

**THE NATIONAL TECHNOLOGY TRANSFER ACT AND  
FMVSS No. 139 PROPOSED PERFORMANCE REQUIREMENTS:**

**FEDERAL REQUIREMENTS FOR THE USE OF VOLUNTARY STANDARDS**

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**I. Overview**

The Center for Regulatory Effectiveness (CRE) is a regulatory watchdog organization that provides public oversight of federal and private regulatory activities. In its watchdog capacity, CRE frequently analyzes the compliance of regulatory proceedings with the various AGood Government@laws including the Data Quality Act, Paperwork Reduction Act and Technology Transfer Act. With regard to the Technology Transfer Act, CRE has a longstanding Voluntary Standards Program and has written in-depth on the use of consensus and consortia standards in securities and telecommunications regulation. As part of its ongoing watchdog role, CRE is analyzing a number of standards-based rulemakings to assess their compliance with the Technology Transfer Act and other AGood Government@laws.

This analysis will:

1. Federal Standards Requirements. Review the policies and procedures set by Congress and the Office of Management and Budget (OMB) for the agency use of voluntary standards in regulatory proceedings.

2. Compliance. Assess NHTSA compliance in their FMVSS No. 139 rulemaking on tire performance standards with the various federal standards policies and procedures.

The CRE analysis is based on information obtained from the NHTSA rulemaking docket and other federal sources.

## II. Federal Requirements for Use of Private Standards in Rulemakings

### A. *The National Technology Transfer and Advancement Act*

Congress, through the National Technology Transfer and Advancement Act of 1995 (P.L. 104-113), required federal agencies to use voluntary private standards in regulations except under certain limited circumstances. Specifically, Section 12(d)(1) of the Act states, All Federal agencies... shall use technical standards that are developed or adopted by voluntary consensus standards bodies...as a means to carry out policy objectives or activities determined by the agencies and departments.@ In that regulations clearly carry out a Apolicy objective@of the agency, they are subject to the requirements of the law.

The only exception to the requirement that agencies use voluntary standards is contained in Section 12(d)(3) of the Act which states that, Af compliance with paragraph (1) of this subsection is inconsistent with applicable law or otherwise impractical...@agencies may elect to use technical standards not developed by the private sector. However, should an agency make such a determination to use standards not developed or adopted by voluntary consensus bodies, the agency would still be required by law to provide, Ato the Office of Management and Budget an explanation of the reasons for using such standards.@ This explanation would, in turn be forward to Congress as part of an annual compliance report.

### B. *OMB Circular A-119*

The Technology Transfer and Advancement Act (NTTAA) is implemented through OMB Circular A-119. In Sec. 12(c) of the Act, Congress directed the National Institute of Standards and Technology (NIST) to provide to them with a Plan for implementing the NTTAA. NIST's Plan for Implementation called on OMB to Arevise OMB Circular A-119 to implement the Technology Transfer Act.@ The Plan went on to explain that, AThe revised circular will require all federal agencies to report annually to OMB through NIST on their use and non-use of private sector voluntary standards in lieu of originating new or revising old regulations.@

OMB Circular A-119 sets specific policy and procedural requirements governing agency use and non-use of voluntary standards.

1. OMB Standards Policy: Required Agency Use of Consensus Standards

Circular A-119, Sec. 6, requires that, All federal agencies must use voluntary consensus standards in lieu of government-unique standards in their procurement and regulatory activities, except where inconsistent with law or otherwise impractical. [emphasis added]

OMB defines use as the inclusion of a standard in whole, in part, or by reference in regulation(s). Sec. 6(a)(1).

The term impractical is defined in Circular A-119 as circumstances where use would fail to serve the agency's program needs; would be infeasible; would be inadequate, ineffectual, inefficient, or inconsistent with agency mission; or would impose more burdens, or would be less useful, than the use of another standard.

2. OMB Standards Policy: Domestic and International Standards

OMB does not require a preference for either domestic or international standards. Sec. 6(h) of Circular A-119 states, This policy does not establish a preference between domestic and international voluntary consensus standards.

