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May 22, 1984

The Honorable John D. Dingell  
House of Representatives

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Dear Mr. Dingell:

Your letter of December 13, 1983, asked that we analyze the legislative veto in that section of the National Traffic and Motor Vehicle Safety Act of 1966, entitled "Occupant Restraint Systems." 15 U.S.C. § 1410b, added by, Pub. L. No. 93-492, § 109, 88 Stat. 1482. The Supreme Court, in Immigration and Naturalization Service v. Chadha, \_\_\_ U.S. \_\_\_, 103 S. Ct. 2764 (1983), generally declared legislative vetoes unconstitutional, and required that existing legislative veto provisions be examined to determine whether the unconstitutional portions could be severed from the remainder of the underlying statute. Your analysis of the legislative veto in section 1410b was contained in testimony before the National Highway Traffic Safety Administration (NHTSA) on December 7, 1983. There, you testified that the veto was not severable and you concluded that NHTSA cannot promulgate a safety standard requiring airbags in all new cars.

Informal discussion with your staff yielded a second question: Would a universal airbag standard constitute a design restriction rather than a performance criterion for crash protection?

For the reasons given below, we conclude that the veto in question is severable, legally enabling NHTSA to promulgate an airbag only standard, provided it observes the heightened administrative procedures called for in subsection (c) of section 1410b. Additionally, we conclude that mandating airbags does not set a design standard and that an airbag standard can be validly cast in performance terms.

#### Background

In October 1981 NHTSA officials rescinded Motor Vehicle Safety Standard 208. That Standard would have required passive restraint devices to be installed on new cars manufactured after September 1982. The required systems were either passive belts or airbags, at the manufacturer's option. Nearly all manufacturers opted for passive belts. The basis for rescission was NHTSA's belief that consumer resistance to passive belt systems would cause new car purchasers to deactivate the systems. Since passive belts were selected to be installed in nearly all new cars, NHTSA reasoned that the actual increase in safety would be minimal. 46 Fed. Reg. 53,419 (1981).

Insurance companies promptly sought judicial review of the NHTSA action, claiming that the rescission was arbitrary and capricious. In June 1983 the Supreme Court agreed, and ordered NHTSA to reopen the rulemaking record on Standard 208 to consider, among other things, the safety improvements which might be achieved through the universal use of airbags. Motor Vehicle Manufacturers Association of America v. State Farm Mutual Insurance Co., Inc., \_\_\_ U.S. \_\_\_, 103 S. Ct. 2856 (1983). NHTSA reopened its rulemaking record and is presently considering the efficacy of an "airbag only" standard.

Section 1410b and the Legislative Veto.

When testifying before NHTSA on this standard, you contended that a mandatory airbag standard would be unauthorized because of the structure of section 1410b. Section 1410b, entitled, "Occupant Restraint Systems" reads, in pertinent part, as follows:

"(b) **Federal motor vehicle safety standard requirements**  
\* \* \*

- (1) No Federal motor vehicle safety standard may--
  - (A) have the effect of requiring, or
  - (B) provide that a manufacturer is permitted to comply with such standard by means of, any continuous buzzer designed to indicate that safety belts are not in use, or any safety belt interlock system.
- (2) Except as otherwise provided in paragraph (3), no Federal motor vehicle safety standard respecting occupant restraint systems may--
  - (A) have the effect of requiring, or
  - (B) provide that a manufacturer is permitted to comply with such standard by means of, an occupant restraint system other than a belt system.
- (3)(A) Paragraph (2) shall not apply to a Federal motor vehicle safety standard which provides that a manufacturer is permitted to comply with such standard by equipping motor vehicles manufactured by him with either--
  - (i) a belt system, or
  - (ii) any other occupant restraint system specified in such standard.
- (B) Paragraph (2) shall not apply to any Federal motor vehicle safety standard which the Secretary elects to promulgate in accordance with the procedure specified in subsection (c), unless it

is disapproved by both Houses of Congress by concurrent resolution in accordance with subsection (d).

(C) Paragraph (2) shall not apply to a Federal motor vehicle safety standard if at the time of promulgation of such standard (i) the 60-day period determined under subsection (d) has expired with respect to any previously promulgated standard which the Secretary has elected to promulgate in accordance with subsection (c), and (ii) both Houses of Congress have not by concurrent resolution within such period disapproved such previously promulgated standard.

