November 24, 2008

Mr. David Kelly, Acting Administrator
National Highway Traffic Safety Administration
1200 New Jersey Avenue, SE
Department of Transportation, West Building
Washington, DC 20590

Petition for Reconsideration on Designated Seating Positions and Seat Belt Assembly Anchorages, Final Rule, 73 FR 58887, October 8, 2008, Docket No. NHTSA-2008-0059

Dear Acting Administrator Kelly:

Public Citizen and the Consumer Federation of America respectfully submit the following petition for reconsideration to the National Highway Traffic Safety Administration's (NHTSA) final rule regarding designated seating position. We object to the agency's final rule on the grounds that it fails to close the regulatory gap regarding provision of enough belts for the number of seating positions *likely* to be perceived by purchasers and occupants of vehicles. Also, this final rule contains language suggesting that NHTSA's regulation should preempt state tort law. We request that the rule be reconsidered based on updated analysis of the safety problem reflecting changes in seat design and that the preemption provision, to be codified at 49 CFR § 571.3(c), be omitted.

Public Citizen is a national non-profit public interest organization with over 80,000 members nationwide, representing consumer interests through regulatory oversight, research, public education, lobbying and litigation. 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 over forty years.

Consumer Federation of America (CFA) is a non-profit association of 300 consumer groups, with a combined membership of more than 50 million people. CFA was founded in 1968 to advance the consumer's interest through advocacy and education.

NHTSA's Final Rule Does Not Close the Regulatory Gap Regarding Adequate Seat Belts.

NHTSA seeks in its final rule to develop a standard for establishing designated seating positions by dividing the width of a seat by a divisor derived from the seating surface of a fifth percentile female. The undersigned do not, in principle, object to the agency's use of seating surface as a means to approximate the number of seating positions; however, the agency's rule unnecessarily complicates the issue of installing a number of seatbelts that is sufficient for the

likely number of occupants. The safety problem arose due to a difference between the number of seating positions perceived to exist, rather than the number of seat belt assemblies required.

The agency provides three compliance options: (1) providing a void space; (2) an unpadded impediment; or (3) an additional seat belt assembly. NHTSA attributes benefits to the new definitions encouraging consumers to purchase a different vehicle. In the final regulatory evaluation, NHTSA states:

> If manufacturers choose to insert a void or add a seat impediment, both of these would potentially reduce the number of occupants. . . . In the long term the consumer might decide to purchase a vehicle that has three designated seating positions. As a result, similar benefits to adding a lap/shoulder belt should accrue. In the short term, if the consumer decides to use the vehicle as is and let someone sit there anyway, no benefits will accrue; or the consumer might use another vehicle so that all passengers can be belted, similar benefits to adding a lap/shoulder belt should accrue with this scenario.[1]

NHTSA states that the problem is less significant today because the average seat width of a two designated seating position (2-DSP) seat has decreased from 1118 mm in the 2001 model year to 979 mm in the 2006 model year.[2] However, the agency did not investigate whether the options of void space or impediment would discourage occupants from sitting in a space that is not a designated seating position. NHTSA uses the example of the otherwise similar Ford Mustang and Chevrolet Camaro, which shows that three occupants were seated in the 2-DSP rear seat of the Camaro, although there was a carpeted drive shaft tunnel dividing the two seats.[3] This does not confer confidence that the option of providing an impediment is sufficient to prevent excessive occupancy.

NHTSA Has not Provided Adequately Updated Data to Support its Assertions.

The undersigned respectfully acknowledge the agency's goal of establishing an objective measure of designated seating position, but we are skeptical that the updates required under this regulation adequately resolve the ambiguity that initiated this action. The agency has not provided sufficient analysis supporting two central assertions: (1) that the change in average seat width between 2001 and 2006 has reduced the safety problem; and (2) the human factors related to reduced belt use rates when an additional occupant is seated in a 2-DSP seat.

The agency does not update its analysis to include more recent data than are included in the notice of proposed rulemaking (NPRM) regarding its claim that the reduction in average seat width for 2-DSP seats likely to be affected by this rule will resolve the safety problem. NHTSA says: "The reduced seat size more clearly indicates to occupants the capacity for which crash protection is provided."[4] However, it does not provide data showing a reduced rate of excess occupancy of 2-DSP seats since the reduction in seat width.

