DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Parts 573 and 577

[Docket No. NHTSA 2001–11107; Notice 3]

RIN 2127–AJ05

Motor Vehicle Safety; Reimbursement Prior to Recall

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Response to a petition for reconsideration.

SUMMARY: This document denies a petition for reconsideration of a final rule issued by NHTSA with respect to the reimbursement of costs incurred by owners of motor vehicles or motor vehicle equipment to remedy of safety-related defects or noncompliances with a Federal motor vehicle safety standard (FMVSS). That final rule implemented section 6(b) of the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act. Under the rule, in their programs to remedy defects or noncompliances, motor vehicle and motor vehicle equipment manufacturers are required to include a plan for reimbursing owners for the cost of a remedy incurred within specified times before and shortly after the manufacturer's notification of the defect or noncompliance.

FOR FURTHER INFORMATION CONTACT: For non-legal issues, contact George Person, Office of Defects Investigation, NHTSA (phone: 202–366–5210). For legal issues, contact Andrew DiMarsico, Office of Chief Counsel, NHTSA (phone: 202–366–5263).

SUPPLEMENTARY INFORMATION:

I. Background

Section 6(b) of the TREAD Act amended 49 U.S.C. 30120(d) to require a manufacturer's remedy program to include a plan for reimbursing an owner or purchaser who incurred the cost of the remedy within a reasonable time in advance of the manufacturer's notification under 49 U.S.C. 30118 (b) or (c). Section 6(b) further authorized the Secretary to prescribe regulations establishing what constitutes a reasonable time and other reasonable conditions for the reimbursement plan. *See* 49 U.S.C. 30120(d).

On October 17, 2002, NHTSA published a final rule implementing the reimbursement provision of the TREAD Act. 67 FR 64049. The final rule required manufacturers' programs for remedying safety defects and noncompliances in motor vehicles and equipment to include reimbursement plans that, at a minimum, cover certain expenditures incurred to remedy the defect or noncompliance before the implementation of the recall. *See* 49 CFR 573.13 and 577.11 (2003). The reader is referred to that notice, and the prior Notice of Proposed Rulemaking (NPRM), 66 FR 64078 (December 11, 2001), for further information.

The rule requires manufacturers to provide reimbursement, at a minimum, to consumers who obtain a pre-notification remedy within a specified time period. The beginning of the minimum reimbursement period is determined by first considering the underlying categorical basis for the recall. For recalls based upon a safety-related defect, the start of the minimum reimbursement period is the date NHTSA's Office of Defects Investigation (ODI) opens an investigation known as an engineering analysis (EA) or one year prior to the date the manufacturer submits its notice of a defect to NHTSA pursuant to 49 U.S.C. 30118(b) or (c) and 49 CFR Part 573, whichever is earlier. For recalls based upon a noncompliance with a FMVSS, the start of the minimum reimbursement period is the date of the observation of a test failure by either the manufacturer or NHTSA.

The end of the minimum reimbursement period is determined by the nature of the product being recalled. For motor vehicles, the end date is ten days after the date the manufacturer mailed the last of its notices to owners pursuant to 49 CFR 577.5. For replacement equipment, the end date is ten days after the date the manufacturer mailed the last of its notices pursuant to 49 CFR 577.5 or 30 days after the conclusion of the manufacturer's initial efforts to provide public notice of the existence of the defect or noncompliance pursuant to 49 CFR 577.7, whichever is later. Manufacturers may (and generally do) provide reimbursement for a longer period than required under the rule.

The agency based the regulatory delineation of ''reasonable time'' on the language and legislative history of section 6(b) of the TREAD Act. We also considered the free remedy provision of the National Traffic and Motor Vehicle Safety Act, as amended, 49 U.S.C. Chapter 301 (Safety Act). Under the Safety Act, manufacturers of motor vehicles and equipment that are recalled must provide a remedy without charge unless the vehicle or replacement equipment was bought by a first purchaser more than 10 calendar years (5 years for a tire) before notice of a defect or noncompliance with a FMVSS under 49 U.S.C. 30118. *See* 49 U.S.C. 30120(g)(1). As explained in the preamble to the final rule, in the TREAD Act reimbursement provision, Congress required a reimbursement period covering persons who incurred the cost of the remedy within a ''reasonable time in advance'' of the manufacturer's notification under section 30118.[1] We therefore concluded that the period for reimbursement should be limited by this language. 67 FR at 64051. We also noted that Congress was well aware of statutory periods for free remedies (49 U.S.C. 30120(g)(1)), since it had extended those periods in section 4 of the TREAD Act, and the fact that it did not reference it in the reimbursement provision of the Act cannot be viewed as inadvertent. *See* 67 FR at 64052. Thus, we reasoned that not all pre-notification remedies within the free remedy period were to be eligible for reimbursement.