The Circular goes on to state that, in the interests of promoting trade and implementing treaty agreements, agencies should consider international standards in regulatory applications.

3. OMB Standards Policy: Consensus and Non-Consensus Standards

OMB Circular A-119 focuses primarily on the use of private voluntary consensus standards, i.e. ANSI-type standards. However, the Circular also recognizes and sets government policy for use of private sector non-consensus standards. Specifically, Sec. 6(g) of the Circular states, This policy does not establish a preference among standards developed in the private sector. Specifically, agencies that promulgate regulations referencing non-consensus standards developed in the private sector are not required to report on these actions...

Of particular relevance to the FMVSS tire performance standards rulemaking, Sec. 6(g) goes on to state, For example, this policy allows agencies to select a

non-consensus standard developed in the private sector as a means of establishing testing methods in a regulation...@[emphasis added]

4. OMB Standards Policy: Relation Between Standards Policy and Agency Regulatory Authority

The OMB Circular, in Sec. 6(c), states that it does not restrict agency authority ~~A~~to make regulatory decisions.@ OMB goes on to define such regulatory authority as including, ~~A~~determining the level of acceptable risk; setting the level of protection; and balancing risk, cost, and availability of technology in establishing regulatory standards.@ Thus, under OMB's policy, private standards do not preempt agency decisions regarding the specific level of protection to be provided by a regulation.

5. OMB Standards Policy: Agency Participation in Consensus Standards Development

Section 7 of the Circular strongly encourages agencies to participate in the development of consensus standards, particularly when a consensus standards body is developing a needed standard. Furthermore, Section 7(j) specifically states that, when a consensus body is likely to develop a needed standard in a timely fashion that would be lawful and practical for the agency to use, ~~An~~ agency should not be developing its own government-unique standard and instead should be participating in the activities of the voluntary consensus standards body.@[emphasis added]

6. OMB Standards Policy: Procedural Requirements

The National Technology Transfer and Advancement Act and OMB Circular A-119 impose a number of procedural requirements on agencies regarding their use and non-use of voluntary standards. Specific procedural requirements include:

- \$ *Reporting to NIST.* Section 9(a) of OMB Circular A-119 states, ~~As~~ required by the Act, your agency must report to NIST@on agency decisions ~~A~~to use government-unique standards in lieu of voluntary consensus standards.@

§ *Reporting to OMB.* Section 10 of the Circular requires agencies to develop processes to identify, manage, and review your agency's development and use of standards so that, at a minimum, the agency is able to report to OMB, through NIST, on their use of government-unique standards in lieu of consensus standards along with an explanation of the reasons for such non-usage.

§ *Federal Register Notices.* Section 11(a)(2) of Circular A-119 requires agencies, when they are proposing to use a government-unique standard in lieu of a consensus standard, to provide a statement in the NPRM which: 1) identifies such standards; and 2) provides a preliminary explanation for the proposed use of a government-unique standard in lieu of a voluntary consensus standard.

Section 11(b) requires that agencies publish a discussion in the preamble of the Final Rulemaking that restates the statement in the NPRM or IFR, acknowledges and summarizes any comments received and responds to them, and explains the agency's final decision

Section 11(b)(2) requires that, when agencies use a government-unique standard in lieu of a consensus standard, they identify the standards and discuss why use of the consensus standards would be inconsistent with law or other impractical. Furthermore, the agency is required to transmit the statement in accordance with the requirements of Section 9(a) of the Circular.

### III. NHTSA FMVSS No. 139 Rulemaking

NHTSA has proposed using a set of government-unique tire performance standards in the FMVSS No. 139 rulemaking. To determine if such proposed use would be in compliance with the Technology Transfer and Advancement Act, three questions need to be answered.

1. Is there a set of voluntary standards available for adoption by NHTSA in lieu of the proposed government-unique standard?
2. Would use of voluntary standards be inconsistent with applicable law?

3. Would use of voluntary standards be impractical?

If there are private sector tire performance standards whose use would be neither inconsistent with law nor otherwise impractical, then NHTSA use of the proposed government-unique standards would violate the National Technology Transfer and Advancement Act and OMB Circular A-119.

