the grounds that we changed our rules while the Goodman and Chan petitions were pending before us. In the interests of fairness, we will grant petitioners the relief necessary to place them in the same posture as other SMR licensees that are subject to a twelve-month rule. We will not, however, permit petitioners who have not achieved loading of 70 mobiles to treat their channels as exclusive. Such relief was not requested and, indeed, was deemed by the Receiver to be unnecessary.

27. We are granting petitioners only limited relief, and for the reasons stated above. To grant this relief for the reasons stated by the petitioners would undermine the objectives of our construction requirements. As we have noted on numerous occasions, the purpose of the prohibition against assignment or transfer of unconstructed licenses is to deter speculation and trafficking in licenses. Even if we assume that many of the licensees at issue here were unaware of or misinformed about this rule, as appears likely, petitioners do not dispute that these licensees were primarily interested in acquiring SMR licenses as a form of investment that they could subsequently sell for a profit. We believe it would be incongruous to grant waivers to licensees on this basis when we have consistently denied them to licensees who had a bona fide intent to construct and operate SMR systems but were unable to construct because of adverse business decisions. The Commission has previously noted that frequencies in the 800 MHz band are extremely scarce in many areas, making it difficult for applicants to obtain channels. Moreover, the licenses at issue here are for General Category frequencies, which may be licensed not only to SMR operators but also to public safety entities and other categories of private radio users.

28. We also want to be clear that by granting limited relief for the reasons stated, we do not intend to reward and encourage further speculative activity by entities like the Receivership Companies and possibly invite abuse of the Commission's processes. The problem of application mills is one that we have encountered and continue to encounter in a number of services. If we were to grant a waiver on the grounds that such action was needed to afford relief to the unwitting victims of a few such companies, the result almost inevitably would be to encourage numerous similar requests. Furthermore, we would be compelled in each case to ascertain whether the licensee in fact was a victim of fraud or was claiming fraud as a pretext.

Finally, the grant of a waiver for the reasons stated by petitioners could inadvertently become a tool used by the application mills themselves in their solicitation of new clients, resulting in more unsuitable applicants seeking Commission licenses. We do, however, affirm our commitment to pursue ongoing initiatives and explore new ways to deter the practices of application mills and alert the public regarding licensing fraud.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 595

[NHTSA–98–4342]

RIN 2127–AH25

Air Bag On-Off Switches

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

ACTION: Final rule: response to petitions for reconsideration.

SUMMARY: This document responds to the petitions for reconsideration and letters seeking non-rulemaking action that NHTSA received in response to its final rule exempting motor vehicle dealers and repair businesses from the statutory prohibition against making Federally-required safety equipment inoperative so that they could install air bag on-off switches for vehicles owned or operated by individuals within discrete risk groups. This document denies the petitions for reconsideration. NHTSA will, however, change its current policy with regard to one of the three issues raised in the letters seeking agency action not requiring a rulemaking procedure.

FOR FURTHER INFORMATION CONTACT: For information about air bag on-off switches and related rulemaking, call the NHTSA Hotline at 1–800–424–9393; in the D.C. area, call 202–366–0123. In addition, visit the NHTSA Web site at http://www.nhtsa.dot.gov/airbags/. Among the available materials are descriptions of the procedures for requesting authorization to obtain an on-off switch and a list of questions and answers about air bags and on-off switches. There are also crash videos showing what happens in a crash to a belted, short-statured dummy whose driver air bag is turned off.

SUPPLEMENTARY INFORMATION:

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I. Background

On November 18, 1997, the National Highway Traffic Safety Administration, Department of Transportation, issued a final rule which allows for the installation of air bag on-off switches under limited conditions. (62 FR 62406) Effective January 19, 1998, the rule exempts motor vehicle dealers and repair businesses from the statutory prohibition against making federally-required safety equipment inoperative so that they may install, subject to certain conditions, retrofit manual on-off switches for the air bags of vehicle owners whose request is authorized by NHTSA. To obtain such authorization, vehicle owners must submit a request form to NHTSA on which they have certified that they have read an agency information brochure about air bag benefits and risks and that they or a user of their vehicle is a member of one of the risk groups specified by the agency. The agency began processing and granting requests December 18, 1997.