In deciding what time period constituted a ''reasonable time in advance'' of a manufacturer's notification of a defect or noncompliance, we relied upon the statutory concerns underlying the remedy of noncompliances with FMVSSs and safety-related defects, and where applicable, the agency's investigative process. *See* 67 FR at 64051–53 and 66 FR at 64078–79 (December 11, 2001) (NPRM). As noted in the NPRM, we believe that the minimum period for reimbursement need not begin before consumers would be expected to have a substantial concern that the problem in question would need to be addressed by a safety recall. *See* 66 FR at 64079. As explained above, in our view, for noncompliances this would be when NHTSA or the manufacturer observes a test failure; for safety defects, it would be when ODI opens an EA or one year before the manufacturer submits its Part 573 notice, whichever is earlier. *See* 67 FR 64079. Before these dates, in our view, there would be no reason for a consumer to anticipate a safety recall would be forthcoming. While an owner of a motor vehicle or motor vehicle equipment may need to address a problem in his or her vehicle or equipment prior to these dates, and thus incur the cost of a remedy, the overall level of concern over the matter will not have reached a level such that a recall

[1] In addition to the differences in the time periods of the free remedy provision and the reimbursement provision, the provisions run from different dates. The free remedy runs from the date of the first purchase; the reimbursement period begins at a reasonable time in advance of the manufacturer's notification under 49 U.S.C. § 30118(b) or (c).

would be anticipated. Thus, under the rule, reasonable concerns would not dictate delaying the replacement or the repair of a problematic part on the basis of an expectation that with a delay a free remedy would be available under a recall, as was the case with the Firestone tires that preceded the enactment of the TREAD Act. There, as reported to NHTSA, some owners delayed replacing Firestone tires, which were under investigation and determined to be defective shortly thereafter, because they would have to pay for the replacements, but would not have to do so if there was a recall.

Public Citizen (PC) and the Center for Auto Safety (CAS) (collectively ''PC/CAS'') jointly filed a timely petition for reconsideration of the rule.

II. Discussion

PC/CAS's petition contends that the mandatory reimbursement period established by the final rule is too limited. PC/CAS take issue with both the beginning date and the end date of the required reimbursement period.

A. Beginning Date of the Reimbursement Period

PC/CAS object to the beginning date of the reimbursement period on various grounds. They first argue that NHTSA's regulation is inconsistent with the purpose of a reimbursement amendment offered by Congressman Bill Luther during the deliberations on the TREAD Act. More broadly, throughout their petition, they claim that the agency's determination of what constitutes a ''reasonable time'' is inconsistent with the overall purposes of the TREAD Act. They also assert that the rule fails to provide a ''uniform'' remedy and that NHTSA therefore should have adopted one of two ''bright-line'' rules. They also contend that the rule does not advance several of their policy choices.

Our responses follow.

1. The Luther Amendment

PC/CAS assert that the period for reimbursement in the rule is inconsistent with the purpose of a proposed amendment offered by Congressman Bill Luther to the bill that ultimately became the TREAD Act. PC/CAS argue that Congressman Luther's amendment was intended to encourage consumers to act on safety defects as soon as they are evident, rather than wait for a formal recall, and that a reimbursement period that falls short of the period for a free remedy under section 30120(g)(1) [2] is inconsistent with the amendment. PC/CAS's reliance on the Luther amendment is misplaced because they fail to recognize that Congressman Luther's amendment was modified before the bill was enacted.