NHTSA has not adequately researched the relationship between the number of occupants in a seat and the belt use rates. In its final regulatory evaluation, NHTSA says that the 1997-2001 National Automotive Sampling System (NASS) data show that when two occupants are in a 2-DSP seat that the belt use rate is 53.25%, but that when three occupants are in a 2-DSP seat that belt use rates drop to 27.67%.[5] The agency has not looked at more recent data reflecting

increased belt use in the rear seats. According to NHTSA, the belt use rate in rear seats was 76 percent in 2007, which it also notes was an 11 percent increase over 2006.[6] However, NHTSA makes no attempt to explain factors which lead to reduced belt use when more than two occupants are in a 2-DSP seat, nor does it account for the increase in rear belt use rates.

NHTSA did not investigate the reasons for the decrease in belt use rates when three people occupied a 2-DSP seat. Two potential reasons are insufficient seat space for three occupants to comfortably sit with two of the occupants belted, and that the person sitting in a non-designated seating position without a belt discourages other occupants from wearing a belt. NHTSA has not given detailed analysis on the factors related to decreased belt use; however, these factors would be useful in establishing the safest option among belts, void space, or an impediment for preventing excessive occupancy.

The agency has a responsibility to use the most recent available data in setting regulations. The undersigned acknowledge that the NASS and Fatality Analysis Reporting System (FARS) data takes time to process, but data is available in NASS through 2005 and FARS data is available through 2007. The agency should be able to provide an updated analysis that reflects changes in belt use patterns since 2001.

The agency did point out that vehicle designs had changed such that 2-DSP seats in SUVs had gotten about six inches shorter between 2001 and 2006.[7] However, the problem of three occupants using a 2-DSP seat does not necessarily change just because the seats are now six inches shorter on average. The problem is that many bench seats are designed to hold three occupants, and bench seats holding two occupants are predominantly in two-door SUVs and subcompact cars, which resemble vehicles that are largely the same, but have benches designed to hold three occupants. NHTSA discusses the perception that a seating position is increasingly identified with a seat belt; however, this rulemaking was initiated due to confusion regarding the number of seating positions available in a bench seat.

NHTSA does not discuss the distinction between 2-DSP and 3-DSP seats in any other terms than the seating width (hip room in NPRM), but it is conceivable that some of the confusion comes from the fact that many 3-DSP bench seats do not comfortably seat three adults. Children are more likely to sit in rear seating positions, but NHTSA says nothing about whether children are more likely to exceed the designated occupancy of a vehicle. The agency does not discuss whether children over 40 pounds but smaller than a 5^{th} percentile female are more likely to be ejected if they are unbelted, nor does it discuss whether it is more common for there to be more children than there are seating positions in a vehicle.

NHTSA should clarify its intent to provide objective seating positions by omitting the option to designate a seating position through providing an unpadded impediment. If a seat contains three 330 mm seating spaces, then the manufacturer should provide three seat belt assemblies. If a seat does not contain three 330 mm seating spaces, then the manufacturer should use the void space option. The undersigned further believes that the void space should be labeled to reflect that it is not a seat, and that sitting in that space is dangerous. This provides a clear and unambiguous definition of designated seating positions. It is also more consistent with NHTSA's own assessment of the benefits of the designated seating position rule, which claim

benefits for consumers choosing a vehicle with the appropriate number of belted seating positions for the number of occupants being transported.[8]

NHTSA's Comments about Preemption are Harmful and Unnecessary.

Since 2005, regulatory agencies have included language that expresses the opinion purportedly of the agencies that regulations should preempt state liability law in over sixty rulemaking actions across the government. Twenty-three of these actions have been at NHTSA.[9] In each of these actions, the preemption language appeared only in the preamble of the rule, and was not contained in the regulatory text itself. However, the final rule for designated seating position includes preemption language both in the preamble and the regulatory text itself.[10]

Including the language in the regulatory text is significantly different than previous actions of NHTSA and the other agencies. In the NPRM, NHTSA expresses the view that tort law conflicts with federal safety regulations. NHTSA says:

> Under 49 U.S.C. 30103(b), when a safety standard is in effect under the FMVSSs, a State is preempted from adopting or retaining a standard that imposes a different standard of performance, except for vehicles obtained for its own use. This express preemption clause has been interpreted as limited to State statutes and regulations based on the presence in the Safety Act of a provision stating that compliance with a FMVSS does not exempt ''any person from any liability under common law'' (49 U.S.C. 30103(c); ''saving clause''). However, neither the express preemption clause (by negative implication) nor the saving clause bars the preemption of state common law in instances in which state law (tort law) conflicts with uniform Federal safety regulations of national applicability.[11]