NHTSA received 20 petitions for reconsideration of the final rule. Sixteen of these petitions are from members of the general public, and the other four are from organizations. The content of two of the organizational petitions, those from the National Motorists Association and the National Motorists Association, New Jersey Chapter, is very similar to that of the petitions from the general public. Accordingly, they are discussed together with the general public petitions. All other organizational petitions are addressed separately. NHTSA also received two letters that were characterized as petitions for reconsideration but which did not seek any rulemaking action from the agency. Each of the letters are addressed separately.

II. Letter From National Association of Independent Insurers

In the preamble to the Final Rule, NHTSA stated that it would continue to

authorize deactivation of air bags under very limited circumstances when an on-off switch was not available for a given vehicle make and model. NHTSA stated that it would publish the vehicle identification numbers (VIN) of vehicles whose air bags have been deactivated pursuant to an agency letter permitting such action. The agency indicated that it would take this action out of concern about the impermanence of labels alerting the occupants of a vehicle that one or both of its air bags had been deactivated. The agency did not, however, state where this list would be kept or how often it would be updated.

The National Association of Independent Insurers (NAII) submitted a document that was described as a petition for reconsideration and that asked NHTSA to clarify the manner of VIN publication, to publish the VINs of vehicles with on-off switches, and to make available to insurers the names of the owners of vehicles with on-off switches or deactivated air bags.[1] Since the actions requested by NAII are not rulemaking actions, the agency is treating the document as a letter instead of a petition for reconsideration. NHTSA is taking some of the actions requested by NAII, but declines to take the remaining actions.

The agency agrees that it is desirable to advise the public where it can find out whether a particular vehicle has deactivated air bags as well as how often such information will be updated. The list of VINs for vehicles known by the agency to have had one or both of their air bags deactivated will be located at the NHTSA web site (http://www.nhtsa.dot.gov) and will be updated weekly. NHTSA cautions that this list will be incomplete. The vast majority of agency letters sent to date granting permission for deactivation were sent prior to issuance of the final rule. Prior to that time, the agency did not require persons requesting permission for deactivation to provide the VIN of their vehicle. NHTSA has sent new letters asking the recipients of those pre-final rule deactivation permission letters to provide the VIN of any vehicle that has had one or both of its air bags deactivated pursuant to the permission letter and to indicate which air bag was deactivated. The percentage of these letters for which the agency receives responses will depend upon the good will of each individual owner receiving the request, since NHTSA cannot legally compel a response.

[1] NAII maintained that they need the names of switch applicants because VINs are often incorrectly transcribed.

NHTSA has decided against making the VINs for vehicles with on-off switches available to the public as general information. NHTSA does not believe that any interest is served by making such a list available. The regulatory text requires that on-off switch telltales be clearly visible to the front seat occupants. Accordingly, a quick vehicle inspection should alert any interested party to the presence of an on-off switch. While insurers may not regularly inspect the vehicles that they insure, as NAII asserted, insurers can require applicants or policyholders to state whether they have an on-off switch before the policy is issued or renewed. At that time, the insurer can decide whether to provide a discount for the air bag. NHTSA notes that for those individuals who are at heightened risk from a deploying air bag, the safety benefits contemplated by insurers in providing an air bag discount may not apply.

NHTSA will not provide insurers or any other members of the public with information identifying the owner of any vehicles listed on its web site. NHTSA believes that revealing such information would be a violation of the Privacy Act (5 U.S.C. section 552a). Accordingly, NAII's request that they be allowed to verify the ownership of vehicles is declined.

III. Letter From National Association of Pediatric Nurse Associates and Practitioners, Inc.

Under the final rule, NHTSA continues to grant requests for air bag deactivation for vehicles where the vehicle manufacturer has not produced an on-off switch. The criteria for deactivation, however, are stricter than the criteria for installation of an on-off switch since deactivation is a permanent measure that cannot be easily reversed. For example, the deactivation criteria are stricter than their on-off switch counterpart in requiring that medical conditions be documented by a physician and that the physician state that the risk of deployment outweighs the risk of potentially impacting the steering wheel or dashboard.