The initial bills introduced in both the House of Representatives (H.R. 5164) and the Senate (S. 3059) in the wake of the Firestone tire investigation did not include any reimbursement language. Mr. Luther's amendment, offered during the mark-up of the bill in the House Subcommittee on Telecommunications, Trade, and Consumer Protection on September 21, 2000, would have required:

> a manufacturer to fully reimburse the owner of a motor vehicle which replaces equipment on a motor vehicle before a recall is ordered under subsection (a) or (b) because such equipment is defective or not in compliance with a motor vehicle safety standard.

This proposed amendment did not refer to any time limitation for the period for reimbursement.

However, the full Committee did not adopt Mr. Luther's reimbursement language. On October 6, 2000, during the mark-up conducted by the full Committee on Commerce, its Chairman, Congressman Billy Tauzin, offered an amendment to Mr. Luther's reimbursement provision. Among other changes, Chairman Tauzin's amendment, which was ultimately enacted as section 6(b) of the TREAD Act, added a time limitation to the period for reimbursement:

> A manufacturer's remedy program shall include a plan for reimbursing an owner or purchaser who incurred the cost of the remedy within a reasonable time in advance of the manufacturer's notification under subsection (b) or (c) of section 30118. The Secretary may prescribe regulations establishing what constitutes a reasonable time for purposes of the preceding sentence and other reasonable conditions for the reimbursement plan.

The Commerce Committee reported H.R. 5164, as amended, to the House of Representatives. *See* H.R. Report No. 106–954, p. 11 (2000). The summary section of the report stated, ''[F]urther, the legislation addresses * * * reimbursement for parts replaced *immediately* prior to a recall.'' *Id.* at p. 6 (emphasis supplied).

No further amendments to the reimbursement provision were offered in the House. The full House of Representatives passed H.R. 5164 as reported out of Committee. *See* 146 Cong. Rec. H9624–32 (2000). The Senate passed H.R. 5164 on October 11, 2000. *See* 146 Cong. Rec. S10272 (2000).[3]

2. The Purposes of the TREAD Act

PC/CAS next argue that the time periods established in the reimbursement rule are inconsistent with the purposes of the TREAD Act. PC/CAS broadly advance various purposes of the TREAD Act such as: to ''incentivize'' recalls and ''disincentivize'' stonewalls; discourage foot dragging by manufacturers by making it less financially advantageous to delay announcement of a recall; to influence customer behavior; to encourage the timely replacement of defective parts and remedy a defect before an official acknowledgement; to expand consumers' rights; to provide meaningful recourse to consumers affected by a recall; and not limit reimbursement in a manner contrary to good public policy. PC/CAS broadly assert that the agency's reimbursement rule fails to further these purposes of the TREAD Act.

PC/CAS's broad assertions of various and sundry purposes of the TREAD Act lack support or citation. Even if one could read some provisions of the TREAD Act as being consistent with some or all of these asserted ''purposes,'' it would not support PC/CAS's arguments. Section 6(b) cannot fairly be viewed as an omnibus provision that authorized NHTSA to adopt rules to advance general policies. We must be guided by the language of the statutory provision. Thus, for example, while we agree with PC/CAS that an apparent congressional purpose of Section 6(b) was to expand consumer rights by creating an obligation on manufacturers to provide reimbursement to purchasers for some pre-recall expenditures that was not previously required under the Safety Act, that would not resolve the scope of the rule. The critical question is the *extent* of the rights, which requires consideration of the statutory term ''a reasonable time in advance of notification.'' That is just what NHTSA did.

3. Uniform Statutory Remedy

PC/CAS further argue that the reimbursement rule does not provide a ''uniform statutory remedy'' because the

[2] Section 30120(g)(1) states: The requirement that a remedy be provided without charge does not apply if the motor vehicle or replacement equipment was bought by the first purchaser more than 10 calendar years, or the tire, including an original equipment tire, was bought by the first purchaser more than 5 calendar years, before notice is given under section 30118(c) of this title or an order is issued under section 30118(b) of this title, whichever is earlier.

[3] The reimbursement provision was inadvertently left out of H.R. 5164 as reported. On October 12, 2000, the House of Representatives passed H. Con. Res. 428 to add it. *See* 146 Cong. Rec. H9852 (2000). The Senate passed H. Con. Res. 428 on October 17, 2000. *See* 146 Cong. Rec. S10632 (2000).

reimbursement period is based upon the timing of the remedy rather than the nature of the remedy. PC/CAS contend that this can cause similarly situated consumers to be treated differently.