**"(c) Federal motor vehicle safety standard promulgation procedure; rule making requirement; data, views or arguments; presentation opportunity; transcript; notification of Congressional Committees; data, views, or arguments of Members of Congress; transmittal of standard to Congress and Congressional Committees.**

The procedure referred to in subsection (b)(3)(B) and (C) in accordance with which the Secretary may elect to promulgate a standard is as follows:

(1) The standard shall be promulgated in accordance with section 1392 of this title, subject to the other provisions of this subsection.

(2) Section 553 of title 5, United States Code shall apply to such standard; except that the Secretary shall afford interested persons an opportunity for oral as well as written presentation of data, views, or arguments. A transcript shall be kept of any oral presentation.

(3) The chairman and ranking minority members of the House Energy and Commerce Committee and the Senate Commerce, Science and Transportation Committee shall be notified in writing of any proposed standard to which this section applies. Any Member of Congress may make an oral presentation of data, views, or arguments under paragraph (2).

(4) Any standard promulgated pursuant to this subsection shall be transmitted to both Houses of Congress, on the same day and to each House while it is in session. In addition, such standard shall be transmitted to the chairmen and ranking minority members of the committees referred to in paragraph (3).

**"(d) Concurrent resolution of disapproval during prescribed period; Federal motor vehicle safety standard effective upon expiration of such period**

(1) A standard which the Secretary has elected to promulgate in accordance with subsection (c) of this section shall not be effective if, during the first



period of 60 calendar days of continuous session of Congress after date of transmittal to Congress, both Houses of Congress pass a concurrent resolution the matter after the resolving clause of which read as follows: 'The Congress disapproves the Federal motor vehicle safety standard transmitted to Congress on \_\_\_\_\_, 19\_\_\_\_'; (the blank space being filled with date of transmittal of the standard to Congress). If both Houses do not pass such a resolution during such period, such standard shall not be effective until the expiration of such period (unless the standard specifies a later date).

(2) For purposes of this section --

(A) continuity of session of Congress is broken only by an adjournment sine die; and

(B) the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the 60-day period."

Based on your interpretation of Chadha and the legislative history of the statute, you concluded that the two-House veto contained in subparagraph (b)(3)(B) was not severable and that the entire subparagraph must be stricken as a result. (Under your interpretation, subparagraph (b)(3)(C) and subsections (c) and (d), which are linked to subparagraph (b)(3)(B), would also be stricken.)

#### The CHADHA Test for Severability

When the Supreme Court held legislative vetoes unconstitutional in Chadha, it also reiterated its longstanding test for severability. The test is two-fold.

First, the unconstitutional provision is presumed severable if the remainder of the statute "is fully operative as a law" without it. 103 S. Ct. at 2775 (quoting Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 234 (1932).) Second, the provision is severable unless it is evident that the Congress would not have enacted the statute without the unconstitutional portion. 103 S. Ct. at 2774 (citing Buckley v. Valeo, 424 U.S. 1, 108 (1976).)

In this case, the remaining portions of the statute are fully operative without the legislative veto provisions. The unconstitutional portions of the law are the last phrase of subparagraph (b)(3)(B), all of subparagraph (b)(3)(C), and subsection (d). With these removed, the statute still (1) outlaws standards requiring or permitting continuous



buzzers or interlock systems; (2) permits standards in which the manufacturer is allowed to equip a vehicle either with the system described in the standard or with safety belts; and (3) permits any other standard which NHTSA promulgates under the detailed procedural requirements of subsection (c). It is thus clear that the statute can still operate with the unconstitutional portions removed.

With respect to the second part of the test, we find no evidence, in the legislative history or elsewhere, that the Congress would not have passed the law without the legislative veto provisions.

The bill that would later become section 1410b originated in and passed the Senate in 1973. At that time, it contained no reference to occupant restraint systems. By the time the House considered the bill in 1974, consumer protest over the NHTSA-required seat belt ignition interlock systems had effectively been conveyed to the Congress.