The National Association of Pediatric Nurse Associates and Practitioners asks NHTSA to allow pediatric nurse practitioners to recommend air bag deactivation if such deactivation is in the best interests of their patient. Since the criteria governing deactivation were not part of the regulation adopted in the final rule, NHTSA has treated the Association's ''petition'' as a simple request for a policy change.

NHTSA recognizes that pediatric nurse practitioners serve an important role in the medical community, particularly in medically under-served areas, where they may provide the majority of medical care for their patients. NHTSA also believes that nurse practitioners are qualified to determine whether a child's medical condition warrants riding in the front seat. Accordingly, NHTSA believes the Association's request is reasonable and has decided to accept medical documentation from pediatric nurse practitioners.

IV. Petition From Mitsubishi Motors R&D of America

Mitsubishi Motors filed a petition for reconsideration seeking to have NHTSA's approval of a request for an on-off switch or deactivation conditioned on a guarantee by the owner that he or she will have the switch removed or the air bag reconnected prior to selling the vehicle. Mitsubishi contends that this is the only way to ensure that only those individuals within one of the specified risk groups loses the potential benefits of the air bag.

NHTSA is denying Mitsubishi's request because even if the agency amended the final rule to condition its approval of owner requests for an on-off switch upon the owner's promising to remove the switch, the agency could not enforce such a promise.

NHTSA can place limitations on the circumstances in which dealers and repair businesses are exempted from the make inoperable prohibition. Indeed, in the final rule, the agency specified that it would not approve switch requests unless the requestor provided certain information and made certain statements. For example, it specified that the requesters must certify that they had read the agency's information brochure and that they or a user of their vehicle is a member of one of the identified risk groups.

However, the agency cannot condition its approval of requests upon the subsequent restoration of the air bags to their original condition prior to resale. The most it could do would be to condition its approval upon the receipt of a promise to make such restoration. Since such a promise could not realistically be enforced against the vehicle owner and would not serve as a limitation on the exempted dealers or repair businesses, the only covered entities under the applicable statute, there would be no assurance that requiring such a promise would ultimately lead to the restoration of the air bags to their original condition.

NHTSA believes the final rule, as drafted, provides adequate notice of the presence of an on-off switch. The required telltale must be illuminated and visible to the driver when the driver-side air bag is turned off and to all front seat occupants when the passenger-side air bag is turned off. NHTSA does not believe there will be a significant amount of misuse in the secondary market, although it acknowledges that nothing in the final rule would preclude an individual who is not at risk from a deploying air bag from purchasing a used vehicle that has a switch and then turning the air bag off.

V. Petition From the American Car Rental Association

In the final rule permitting vehicle owners to apply to the agency for permission to have an on-off switch installed by a dealer or repair business, NHTSA did not differentiate between owners of individual vehicles and owners of vehicle fleets.

The American Car Rental Association (ACRA) has asked NHTSA to modify its final rule to prohibit short-term car rental companies from having on-off switches installed in the vehicles in their rental fleets. ACRA states that it cannot ensure that individuals who are not at risk from a deploying air bag will not misuse an on-off switch. NHTSA is denying ACRA's petition because it believes that a rental fleet owner should be able, if it so wishes, to obtain permission to have on-off switches installed in at least some of its vehicles. It would be reasonable for a fleet owner to make such a request if it believes that a sufficient percentage of its rental population falls within the specified risk groups.

The agency emphasizes that under the final rule, no vehicle owner, whether a company or an individual, is required to have an on-off switch installed. Each decision by a vehicle owner to request permission to have a switch installed should only be made after a careful consideration of the risks involved in having an air bag unavailable in the event of a crash. If rental car companies believe that it would not be appropriate to have vehicles with on-off switches available for their customers who are at risk from an air bag, then they can decide not to request permission for their installation. Alternatively, if they decide that they want to provide at-risk individuals with a vehicle with an on-off switch, then they may decide that it is worthwhile to request a switch for some portion of their fleet.[2] In either case, NHTSA believes this is a decision that can only be reached by the rental companies. NHTSA continues to believe that traditional contract remedies and business relationships will allow for adequate policing of on-off switch use. This is why NHTSA did not exclude leased vehicles or fleet vehicles from the on-off switch rule.