PC/CAS do not point to any language in Section 6(b) of the TREAD Act that supports its assertion that the reimbursement period should be based on the nature of the remedy or that all persons who remedied a defect or noncompliance prior to the manufacturer's notification must have the same right to reimbursement. By its terms, the TREAD Act's reimbursement provision is oriented toward the timing of the remedy; it expressly refers to reimbursement of a purchaser who ''incurred the cost of the remedy within a reasonable time in advance of the manufacturer's notification.'' Accordingly, in circumstances where one vehicle was repaired before the beginning of the reimbursement period and another vehicle was repaired during the reimbursement period, the fact that the rule does not require the owner of the first vehicle to be reimbursed is entirely consistent with the statute and its legislative history.

We note that even under PC/CAS view that the reimbursement period should be based on the time for a free remedy under section 30120(g)(1), there may be differences in eligibility for reimbursement. For example, in cases where a defective part is used for several model years, under PC/CAS's preferred ''bright-line'' approach, owners of vehicles under 10 years old would be eligible for reimbursement, while owners of vehicles with the same defective part that are more than 10 years old would not be eligible for reimbursement.

4. Manufacturers' Reduction of Their Liability

One of PC/CAS's central themes is that by basing the time frame for the duty to reimburse on the opening of an Engineering Analysis in a defect investigation, the longer a manufacturer can ward off an EA, the lower its liability. PC/CAS thus claim that the reimbursement rule creates an incentive for manufacturers to delay a recall and stonewall the agency.

As discussed above, Section 6(b) was not framed in terms of incentives for timely recalls. Moreover, we do not agree that the reimbursement rule would encourage a manufacturer to delay a recall. There are several factors that encourage the timely determination and notification of safety-related defects and noncompliances that far outweigh any possible cost savings that might be achieved through limiting the number of owners possibly entitled to reimbursement.

The Safety Act requires manufacturers to notify NHTSA and owners of vehicles and equipment when the manufacturer learns that the vehicle or equipment contains a defect and decides in good faith that the defect is related to motor vehicle safety, or decides in good faith that the vehicle or equipment does not comply with an applicable FMVSS. *See* 49 U.S.C. 30118(c)(1) and (2). Such notification must be given within a reasonable time after the manufacturer first decides that a safety-related defect or noncompliance exists under section 30118(c). *See* 49 U.S.C. 30119(c)(2). A manufacturer cannot evade its statutory obligations ''by the expedient of declining * * * to reach its own conclusion as to the relationship between a defect in its vehicles and * * * safety.'' *United States* v. *General Motors Corp.,* 574 F. Supp. 1047, 1050 (D.D.C. 1983). Thus, a manufacturer incurs its duties to notify and remedy whether it actually determined, or it should have determined, that its vehicles are defective and the defect is safety-related. The failure to perform these duties in a timely manner is a violation of the Safety Act that can subject the manufacturer to substantial civil penalties. *See* 49 U.S.C. 30165.[4]

The TREAD Act also reduced the likelihood that NHTSA will be unaware of a potential safety problem. Prior to the TREAD Act, in deciding whether to open a defect investigation, NHTSA relied heavily on owner complaints to obtain information about potential problems. The TREAD Act significantly expanded the nature and amount of information NHTSA receives authorizing the agency to require manufacturers to submit a wide variety of information related to potential defects. *See* Sections 3(a) and 3(b) of the TREAD Act, 49 U.S.C. 30166(l) and (m). NHTSA implemented these provisions by requiring manufacturers submit Early Warning Reporting (EWR) information, reports on foreign recalls, and various advisories and bulletins. *See* 49 CFR Part 579. This information will reduce a manufacturer's ability to delay or avoid a recall in the hope that the agency will not become aware of a real-world safety problem.[5]

PC/CAS cite a handful of specific instances where manufacturers have delayed conducting recalls, such as Ford's recall of model year (MY) 1988–93 vehicles with defective ignition switches and Chrysler's recall of MY 1993–95 Chrysler LH vehicles to address fuel rail leaks. These examples do not make their case. To begin, in view of the small numbers, they are not representative. Vehicle manufacturers undertake hundreds of recalls per year. In 2003, vehicle manufacturers conducted 529 vehicle recalls; the average number of recalls per year for the last five years is 471. In 2003, approximately 75 percent (or 401) were undertaken by manufacturers in the absence of investigations by NHTSA.