The House considered several formulations of restrictive amendments, but eventually settled on a two-part amendment. First, interlock systems and warning devices other than simple warning lights were banned entirely. Second, except for lap/shoulder seat belts, other safety systems could only be offered as optional items on new cars. The legislative history of the second part, the Wyman amendment, evidences a clear legislative intent in the House that consumers not be required to pay for expensive safety systems that they didn't want. The House version did not, however, contain the legislative veto provision ultimately included in the law.

The original bill that passed the Senate having been silent on the interlock/warning system issue, Senators Buckley and Eagleton introduced a restrictive amendment to a different Senate bill. The Buckley-Eagleton amendment resembled the House amendment in that it banned interlock systems and warning devices other than lights. It differed from the House amendment, however, in that it permitted NHTSA to promulgate future standards for non-belt systems after public hearing and with the approval of the Senate Commerce Committee and the House Interstate and Foreign Commerce Committee.

After the Senate had passed the amendment, Senator Buckley withdrew it. In explaining the reason for this procedural exercise, Senator Eagleton stated:

"[T]he Senate has gone on record and, in a sense, instructed the conferees in a bill now pending in

conference with the conference committee as to our views respecting the seatbelt interlock system."

120 Cong. Rec. 30851 (1974) (remarks of Sen. Eagleton). Senator Buckley added:

"[W]e have now, by virtue of the vote on the Amendment served our purpose, and that is to place the Senate clearly on record in opposition to the mandating of the systems and, therefore, in effect, we had instructed the Senate conferees to accede to the House position." Id.

Read in the context of his and Senator Eagleton's statements and the differing amendments passed in the House and the Senate, it is clear that Senator Buckley's comment that the conferees were instructed to accede to the House position applied only to the issue on which the House and Senate were in agreement, namely banning interlocks and continuous buzzers.

The House and the Senate were not in agreement as to future safety systems. The Wyman amendment in the House clearly left the safety choice to the individual consumer. The sense of the Senate appeared to be that the public ought to be consulted before any new safety regulations were issued.

The legislation agreed to by the conference committee is a combination of the House and Senate versions. Like both versions, the conference bill contained a ban on interlock or continuous buzzer systems. Like the House bill, the conference bill permitted a safety standard that allowed a choice between seat belts and some other occupant restraint system, although in the conference version the choice was to be made by the manufacturer rather than the consumer. Like the Senate amendment, the conference bill permitted a standard adopted after a public proceeding, although the conference bill contained much stricter procedural requirements and substituted the two-House legislative veto for advance approval by the committees.

There is nothing in the legislative histories of either the House or Senate amendments, or in the report of the conference committee (see H.R. Rep. No. 1452, 93d Cong., 2d Sess. 44-45 (1974)), that convinces us that the conferees would not have agreed on, and the two chambers would have not have enacted, the legislation but for the presence of the legislative veto. The conference bill, which became the legislation, essentially satisfied the desires of the House that there be choice and of the Senate that the public

participate in the formulation of future standards. We see the legislative veto as icing on the cake rather than a prerequisite to agreement between the House and Senate on future safety standards.

A second reason we feel the veto in question is severable is the context in which it occurred. By passing Public Law 93-492 the Congress indicated plainly that it knew how to stop safety standards the public found objectionable. It passed a law banning interlocks and preventing the future requirement of continuous buzzers. If Congress had wished either to ban airbags entirely or to remove NHTSA's rulemaking authority in the crash/safety restraints areas, it could have done so. Instead, however, it opted to ensure consumer choice and consultation about future systems rather than to second-guess the state-of-the-art 2, 3 or 5 years in the future with regard to passive restraint devices.

We conclude, therefore, that 1) the legislative veto was not an indispensable prerequisite to House/Senate agreement and 2) that the statute is fully operable without the legislative veto. Additionally, we feel that the policy behind the section 1410b, namely to maximize consumer participation in selecting safety systems, is better served by a determination of severability. As a consequence, the veto is severable from the remainder of the statute, and NHTSA may promulgate an airbag only standard under the procedures specified in subsection (c) of section 1410b.

#### Design vs. Performance Standards

Assuming that NHTSA is not prohibited from promulgating a mandatory airbag rule, your second question is whether an "airbag only" standard would set a design rather than a performance standard. It is our view that an airbag standard need not impinge on design freedom and that such a standard can be validly written in performance terms.