VI. Petitions From Members of the General Public

NHTSA received 16 petitions from members of the general public as well as a petition from the National Motorists Association and the New Jersey chapter of the National Motorists Association. All of these petitions raised the same issues and will accordingly be responded to together. While 28 separate issues were raised in these petitions, many of the issues can be grouped together and have been so grouped here.

Membership in a Risk Group

The petitioners claim that the Government ignored the safety of individuals at risk from air bags, notably children and short-statured females, by creating discrete risk groups that would be eligible for on-off switches rather than allowing deactivation on demand. NHTSA disagrees.

NHTSA believes its final rule appropriately responded to the risk that passenger-side air bags can pose to children. The final rule allows anyone who needs to carry children in the front seat to apply for and receive an on-off switch. Thus, petitioners' contention that the final rule places children at risk is incorrect. Even individuals who only occasionally must drive with children in the front seat can obtain permission for a switch.

Petitioners imply that it is only the air bag which makes the front seat dangerous for children. NHTSA notes that it is preferable to have children sit in the back seat whenever possible since crash data demonstrate that is the safest location, regardless of whether the vehicle is equipped with an air bag. While a significant number of people still choose to allow their children to sit in the front seat, most do so by choice, not necessity.[3]

Likewise, the agency disagrees with petitioners' contention that switches or deactivation on demand should be allowed because children are often improperly restrained. Allowing deactivation on demand would be inappropriate because it would allow people who are not at risk to obtain and use switches to turn off their air bags, thus decreasing their safety. The approach adopted by the agency makes it necessary for vehicle owners to focus on and evaluate the factors that create risk and encourages them to take steps to reduce that risk. The final rule helps to prevent air bag fatalities involving children since the rule allows an on-off switch for anyone who must carry children in the front seat. However, allowing widespread deactivation, apart from not adding any additional safety benefit, could send the conflicting message that children do not need to be restrained as long as they are not in front of an air bag. Further, as noted above, encouraging front seat use would reduce child safety since, even in the absence of an air bag, the front seat is significantly less safe than the back seat.

Petitioners' contention that air bags will cause unreported deaths because short-statured individuals will be unable to control their vehicles after moving their seats back to obtain ten inches is also apparently based on a misreading of the final rule. NHTSA stated that most individuals can achieve the desired ten-inch distance by slightly modifying their driving posture, and still maintain a safe, comfortable driving position. For those individuals who cannot comfortably drive ten inches or more from their air bag, NHTSA recommends they consider having an on-off switch installed.

Contrary to petitioners' contention, NHTSA believes that vehicle owners will carefully read the agency's information brochure and then carefully assess whether they or any user of their vehicle is really at risk from the vehicle's air bags. The agency expects that the owners who request permission for an on-off switch will be people who can legitimately certify membership in a risk group. Anyone who must transport children in the front seat is eligible for an on-off switch. Likewise, people who suffer from a medical condition which they believe places them at risk from a deploying air bag, or people who are unable to get 10 inches or more from the air bag cover, regardless of their height, are eligible for an on-off switch.

NHTSA fully considered allowing persons to deactivate their air bags without having to show or claim actual risk. The agency decided that public safety interests dictate that individuals who do not fall within one of the specified risk groups should not be

[2] NHTSA encourages rental companies to provide information to renters of such vehicles with on-off switches so they understand the circumstances under which it would be appropriate to use the switch. Rental companies could choose to provide renters with a copy of the NHTSA publication Air Bags and On-Off Switches, Information for an Informed Decision.

[3] Cf., Jack Edwards, Kaye Sullivan, ''Where Are All the Children Seated and When Are They Restrained?'', SAE Technical Paper 971550 (1997).

allowed to have an on-off switch installed. Particularly given the evidence of misperception of risk by a significant number of vehicle owners, NHTSA does not believe that an individual's belief that he or she has the right to choose whether to have an air bag outweighs society's interest in avoiding death and serious injury and the enormous public expense associated with unnecessary injury.