Second, PC/CAS have not demonstrated that a desire on the part of manufacturers to limit reimbursing owners was a factor, much less a significant factor, in delaying the cited recalls. Ordinarily, a recall is triggered if only a small fraction of vehicles exhibit a defect. *See, United States* v. *General Motors Corp.,* 518 F.2d 420 (D.C. Cir. 1975) (*Wheels*) (holding that a wheel is defective if there were a significant number of failures and noting that the term ''significant'' indicates that there must be a non-*de minimus* number of failures. 518 F.2d at 438 fn. 84.) The significant cost in a recall campaign is the cost of remedying the vehicles that have been recalled. In comparison, the cost of reimbursing owners of the small fraction of vehicles that have been repaired before the recall is not particularly significant. Thus, while it is possible that a manufacturer would improperly delay a recall, it is highly unlikely that such a decision would be driven by anticipated reimbursement costs. In addition, once they decide to conduct a recall, many manufacturers provide broad reimbursement, in part as a matter of customer relations. In fact, in both the Ford ignition switch and Chrysler fuel rail recalls, Ford and Chrysler offered reimbursement to all consumers who had remedied the problems prior to the announcement of the recall, regardless of the length of time involved.[6] The fact

[4] Section 5(a) of the TREAD Act significantly increased the potential amount of such civil penalties from $1,000 to $5,000 per violation and increased the maximum civil penalty for a related series of violations from $925,000 to $15,000,000.

[5] For example, EWR information recently helped lead to the early identification of a safety problem in, and the recall of, certain tires manufactured by Bridgestone/Firestone, Inc. *See* Danny Hakim, *Another Recall Involving Ford, Firestone Tires and SUVs,* N.Y. Times, February 27, 2004, at C1. In the same article, Joan Claybrook, President of Public Citizen, one of the petitioners here, said the action showed that the new system worked. *Id.* at C5.

[6] Ford's notification letters to owners advising of a defect in the ignition switch provided that Ford would provide a refund if the owner obtained the remedy before the date of the owner notification letter. Chrysler also offered reimbursement to owners who remedied the fuel rail leaks prior to recall. *See Carson* v. *DaimlerChrysler Corp.,* No. W2001–03088, 2003 WL 1618076 (Tenn. Ct. App. March 19, 2003).

that Ford and Chrysler provided reimbursement without any time limitation (and provided it before the statutory requirement to do so) further demonstrates that a desire to reduce the cost of potential reimbursements is not a factor that would cause manufacturers to improperly delay defect or noncompliance determinations.

5. Other Concerns

PC/CAS contend that as a result of its tying ''reasonable time'' to the agency's investigative processes, the reimbursement rule is unnecessarily complex and consumers will be unaware of the reference point for the reimbursement period. As we stated in the preamble to the final rule, we find it unnecessary for consumers to know how ''reasonable time'' is determined or have an intimate knowledge of NHTSA's investigative process. *See* 67 FR at 64052. Under the rule, manufacturers must provide the specific dates for the period of reimbursement in their reimbursement plans and provide appropriate notice to consumers. *See* 49 CFR 577.11(d)(3).

PC/CAS raise a narrow issue involving the start of the reimbursement period when the recall was based on a noncompliance with a FMVSS. They assert that tying reimbursement to the '' 'date of the [manufacturer's] initial test failure or the initial observation of a possible noncompliance' confers upon manufacturers virtually unrestricted leeway to define a reimbursement period, latitude that would likely be advantageous to manufacturers at the expense of consumers.''

