult for occupants to use their respective safety belts when three occupants are seated at such a location.*

See 70 F.R. at 36097 [emphasis added]. As noted in the NPRM, the agency's preliminary regulatory evaluation (PRE) found no safety benefits associated with two of the three compliance options; namely, the "void" or "obstruction" options, "because the benefits are influenced by occupant behavior." *See* 70 F.R. at 36098. Yet the agency's notice indicates that the manufacturers are far more likely to choose these zero-benefit compliance options rather than providing the safe option – an additional safety belt assembly.

Nonsensically, the total benefits figure (5 lives saved and 41 AIS 2-5 injuries annually) put forward by NHTSA assumes that manufacturers will add an additional lap/shoulder belt assembly where needed – the opposite of the agency's conjecture concerning the two compliance options most likely to be chosen by manufacturers.

The agency's decision to permit the "void" or "obstruction" loopholes is further complicated by the lack of any showing that these design options will substantially reduce the risks by altering current consumer behavior. The "void" option creates a space of at least 5.9 inches wide and the "obstruction" option requires an obstruction height of only .2 inches. There is only scant and virtually anecdotal record evidence to demonstrate that consumers who currently crowd into 2-DSP seats with 3 passengers will alter that behavior in response to these design changes.

NHTSA's PRE evidently included only a paltry few vehicles with either of these two design options,[2] and shows only that the existence of these design features *may* lower the risks. In the Acura in particular, the fatality rate was 2.4 per million registered vehicles, meaning that while the risks appeared lower than in other vehicles, they were not eliminated. NHTSA's data also conflates outcomes from many vehicle makes and models, and therefore may confuse overall safety design and quality differences with the subject matter studied.

NHTSA could be miscalculating occupant behavior and acceptable levels of comfort and the proposed impediments could be far less effective in preventing extra occupancy than the agency estimates. The proposed "impediment" or "void" might function merely as moneysaving loopholes by exempting automakers from having to provide restraint systems in spaces where occupants may continue to sit.

NHTSA says merely that an occupant would be "less likely" to occupy that space, but provides no detailed predictions of actual consumer response to a widespread change in vehicle design that eliminates seating capacity. As the agency acknowledges, "[i]f a seating position is unavailable (because of a void) or uncomfortable (because of an impediment), but three occupants sit in the back seat regardless, no benefits will accrue." *See* 70 F.R. at 36099.

In that event, which remains unquantified, the cumulative effect of NHTSA's installation of a loophole-riddled rule and its attempt to eliminate state tort liability in this area would merely remove a far more robust safeguard than the rule – the duty of care – thereby decreasing the level of safety protection available to the public.

NHTSA's Assertions that State Tort Liability Is Preempted Are Unmerited and Without Basis in Law

NHTSA asserts that liability under state tort law may create incentives for manufactures to install additional safety belts not required by the proposal, and that such liability is therefore preempted by this rulemaking. NHTSA's assertions constitute an attempt to extend the holding in *Geier* to encompass an unwarranted and unprecedented expansion of federal power.

Federal law's supremacy over state law is not a carte blanche invitation for an executive agency to impose its own notions of tort "deform" on the citizens of the various states. The jurisprudence is very consistent in establishing a presumption of non-

preemption unless the intention for federal preemption is *clearly* expressed by Congress. This is not at all the case in the Safety Act.

The National Highway Safety Act contains a preemption provision as well as the so-called "savings clause." The preemption provision, 15 U. S. C. §1392(d), states that:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any *safety standard* applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard [emphasis added].[3]

The savings clause, 15 U. S. C. §1397(k), however, states that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law."[4] The Safety Act, therefore, preempts only the positive law formulation, a state "safety standard," and as the court found in *Geier*, the question as to state tort liability concerns whether an implied, or conflict, preemption issue exists.

Conflict preemption is a specific inquiry, not a general one, and NHTSA's bare assertions in the NPRM fall far short of the showing and specificity needed to justify the agency's intended incursion on state law. While NHTSA suggests that continued liability exposure would be detrimental to safety, it provides no evidence of this harm, and its claims are illogical.

While NHTSA claims that too many DSPs with accompanying safety belts would, for example, make occupants "less likely to use safety belts because limited space would make such use difficult or uncomfortable," there is no empirical data to support this claim in the record. NHTSA does not explain why occupants of a seat with unneeded safety belt assemblies would not merely push the belt attachments down into the seat cushions and out of the way. It also fails to acknowledge any safety benefits, for example, in a large SUV that can seat four people and may have to do so on occasion.

NHTSA also fails to indicate why its rulemaking should alter the landscape on the existing liability of manufacturers from a safety perspective. Whatever the liability risk faced by manufacturers with regard to DSPs, it existed before issuance of this NPRM. The agency fails to offer any historical examples of how such liability exposure has led to the designation of more or different DSPs than those required by the current federal definitions.

If manufacturers were subject to a truly significant liability risk, such exposure would likely have led automakers to install better-functioning safety belts in all auxiliary and jump seats. If this had occurred, there would perhaps be less need for this proposal. Yet it did not.

The fact is that any possible liability risks to manufacturers would likely further, not frustrate, achievement of NHTSA's safety objectives in improving safety for DSPs. Standards established under the Safety Act impose minimum, not maximum requirements. The purpose of the Safety Act, as stated by Congress, was to "reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents,"[6] and the Safety Act defines a "safety standard" as a "minimum standard for motor vehicle performance, or motor vehicle equipment performance."[7]

Potential tort liability might well lead to refinements beyond what NHTSA now envisions about DSPs, perhaps by making them even less ambiguous to vehicle occupants or making it less feasible for occupants to be located outside of DSPs. This would not frustrate the agency in achieving its objectives related to the DSP definition and would instead improve safety.