Risk of Injury and Death

Petitioners claim that NHTSA's regulatory evaluation indicates that 30 percent of individuals impacted by air bags will receive an injury so that the other 70 percent of that population will avoid injury. Petitioners aver that this level of injury is excessive. The agency believes that the significance of this level of injury cannot be properly assessed in a vacuum. The alternative of what would happen to a vehicle occupant in the absence of an air bag must be considered. In moderate to severe crashes, even belted occupants, especially drivers, will strike their head, neck and chest against the interior of their vehicle in the absence of an air bag. Consequently, the injuries prevented by air bags are typically substantially more serious than the injuries that air bags cause. Further, petitioners do not take into consideration the significant reduction in fatalities which are not represented in the table cited by petitioners.

Contrary to petitioners' assertion, the Government is not mandating that the American public accept a 4 percent risk of death by requiring air bags on all new vehicles. The risk of death cannot be based on a comparison of lives saved versus lives lost. The evaluation of risk must be based on a comparison of total deployments (over 2.1 million) versus lives lost. This risk is less than 0.005 percent. Moreover, for those persons for whom the risk is relatively high, the rule allows the installation of an on-off switch.

The comparison of lives saved to lives lost is instructive. The most recent data (June 1, 1998) indicate that while 105 persons have been killed by air bags, 3,148 persons have been saved. Therefore, a person is 31 times more likely to be saved by an air bag than killed by an air bag. Further, the ratio could be even higher in the future since the 31:1 ratio is based on there being no change in occupant behavior or improvements in air bag design due to NHTSA's Final Rule allowing depowered air bags (62 FR 12960). The vast majority of the 105 air bag deaths could have been prevented through simple behavior modification, namely wearing a safety belt and moving the children to the back seat. NHTSA does recognize that not all risk can be eliminated through behavioral changes since there may occasionally be factors beyond the driver's control. In those instances, NHTSA allows the installation of an on-off switch.

NHTSA's estimates of air bag effectiveness were based on two separate analyses. The first was developed by comparing fatality rates of drivers with air bags to passengers without air bags in the same vehicle. These rates were compared to those of older vehicles of the same make and model without driver or passenger air bags. This approach is called ''double pair comparison analysis'' and is widely used in effectiveness evaluations. The second analysis, which also used double pair comparison methodology, involved comparing fatality rates of frontal and non-frontal impacts of air bag vehicles to non-air bag vehicles. Both methods produced similar results. Neither of the methods took the occupant's safety belt use into consideration (i.e., the estimates were based on the experience of all occupants, regardless of whether they used safety belts). Thus, possible errors in the reporting of safety belt use would have had no effect on these estimates. Regarding the suggestion by petitioners that air bags might provide a net negative benefit for major population groups, these groups are the ones that are specifically allowed to install on-off switches. Persons outside these groups are statistically safer with air bags than without them.

Costs Associated With the Final Rule

Petitioners state that NHTSA has grossly underestimated the cost of on-off switches in evaluating the actual cost of installation, in evaluating the time value of the consumer, and in determining the overall cost based on the number of people who will have a switch installed. Cost was not the deciding factor in issuing the final rule. Safety was the paramount concern in the decision-making process.

NHTSA notes that it lacks the authority to control the amount that dealers and repair businesses charge to install an on-off switch. However, since installation is a purely voluntary expense, each individual can decide whether he or she believes the risk of deployment justifies the accompanying expense. Finally, regardless of the amount charged to consumers, NHTSA continues to believe that a simple on-off switch could be installed for $38 to $63 based on the amount of work required to install the device and the hardware necessary to create a device.

Petitioners contend that the hourly rate of $9.20, the figure that NHTSA used to place a value on the time members of the public who read the brochure and complete the form, should be higher since owners of air bag-equipped vehicles are wealthier than the average American. NHTSA's figure was based on guidance developed by the Department of Transportation for valuing travel time when evaluating regulatory alternatives. The figure is based on a combination of personal or leisure time and time spent at work and represents the wage scale of a wide variety of employees. NHTSA notes that most people would not need to take off work to read the information brochure and fill out the form. Accordingly, the figure of $9.20 may be slightly higher than the true value of the time that an individual would spend for those purposes. Nevertheless, NHTSA believes an hourly rate of $9.20 is reasonable.

