

September 26, 2003

Honorable Jeffrey W. Runge, M.D.
Administrator
National Highway Traffic Safety Administration
400 Seventh Street, S.W.
Washington, DC 20590

RE: Letter in Support of Petition for Reconsideration – Denman Tire Corporation;
Federal Motor Vehicle Safety Standards; Tires (Docket No. NHTSA-03-15400); 68 Fed.
Reg. 38116 (June 26, 2003).

Dear Administrator Runge:

The Office of Advocacy (“Advocacy”) of the U.S. Small Business Administration (“SBA”) submits this letter in support of the Petition for Reconsideration filed by Denman Tire Corporation, with the National Highway Traffic Safety Administration (“NHTSA”), in regard to the above referenced matter.

On June 26, 2003, NHTSA published its final rule revising and updating safety performance standards for tires. The new Federal Motor Vehicle Safety Standards (FMVSS No. 139) requires radial tires to undergo more intensive high speed and endurance tests and a new low pressure test. In the final rule, the agency excluded specialty bias ply tires, but did not exclude limited production specialty radial tires. As written, the rule will have a significant economic impact on small businesses that produce limited production specialty radial tires. In this case, Denman, which represents 33% of the small business industry, is significantly affected by the rulemaking. For Denman, compliance with the rule would cause the company to go out of business.

Advocacy recommends that NHTSA exclude limited production specialty radial tires from the rule, when the number of highway miles driven per year is minimal and when the size and design produced are less than 15,000 tires per year. Doing so will minimize the economic impact on small businesses while allowing limited production specialty radial tires to remain regulated under existing FMVSS standards 109 and 119.

The Office of Advocacy

The Office of Advocacy, created in 1976, monitors and reports on agency compliance with the Regulatory Flexibility Act of 1980 (“RFA”), as amended by the Small Business

Regulatory Enforcement Fairness Act of 1996 (“SBREFA”).¹ The RFA requires federal agencies to determine a rule’s economic impact on small entities and consider significant regulatory alternatives that achieve the agency’s objectives while minimizing the impact on small entities. Because it is an independent office within the SBA, the views expressed by the Office of Advocacy do not necessarily reflect the views of the SBA, or the Administration.

On August 13, 2002, President George W. Bush signed Executive Order 13272, requiring Federal agencies to implement policies protecting small businesses when writing new rules and regulations.² Executive Order 13272 instructs Advocacy to provide comment on draft rules to the agency that has proposed a rule, as well as to the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget.³ Executive Order 13272 also requires agencies to give every appropriate consideration to any comments provided by Advocacy. Under the Executive Order, the agency must include, in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, the agency’s response to any written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁴

Petitioner Will Suffer Significant Economic Harm

Advocacy agrees that the requestor, Denman Tire, will suffer significant economic harm if it is required to comply with the final rule. Limited production specialty radial tires make up approximately one-third of Denman’s business. The tires are manufactured in small quantities for use on classic, antique and special off-road vehicles that are not driven extensively on highways.

The expense of conducting the testing required by the rule will be especially burdensome because it will require Denman to test a higher percentage of the tires it makes at a proportionally higher cost than other tire manufacturers. However, if Denman ceases to produce specialty radial tires rather than conduct the testing, the company will go out of business. Thus, as the only small business that produces limited production specialty radial tires as a significant portion of its business, Denman will be severely impacted by the rule.

NHTSA can minimize the potential impact on Denman by reconsidering its decision and excluding limited production specialty radial tires from the final rule. Excluding the tires will not create a safety risk, since (1) there is no indication that limited production specialty radial tires are any less safe than specialty bias ply tires,⁵ (2) the tires are not

¹ Pub. L. No. 96-354, 94 Stat. 1164(1981), (codified as amended at 5 U.S.C. §§601-612).

² Exec. Order No. 13,272 § 1, 67 Fed. Reg. 53,461 (Aug. 13, 2002)

³ E.O. 13272, at § 2(c), 67 Fed. Reg. at 53,461.

⁴ Id. at § 3(c), 67 Fed. Reg. at 53,461.

⁵ In its petition, Denman asserts, “Everyone agrees that bias tires constitute a lower technology than radial tires. These bias tires have poorer traction and less strength (lower penetration resistance).” Federal Motor Vehicle Safety Standards;Tires Docket No. NHTSA-03-15400 68 Fed. Reg. 38116, June 26, 2003. (to be codified at 49 C.F.R. pt. 571).

produced for use on new light vehicles, and (3) the tires are not driven significantly on the highway. Further, excluding limited production specialty radial tires will preserve Denman's ability to continue doing business, while still being regulated under existing safety standards.

NHTSA's Certification is Inadequate

In the final rule, NHTSA certified that the final rule will not have a significant impact on a substantial number of small entities.⁶ However, Advocacy's review of the certification indicates that it is deficient because the factual basis⁷ for the certification is inadequate.

Agency certifications contained in final rules are subject to judicial review.⁸ Courts evaluate certifications by determining whether there is a factual basis to support the certification. The factual basis for a certification should describe the number of affected entities, the size of the economic impacts and why either the number of entities or the size of the impacts justifies the certification.⁹ While NHTSA does note, in its RFA discussion, that there are three small businesses engaged in specialty tire manufacturing, the agency does not estimate the economic impacts for these small businesses. Also, the agency does not estimate the manufacturing and compliance costs for these small businesses. Instead, the agency states that the "increase in prices as a result of this final rule will have no real impact" on the small businesses because "they will pass on these prices to consumers."¹⁰ However, the agency does not provide the rationale for how it arrives at this conclusion. For the agency's statement to be valid, standard economic theory would suggest that the market the three manufacturers operate in, faces a perfectly inelastic demand curve.¹¹

Since the certification contains the above deficiencies and thus violates the RFA, Advocacy urges NHTSA to exclude specialty radial tires from the final rule. This result will allow NHTSA to accomplish its regulatory objective of highway safety while minimizing the impact on small business.

Conclusion

Advocacy supports the Petitioner's Request for Reconsideration. Denman, the only small business manufacturer of limited production specialty radial tires, will be seriously impacted by the final rule. Compliance with the final rule will be economically burdensome for small business and is not necessary to achieve the regulatory objective. Excluding limited production specialty radial tires will not create a safety risk because the tires will still be regulated by existing safety standards.

⁶ 68 Fed. Reg. 38145, June 26, 2003.

⁷ 5 U.S.C. § 605(b).

⁸ 5 U.S.C. § 611.

⁹ See *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* at <http://www.sba.gov/advo/laws/rfaguide.pdf>.

¹⁰ 68 Fed. Reg. 38145, June 26, 2003.

¹¹ A perfectly inelastic demand curve is one where the seller liquidates his supply at any given price. Purchasers are not assumed to be sensitive to variations in price.

Advocacy recommends that NHTSA exclude limited production specialty radial tires from the final rule when the highway miles driven are insignificant and the size and design produced are less than 15,000 tires per year.

Thank you for your consideration of these issues. Should you have any questions or require additional information, please contact me or Carrol Barnes of my staff at (202) 205-6890.

Sincerely,

Thomas M. Sullivan
Chief Counsel for Advocacy

Carrol Barnes
Assistant Chief Counsel

Charley Maresca
Assistant Chief Counsel

cc: Dr. John D. Graham, Administrator, Office of Information and Regulatory Affairs,
Office of Management and Budget