The notice goes on to say:

> In addition, if made final, this definition of ''designated seating position'' would preempt any conflicting determinations in state tort law as to whether a location is or ought to be a designated seating position. A tort law determination premised on the designation of more designated seating positions than those required by the proposed definition could have a negative safety impact. [12]

In this final rule, NHTSA goes one step further and includes preemption language in the regulatory text:

> Any State requirement, including any determination under State tort law premised on there being more designated seating positions in a motor vehicle than the number contemplated in the definition of ''designated seating position'' in paragraph (b) of this section would prevent, hinder or frustrate the accomplishment of the purposes of the Federal Motor Vehicle Safety Standards in Part 571 of this title, and is thus preempted by this regulation.[13]

The undersigned respectfully disagree with NHTSA's conclusion. Tort law does not "frustrate the accomplishment or purposes" of this standard. In the preamble to this rule, NHTSA explains:

> The Supreme Court has also recognized that State requirements imposed on motor vehicle manufacturers, including sanctions imposed by State tort law, can stand as an obstacles to the accomplishment of a NHTSA safety standard. When such a conflict is discerned, the Supremacy Clause of the Constitution makes their state requirements unenforceable. *See Geier v. American Honda Motor Co., 529 U.S. 861 (2000)*

NHTSA's use of *Geier v. Honda Motor Co.*, misunderstands that decision. In *Geier*, the Supreme Court considered whether the Safety Act preempted claims for injuries sustained in a car crash by a woman who was wearing her seat belt, but whose 1987 Honda car was not equipped with airbags. The safety standard at issue in the case was FMVSS 208, which addressed passive restraint systems. The version of FMVSS 208 issued in 1984 and in effect in 1987 established a three-year phase-in period for installation of passive restraints in new vehicles. Under that standard, automakers were required to equip some but not all of their 1987 vehicles with passive restraints. The Court found that NHTSA had made a deliberate choice not to require airbags in all vehicles. Rather, it had adopted a phase-in period for passive restraint systems and given automakers a range of choices among different passive restraints as a way to lower costs, overcome technical safety problems, encourage technological development, and win widespread consumer acceptance of airbags, thereby furthering its safety objective. *Geier* held that allowing the manufacturer to be held liable for not installing an airbag would conflict with the agency's objective in fashioning FMVSS 208 as it did.

This very fact-specific holding based on the nature of the complicated passive restraint rule does not support preemption here. The agency's objectives with respect to designated seating position are in no way threatened by the potential for tort suits arising from injuries caused by manufacturers' choices about the number of seating positions to designate in their vehicles and the manner in which they designate them.

First, automakers are extremely unlikely to equip a vehicle with more belts than are necessary. Second, under this final rule, manufacturers are barred from leaving an ambiguous seating surface in the center of a bench seat. For the average affected seat described in the final rule, that is, a bench seat measuring 979 mm, the width of the seat in the center of two seating positions is 85 percent of the width of a designated seating position under the final rule. However, the agency in this rule requires that the center space be interrupted by either a void space or impediment at least 137.5 mm wide, thus reducing the ambiguous center space to a negligible amount far less likely to be mistaken as a seating position.

NHTSA claims that, without the preemption regulation, tort claims could encourage automakers to install more seat belts than are necessary, which could potentially reduce safety. From the agency's notice:

> A tort law judgment premised on there being more designated seating positions in a motor vehicle than the number contemplated in that definition could have a negative safety impact. Such a judgment would tend to induce manufacturers to equip a seating location with an excessive number of safety belts since the Federal motor vehicle safety standards require that each designated seating position be equipped with one or more safety belts. Given that seat belt comfort and convenience continue to be important factors affecting the level of safety belt use. . .NHTSA believes the installation of an

> excessive number of safety belts would decrease, not increase, safety. We expect that occupants would be less likely to use safety belts because limited space would make such use difficult or uncomfortable.[14]

This explanation is unconvincing. NHTSA claims that it suspects that manufacturers are more likely to comply by using the void space or impediment options. If automakers comply with the federal standard, and the agency's countermeasures are sufficient to discourage excessive occupancy, then there would be no ambiguous seating position for which to provide an additional seat belt.