As to the overall cost of the final rule, NHTSA believes that the overall costs are irrelevant to an individual's decision to request permission for and purchase a switch. Individuals either will or will not install an on-off switch, regardless of the final rule's cost to the entire population.

NHTSA's estimate of 80,000 installations per year represented its best estimate as of the time the rule was issued. Current demand for on-off switch authorizations has averaged 189 requests per day. If demand were to remain constant throughout the year, actual demand would be approximately 69,000 installation requests per year. However, NHTSA does not believe that demand will continue at current rates. The issuance of the final rule is still a fairly recent event, having become effective on January 19, 1998. Significant media coverage accompanied both the issuance of the final rule and its implementation. Further, it was natural that there be an initial surge in requests since the majority of individuals who are concerned with deploying air bags were likely to request a switch as soon as the option became available. As time passes and the issuance and media coverage become more distant events, NHTSA believes that demand will also fall. The agency anticipates that future requests will tend to be limited to individuals either buying a new vehicle or having an additional child who cannot be accommodated in the back seat.

Misuse

Petitioner claims that NHTSA's statement in its final rule that it has not seen, and does not expect, a significant

amount of misuse is a tacit acknowledgment by the agency that it has no reasonable basis for requiring membership in a risk group.

Petitioner mischaracterizes the issue. The agency's position on misuse is that past experience indicates some relaxation of its previous limitations on on-off switches is justified, not that switch misuse is not a potential problem under any circumstances.

As an initial matter, any deactivation, or switching off, of an air bag by or for an individual who does not fall within the specified risk groups constitutes misuse. That individual is safer with an air bag than without one. Accordingly, allowing all members of the general public to have on-off switches installed, regardless of risk, can only increase the potential for misuse.

Additionally, NHTSA allowed broader criteria for retrofit switches than for switches installed prior to first sale in certain vehicles based in part on its experience with those switches. Prior to the publication of the final rule at issue here, on-off switches were limited to the passenger side of vehicles with no back seat or a back seat that could not accommodate a child restraint (OEM rule) (49 CFR 571.208 S4.5.4). Under that rule, potential misuse is limited to adult passengers since no switch is available for the driver side air bag and all children under age 12 fall within a risk group prescribed by the retrofit final rule.

NHTSA is unaware of any circumstances in which an adult passenger has been killed or seriously injured in one of these vehicles because the air bag had been switched off, although it does know of an infant fatality where the passenger-side air bag had been left on. This apparent lack of significant misuse in a limited portion of the overall air bag-equipped fleet persuaded NHTSA that some relaxation of the existing requirements, when accompanied by a process designed to inform vehicle owners of actual risk, was justified.

The agency notes that under the OEM rule, all switch-eligible vehicles have either no back seat or only a small seating area. Accordingly, children in most of these vehicles have no choice but to sit in the front seat. As NHTSA has repeatedly cautioned, the back seat is safest for all passengers and particularly for small children. NHTSA remains concerned that allowing switches for individuals who do not meet one of the specified criteria only increases the possibility that children who could more safely ride in the back seat will be placed in greater danger simply because the passenger-side air bag has been turned off.

The Agency's Evaluation of Comments

Petitioners contend that NHTSA failed to take into account the comments from some 600 members of the general public as well as the National Transportation Safety Board and the Insurance Institute for Highway Safety (IIHS). This is incorrect. NHTSA considered all comments in making its decision. However, the agency's decision was based upon safety considerations instead of what appeared from the comments to be the most popular decision.

Further, the final rule may be more popular than suggested by the petitioners. Many of the private citizens who submitted comments on the rulemaking may fall within a specified risk group since the primary complaint was short stature. If these individuals are unable to get at least ten inches from the center of their steering wheel while sitting comfortably, they are eligible for an on-off switch. As to the commenters' attitude toward on-off switches, the degree of their support is uncertain since most commenters did not address on-off switches. Of those who did discuss on-off switches, the majority supported on-off switches as at least an option to deactivation.