NHTSA's asserted preemption would hurt safety and contradicts the agency's mandate to "reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." Removing the potential for tort liability-induced safety improvements would establish an additional incentive for manufacturers to use political clout to push for safety standards of the lowest possible stringency, while insulating manufacturers from challenges encouraging better vehicle design that more fully incorporates a duty of care.

NHTSA's Assertions Violates the Historical Presumption Against Federal Preemption and Usurps the Role of the Courts in Constitutional Interpretation

NHTSA's attempted preemption of state tort law completely contravenes the historical assumption, based on the concept of federalism, that "in a field which the States have traditionally occupied…[,] we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[8] In other words, federal preemption of state law only occurs when it is the clear and manifest purpose of Congress.

NHTSA fails to cite any legislative history in support of its actions or any shred of evidence that Congress intended to delegate to the agency the power to undermine or limit state tort liability in this or any other area. In contrast, the Safety Act and all subsequent enactments by Congress were demonstrably intended to augment existing consumer protections in the area of vehicle safety by providing for specific additional safeguards. In the area of auto safety, common law liability preceded enactment of the Safety Act, and was preserved by the savings clause included as part of that Act.

There has been ample litigation in the general area of vehicle safety, as well as some litigation on the issue of DSPs, and therefore Congress is surely on notice of this aspect of state tort liability. Yet it has never acted to curtail this type of litigation, and instead has used information generated by this litigation as evidence of the need for Congressional mandates to require NHTSA to issue new and improved safety standards.

Moreover, there is a serious constitutional question regarding whether Congress could in fact delegate to any agency a general power to determine whether and when state tort liability is preempted by agency action. Creation of an express preemption provision is the prefecture of Congress. In turn, determinations about the reach of a specific law and its express or implied effects are undoubtedly the province of the judiciary, as they involve crucial constitutional questions of federalism as well as pivotal legal interpretations of the specificity of the state and federal statutes in question. In *Bates v. Dow Agrosciences LLC*, the Supreme Court noted that the Administrative agency had submitted an amicus brief, yet gave no weight to the executive's arguments on the preemption issue.[9]

Bates is illustrative of NHTSA's slovenly approach to the significant legal questions at issue here, because it illustrates that common law duties do not necessarily conflict with federal regulation. Both *Bates* and an earlier case, *Medtronic v. Lohr*, 518 U.S. 470 (1996), require a painstaking examination of the specific and conflicting requirements imposed by both state and federal law. Given the wide manufacturer discretion under the DSP proposal and the differing levels of safety improvement offered by the three options, it is more than likely that a court would find that state law tort duties complement, rather than conflict with, the federal rule by providing an incentive for manufacturers to choose the safest option requiring installation of safety belt assemblies, and thus is fully consistent with federal requirements. In *Bates*, the Court held that a "requirement [or, in this case, a standard] is a rule of law that must be obeyed; an event, such as a jury verdict, that merely motivates an optional decision is not a requirement."[10]

It is more than imaginable that a seat designed in compliance with the DSP rule would nonetheless fail to provide an adequate level of safety for vehicle passengers in a crash, and that such failure would be foreseeable by the manufacturers. NHTSA's role is to issue broad, minimum performance-based standards. The manufacturers must design vehicles to meet or exceed these standards; these vehicles must also be safe in operation for their foreseeable and intended uses.

As David Vladeck writes in a forthcoming article on preemption and regulatory failure:

> Preemption claims are undeniably efforts by industry to shed an important source of market discipline – the threat of liability for visiting unjustifiable harm on others – a discipline that regulation cannot itself provide. It is no surprise that industry seeks to avoid liability. What is important here is that judges reviewing preemption claims must take into account the overall regulatory and liability context in evaluating industry's claim that Congress intended to remove the discipline imposed by the tort system.[11]

NHTSA should recoil from these unauthorized and arrogant threats to tort system safeguards and return to its real business of promulgating federal safety standards by issuing an improved rule that requires safety belt assemblies in all DSPs. With its loopholes and its extraneous attack on state tort law, the current proposal degrades,

rather than improves, safety: first, by reducing obligations on automakers to install safety belts for DSPs, and second, by undermining the common law duties that would encourage automakers to choose the safest compliance option. NHTSA can and should do better.

Endnotes

[1] 529 U.S. 861 (2000).
[2] NHTSA's PRE is very unclear on this point, but it cites only two examples of vehicles with either the "void" or "impediment" design options. *See* Preliminary Regulatory Evaluation, Proposal to Amend the Definition of Designated Seating Position in §571.3, FMVSS 208, at 18-19.
[3] Codified as 49 U.S.C. §30103(b)(1).
[4] Codified as 49 U.S.C. §30103(e).
[5] 70 FR 36098.
[6] 15 U.S.C. §1381.
[7] 15 U.S.C. §1391(2)
[8] *Rice v. Santa Fe Elevator Corp.*, 331 U.S., at 230.
[9] 125 S.Ct. 1788, 1801 (2005).
[10] *Id*. at 1799.
[11] Vladeck, David. "Preemption and Regulatory Failure," 33 Pepperdine L. Rev. ___ (2005) (*forthcoming*).

ENDNOTES:

[12] Codified as 49 U.S.C. §30103(b)(1).
[13] Codified as 49 U.S.C. §30103(e).
[14] 70 FR 36098.
[15] 15 U.S.C. §1381.
[16] 15 U.S.C. §1391(2)
[17] *Rice v. Santa Fe Elevator Corp.*, 331 U.S., at 230.