As explained in the preamble to the NPRM, the observation of a possible noncompliance through testing or observation is a critical point in the initiation of a recall because, while not determinative of a noncompliance, it is the triggering event for OVSC or a manufacturer to conduct an investigation into the potential noncompliance. *See* 66 FR at 64078–64079; *see also* 67 FR at 64051–64052. Thus, we based the start of the reimbursement period for recalls related to noncompliances with a FMVSS on the date of the observation of an apparent failure. Before that time, consumers will have no reason to believe that a noncompliance exists, and will be unlikely to seek a remedy based on a concern about safety.

We also disagree that this provision will allow manufacturers to manipulate the reimbursement period. The date of the initial observation of a possible noncompliance is identified by the manufacturer in its Part 573 report to the agency (*see* 49 CFR 573.6(c)(7)) and is objectively determinable.

PC/CAS also argue that the agency could have adopted one of two bright-line rules to determine ''reasonable time'' in the rulemaking. PC/CAS first suggest a bright line derived from consumer law, *i.e.*, one based on the discovery rule. According to PC/CAS, the applicable period of time to seek recovery would run from the date the consumer discovers the defect recall remedy, which is the date of the receipt of the manufacturer's recall notice, and would continue until barred by a state law statute of limitations.

PC/CAS's petition itself reveals a basic flaw in its discovery rule approach, which renders it irrelevant. It states that it is based on consumer law; it does not purport to be based on Section 6(b) of the TREAD Act. The discovery rule approach is not in accord with the Act, because it does not provide for reimbursement of an owner or purchaser who incurred the cost of the remedy within a reasonable time in advance of the manufacturer's notification. It provides for reimbursement of costs incurred within an unlimited time before a manufacturer's notification. Also, this approach, which depends on state laws, which may differ or may not exist, does not produce a bright line.

The second, and better approach according to PC/CAS, is to adopt the 10-year/5-year time frame for a free repair provided by section 30120(g)(1) as the reasonable time frame for reimbursement. As discussed above, this is neither required by, nor consistent with, Section 6(b).

End Date for Reimbursement

PC/CAS also seek reconsideration of the end dates for the reimbursement period established in the final rule. This is apparently based on a misunderstanding of the rule.

The end date for the reimbursement period is the last date on which a consumer may incur costs that are eligible for reimbursement. We established such a date because Section 6(b) is designed to assure coverage of the reimbursement of remedy costs that are incurred in advance of the manufacturer's notification. Once a consumer receives a recall notice, any subsequent remedial action should be in accordance with the terms of the recall.[7]

PC/CAS seem to believe that the end date in the rule limits the period during which consumers may submit a claim for reimbursement for the costs of a pre-notification remedy. In fact, manufacturers are not allowed to establish a cut-off date for the submission of reimbursement claims. While in the NPRM we originally proposed to allow manufacturers to establish a cut-off date (*see* 66 FR at 64083), for reasons explained in the preamble to the final rule, we decided not to do so (*see* 67 FR at 64059).

Therefore, based upon the above, we are denying PC/CAS's petition for reconsideration of the reimbursement rule.

III. Rulemaking Analyses

NHTSA set forth its rulemaking analyses in the preamble to the final rule. This supplements those statements. Under the Paperwork Reduction Act of 1995, and OMB's regulation at 5 CFR 1320.5(b)(2), on June 9, 2004, NHTSA received approval from OMB for an amendment to a previously-approved information collection requirement (OMB control number 2127–0004) that includes the reimbursement rule.

Issued on: August 9, 2004.

Jeffrey W. Runge,

Administrator.

[FR Doc. 04–18485 Filed 8–11–04; 8:45 am]

BILLING CODE 4910–59–P

[7] Pursuant to 49 U.S.C. 30120, the manufacturer initially determines the type of remedy available to the consumer after notification of a noncompliance or safety defect.

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 579

[Docket No. NHTSA 2001–8677; Notice 11]

RIN 2127–AI25

Reporting of Information and Documents About Potential Defects; Correction

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Correcting amendment.

SUMMARY: This document contains a correction to the final early warning reporting rule, which initially was published on July 10, 2002 (67 FR 45822).

DATES: This final rule is effective August 12, 2004.

FOR FURTHER INFORMATION CONTACT: Jonathan White, Office of Defects Investigation, NHTSA (phone: 202–366–5226).

SUPPLEMENTARY INFORMATION: On July 10, 2002, NHTSA published a final rule