Moreover, the subsequent history of passive restraint regulation demonstrates an important fallacy in the agency's preemption theory. When NHTSA issued FMVSS 208, belt use rates were low, and NHTSA believed that "passive restraints" would meet with less resistance from drivers and passengers, and therefore occupants who otherwise would not choose to wear seat belts would be protected in frontal impact crashes. However, experience with automatic seat belts and airbags proved that: (1) automatic seat belts did not provide the same level of protection afforded by conventional seat belts; and (2) airbags were more effective when occupants were belted. This led NHTSA to pursue other means of encouraging occupants to wear seat belts, including primary seat belt enforcement laws, which have been effective in increasing belt use rates.

Technology marches on, and regulatory reviews by the agencies do not necessarily keep up with the most current level of technology. These regulations will become frozen in time, and occupants who are injured in crashes would be barred from seeking damages as a result of those injuries. Likewise, preemption clauses would suggest that the regulatory agencies provide the last word on safety. This is illogical and unreasonable. The agencies are already given tremendous responsibility to protect the public from an unfathomable number of health and safety threats.

By deciding up front that automakers cannot be held accountable to consumers, the preemption regulation seeks to eliminate an important motivation for companies to improve their vehicles as soon as a defect is identified and to stop using older designs and technology that do not provide the safety that newer ones offer. The consequences of this retrograde attitude can be disastrous, as in the case of rollover and roof crush, where 10,500 people are killed annually in part due to a woefully out-of-date safety standard. Yet the tort system has encouraged some manufacturers to improve their rollover protection above the federal safety standard.

The agency has an obligation to set standards that it judges will protect occupants from injury or death in motor vehicle crashes. NHTSA ought to assert confidence, based on confident analysis of crash data, that its regulations are sufficiently protective to justify enforcement. By including this preemption language, the agency is effectively undermining public confidence in the effectiveness of its regulations. Impeding injured parties from seeking damages in response to injury sustained due to an ineffectively designed vehicle that nevertheless complies with the federally-mandated minimum standards for safety is contrary to the agency's own mission to protect consumers from harm in vehicle crashes.

The undersigned request that NHTSA reconsider its regulation regarding designated seating positions to include updated analysis of the potential success of its proposed measures to prevent excessive occupancy. It must support its assertion that reduced seat width reduces the ambiguity about the occupancy of a bench seat. NHTSA has not satisfactorily demonstrated the relative safety of the three compliance options it has chosen, when the safest option would be to provide a belt for each *likely* seating position. The undersigned acknowledges that the agency seeks to establish an objective measure of a "likely" seating position. However, the agency has not shown how its new definitions of designated seating positions will prevent excess occupancy. Finally, the agency must remove harmful language suggesting that the agency's minimum standards imply preemption of state tort law.

Sincerely,

Joan Claybrook, President
Public Citizen

Jack Gillis, Director of Public Affairs
Consumer Federation of America

Endnotes

[1] *See* "Final Regulatory Evaluation: Designated Seating Position and Seat Belt Anchorages." National Center for Statistics and Analysis, National Highway Traffic Safety Administration. (October 2008), at p. 29.
[2] 73 *Fed. Reg.* 58887, 58898 (October 8, 2008) at. 58889.
[3] *See* "Preliminary Regulatory Evaluation: Designated Seating Position and Seat Belt Anchorages." National Center for Statistics and Analysis, National Highway Traffic Safety Administration. (June 2005), at p. 15.
[4] 73 *Fed. Reg.* 58889.
[5] "Final Regulatory Evaluation: Designated Seating Position and Seat Belt Anchorages." at p. 25.
[6] "Seat Belt Use in Rear Seats." National Highway Traffic Safety Administration. DOT HS 810 933, (April 2008).
[7] 73 *Fed. Reg*. 58889.
[8] *See* "Final Regulatory Evaluation: Designated Seating Position and Seat Belt Anchorages." at p. 29.
[9] *See* "Get Out of Jail Free: How the Bush Administration Helps Corporations Escape Responsibility." American Association for Justice. (October 2008) & "Federal Regulations Limit Consumer Lawsuits." Associated Press. (May 13, 2008) & 73 *Fed. Reg.* 62743, 63786 (October 21, 2008) & 73 *Fed. Reg.* 66786, 66802 (November 12, 2008).
[10] 73 *Fed. Reg.* 58894, 58896.
[11] 70 *Fed. Reg.* 36094, 36108 (June 22, 2005) at 36098. *Citations omitted.*
[12] *Id.*
[13] 73 *Fed. Reg.* 58896.
[14] *Id.* at. 58894-95. *Citation omitted.*