Physician's Report

Petitioners claim that the medical panel did not consider two investigations concerning ''air bag exhaust fire'', a newspaper report of an air bag-related fire, and two anecdotal reports of near-asphyxiation from air bags when it reported that a driver's supplemental oxygen did not justify air bag disconnection. NHTSA's Office of Defects Investigation investigated the two reports of ''air bag exhaust fire'' and concluded that there was no indication the air bags in question caused the burns complained of in the consumer complaints to NHTSA. One of the investigations did note that air bag exhaust does reach temperatures high enough to ignite some fabrics, but that the temperatures did not remain at those levels for a sufficient period of time to create a fire hazard (PE97–014). In neither investigation did the vehicle owner claim that sparks or flames were emitted from the air bag. In any event, if an individual's treating physician believes that supplemental oxygen is a concern, regardless of the analysis reached by the medical panel, the patient is able to obtain an on-off switch under the final rule's criteria.

Petitioners' claim regarding potential diminution in quality of life from air bag injuries does not justify allowing deactivation on demand. Particular concern was raised about potential hearing and vision loss. Injury patterns culled from the National Analysis Sampling System (NASS), as well as all available medical literature, including the University of Michigan report cited by petitioners, were reviewed by the medical panel. None of the available data or literature revealed significant injury to the eyes or hearing loss as a result of air bag deployments.

The medical panel considered all known literature on hearing and vision loss related to air bag deployments. It stated that potential loss of hearing could not be isolated to air bag deployment and that the air bag was no more likely to cause a serious eye injury than impacting the dashboard or steering wheel. Even if these types of injuries were occurring on a regular basis, like arm injuries, the level of injury is incremental and significantly less than the types of injuries which air bags are preventing. The vast majority of injuries caused by air bags are both minor and temporary.[4]

Petitioners' claimed that air bags should be voluntary because individuals are allowed to withhold consent for all other forms of medical treatment. This comment raises issues not only beyond the scope of this rulemaking, but beyond the agency's authority given the statutory mandate for air bags. Nevertheless, the agency notes that air bags are a preventative measure similar to many medical therapies which significantly impact public health. Thus, children are required to be vaccinated before they can enter school, municipalities are required to provide a safe source of drinking water, and the American food supply is subjected to stringent controls to protect the public health.

Deactivation

In the preamble to the final rule, NHTSA stated that it would continue to grant requests for permanent deactivation when no vehicle manufacturer switch is available and when the applicant meets certain criteria. These criteria are more limited than those for which a switch is authorized. The agency notes that the final rule allows the installation of non-vehicle manufacturer switches and that such switches are available. Petitioner claims that NHTSA's policy places individuals at undue risk, alleging vehicle manufacturers may decide not to manufacture switches for all vehicle

[4] NASS analysis did reveal a substantial increase in arm injuries as a result of air bag deployment.

makes and models, and that deactivation is cheaper than switches.

NHTSA's decision to impose more stringent criteria on air bag deactivation is reasonable, given the permanent nature of deactivation. Deactivation renders an air bag unavailable to help anyone in a crash. In contrast, the on-off switch allows a driver to turn the air bag on or off, depending on the risk faced by the individual seated in front of the air bag. This flexibility is important in the case of a vehicle whose users include a mix of people at risk and people not at risk. For example, one member of a couple may have a medical condition which prevents him or her from achieving a 10-inch distance from the air bag, while the other can achieve that distance. Likewise, a family may only have to transport children in the front seat on rare instances, such as when they have to transport a neighbor's child and they have insufficient room in the back seat for all of the children. The presence of an on-off switch would make that air bag available to every individual who is not at risk while the air bag could be turned off for those at risk. In contrast, deactivation renders an air bag unavailable to everyone, regardless of risk.