"Motor vehicle safety standards" are defined by the statute as "a minimum standard for motor vehicle performance, or motor vehicle equipment performance, which is practicable, which meets needs for motor vehicle safety and which provides objective criteria." 15 U.S.C. § 1391(2). "Motor vehicle equipment" in turn, means any "system, part, or component \* \* \* which is manufactured \* \* \* for use exclusively to safeguard motor vehicles, drivers, passengers, and other highway users from risk of accident, injury, or death." 15 U.S.C. § 1391(4). An airbag, therefore, is motor vehicle equipment as defined in § 1391(4).



The rationale behind the Congress requiring NHTSA to establish performance standards rather than design standards was two-fold. First, there was a desire to preserve the manufacturer's opportunity to make design and styling innovations. Second, performance standards were intended to foster competition and its attendant benefits in lower cost and greater efficiency of safety equipment systems. See generally S. Rep. No. 1031, 89th Cong., 2d Sess. (1966).

The matter of design versus performance in the question of safety standards has been litigated. As a preliminary observation, any safety standard will impinge, to a degree, on design freedom. From the cases however, it is possible to conclude that not all safety specifications set "design" standards even though they may strongly influence or even require changes in automobile design.

For example, the 1968 case of Automotive Parts and Accessories Ass'n v. Boyd, 407 F. 2d 330 (D.C. Cir. 1968), upheld a standard requiring factory-installed head restraints in all new cars. The court quoted approvingly the petitioner's summary of NHTSA's position that a standard which did not require manufacturer-provided head restraints but "merely specified performance requirements would not insure that all passenger cars would be so equipped, and would not, therefore, meet the need for safety." Id. at 340. There were additional issues in that case, which contributed to the decision in favor of mandatory, rather than optional head restraints. However, in part it can be interpreted as holding that the universality of a safety standard can itself be a performance criterion.

The question of design versus performance was raised more directly in Chrysler Corp. v. Department of Transportation, 515 F.2d 1053 (6th Cir. 1975). Chrysler went to court attempting to compel further liberalization of NHTSA's safety standard on headlamps. The original standard had mandated circular lamps only, and a modification allowed rectangular lamps of 6 1/2 x 4 inches, but of no other dimensions. The court in that case took note of the front end styling refinements which could be achieved by permitting rectangular lamps of assorted sizes, but found in favor of NHTSA because the record showed that lamp size was related to safety. NHTSA argued successfully that if lamp sizes proliferated, small garages might not stock all possible sizes. Consumers would thus be discouraged from obtaining replacement lamps, thereby reducing safety. After analyzing the legislative intent that NHTSA not control automobile styling or design, the Court concluded that "uniformity of headlamp size is an element of headlamp performance." Id. at 1058. In other words, a standard may be valid even though it

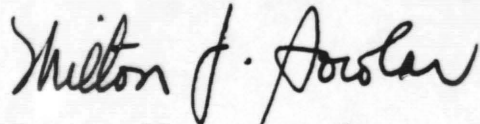
restricts design freedom, if it can be shown to be intrinsically related to safety.

Automotive Accessories and Chrysler, taken together, permit us to conclude that a mandatory airbag requirement would be a legitimate performance standard.<sup>1/</sup>

In further support we note that there appear to be several different design options for the airbags themselves. The current Standard 208 mentions bags triggered by pressure vessels and explosive devices but does not otherwise specify design requirements. 49 C.F.R. § 571.208, S9 (1983). A substitute airbag only standard could be drafted so as to leave design details to the individual manufacturer's discretion. Accordingly, we conclude that an "airbag only" standard can be validly written in performance terms.

We hope the foregoing is of assistance.

Sincerely yours,



Acting Comptroller General  
of the United States

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<sup>1/</sup> In addition, we note that the airbag standard has already been litigated on other grounds and found acceptable. In Pacific Legal Foundation v. Department of Transportation, 593 F.2d 1388 (D.C. Cir. 1979), the petitioners contested the validity of the universal passive restraints requirement (Standard 208 before its rescission) promulgated by NHTSA in 1977. That litigation did not challenge airbags as a design restriction, but rather questioned NHTSA's judgment of their reliability, of negative public reaction, and of dangers from the inflating gasses. On each of these points the court endorsed the passive restraints rule.