While deactivation may be cheaper than an on-off switch, cost was not the agency's main consideration. Safety was the overriding factor. Further, since the cost of both deactivation and on-off switches is ultimately market-based, NHTSA cannot assess the differences in cost with any specificity. NHTSA believes that its estimation of on-off switch cost should not be an overwhelming deterrent to anyone who needs a switch. Cost concerns aside, one is significantly more likely to find a company willing to install an on-off switch than deactivate an air bag. Liability concerns on the part of dealers and repair businesses have rendered permanent deactivation more difficult to get performed than installation of a switch. As for petitioner's claim that deactivation more certainly turns off an air bag than an on-off switch does, manufacturers, dealers and repair businesses have every incentive to produce and install a safe switch since the final rule does not waive civil liability for defective switches or negligent installation.

Further, the agency notes that there are potential risks associated with deactivation. Labels can be removed, either purposely or inadvertently. An occupant expecting air bag protection may unexpectedly find that he or she has none in a crash. Many deactivated air bags will likely not be reactivated prior to resale since there is no incentive to reactivate, and since NHTSA does not have the authority to require reactivation. Consequently, any decision to reactivate, as well as to inform a potential secondary purchaser of the air bag's inoperable status, will depend entirely on the good will of the vehicle's owner.

Depowered and Advanced Air Bag Systems

Petitioners argued that deactivation or on-off switches should remain available to owners of vehicles with depowered air bags and advanced air bags. Under the final rule, on-off switches will be available for vehicles with depowered air bags. As the agency stated in the final rule:

> As to depowered air bags, NHTSA anticipates that they will pose less of a risk of serious air bag injuries than current air bags. However, the agency will wait and accumulate data on depowered air bags before making a final decision on this issue. The agency may revisit this issue in a future rulemaking if data indicate that cutoff switches are not appropriate in vehicles with depowered air bags. For the present, the exemption will apply to vehicles with depowered air bags.

As to advanced air bags, NHTSA did not decide in the final rule whether retrofit on-off switches would be permitted for vehicles with those air bags. The agency did say that it continued to believe, based on safety considerations, that it should prohibit dealers and repair businesses from retrofitting advanced air bag vehicles with cutoff switches. However, since advanced air bags were not expected for several years, there was no immediate need to make a decision. The agency said that it would address this issue in its proposal on advanced air bags.

Process for Receiving Authorization To Have an On-Off Switch Installed

Petitioners argued that the actual number of eligible individuals who will be able to have an on-off switch installed is too low because of the authorization process established by the agency. The agency disagrees. NHTSA defined the eligible risk groups to avoid the need for ad hoc decision making and to expedite the authorization process. The amount of time necessary to read the information brochure and fill out the request form (approximately 30 minutes) is nominal when compared to the significant safety benefit at issue. Likewise, the amount of time required to process a request, currently one or two days, is reasonable, given the benefit that air bags provide to the vast majority of the general public. Further, NHTSA's streamlined process minimizes the amount of time that an at-risk individual must wait before receiving authorization to have an on-off switch installed.

Request for Reconsideration

Based on the foregoing, NHTSA is denying petitioners' request that on-off switches be available on request and without certification of membership in a risk group. As noted above, the risk of serious injury or death is small and the benefit of air bags is large. NHTSA will continue to require vehicle owners to submit the completed on-off switch request forms to the agency for processing. Petitioners' request that the agency allow deactivation on request is likewise denied.

Authority: 49 U.S.C. 322, 30111, 30115, 30117, and 30166; delegation of authority at 49 CFR 1.50.

Issued: August 20, 1998.

L. Robert Shelton,

Associate Administrator for Safety Performance Standards.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 980818222-8222-01; I.D. 081898A]

RIN 0648–AL61

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Red Snapper Management Measures and Closure of the Recreational Fishery

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Emergency interim rule with request for comments and notice of closure.

SUMMARY: This emergency interim rule releases the remaining 1998 recreational and commercial quota reserves for Gulf of Mexico red snapper. In so doing, it supersedes certain provisions of the interim rule that was published in the **Federal Register** on April 14, 1998. In addition, NMFS closes the recreational fishery for red snapper in the exclusive economic zone (EEZ) of the Gulf of Mexico, effective 12:01 a.m., local time, September 30, 1998, through December 31, 1998. The intended effects are to