*A. Is There a Set of Voluntary Standards Available for Adoption by NHTSA in Lieu of the Proposed Government-Unique Standard?*

Yes. The NHTSA docket reveals that there are a number of private voluntary domestic and international, consensus and non-consensus, tire performance standards. Examples in the docket of voluntary tire standards include: ISO 10191 (test methods for verifying the capabilities of passenger cars tire including full load endurance test, high speed test and tread strength test); SAE J1561 (passenger tire high speed test); SAE J1633/ISO 10454 (light truck tire high speed test); Global Tire Standard-2000; and the draft United Nations Economic Commission for Europe (UNECE) Regulation 30.

In addition to the consensus standards for tire performance testing available to NHTSA, The Rubber Manufacturers Association (RMA) proposed NHTSA adopt their private voluntary consortia (non-consensus) standard set of tire performance tests.

Thus, it can be concluded that NHTSA has a variety of voluntary standards they could choose from in setting the FMVSS No. 139 tire performance requirements.

*B. Would Use of Voluntary Standards be Inconsistent With Applicable Law?*

No. There is nothing in the TREAD Act or other legislation which would prohibit or be otherwise inconsistent with NHTSA use of voluntary standards for tire performance requirements in FMVSS No. 139. NHTSA, in their March 5, 2002 NPRM, explicitly points out that the TREAD Act does not specify what revisions or updates should be made. NHTSA goes on to explain that the TREAD Act does not specify which particular existing tests should be improved or how much they should be improved. Likewise, it does not specify which particular new tests should be added or how stringent they should be.

Thus, since Congress gave NHTSA broad discretion in updating tire performance standards, use of available voluntary standards would not be inconsistent with applicable law.

*C. Would Use of Voluntary Standards be Impractical?*

No. NHTSA has not provided any evidence that use of voluntary standards would be impractical. Under OMB Circular A-119, the regulatory agency determines the acceptable risk and/or level of protection and then selects a voluntary standard as the regulatory test method. Should a voluntary standard not be available and a consensus body is not in the process of developing a relevant standard on a timely basis, a government-unique standard may be used. However, NHTSA has not followed this process. Specifically, NHTSA has not established any specific level of protection or risk level which various standards could measure, other than the general requirement that the new tire performance standards be **more stringent** than current agency requirements. Instead, NHTSA created a government-unique standard and then, essentially, stated that the government-unique standard was their level of protection. NHTSA's cart-before-the-horse approach is in direct contradiction to the policies and procedures set by the Technology Transfer Act and OMB Circular A-119

NHTSA, in the NPRM, cites three reasons for not proposing adoption of a voluntary standard. However, none of these justifications are valid in the context of the NTTAA and OMB Circular A-119. Specifically, NHTSA claimed:

1. **No** one of the voluntary standards contained all six of the proposed test procedures and requirements...@

As explained above, NHTSA did not establish a protection level distinct from the government-unique standard. Thus, NHTSA is rejecting voluntary standards for not being the same as a government-unique standard even though the purpose of the law is to require agency use voluntary standards instead of government-unique standards whenever possible. Furthermore, nothing in the Act or OMB Circular would prevent NHTSA from using multiple voluntary standards. NHTSA has not claimed that voluntary standards do not meet the **more stringent** requirement.

2. Voluntary consensus standards do not exist for several of the test procedures and requirements...@

As explained above, NHTSA is excluding voluntary standards for not being the same as a government-unique standard. NHTSA has not established that the government-unique test procedures are needed to meet a NHTSA-defined level of protection.

3. While the testing conditions and procedures of some voluntary standard have been incorporated by reference into the agency's proposal, the specified performance requirements of the voluntary standards are either different than those specified in our proposal or are non-existent.@

Again, NHTSA provides a tautological statement that their government-unique standard is different than various voluntary tire performance standards even though the goal of the Technology Transfer Act is for government agencies to use voluntary standards not for voluntary standards to mimic government-unique standards. It is important to note that NHTSA never claims that the voluntary standards do not meet certain risk or protection levels set by the agency, i.e. that the voluntary standards would be impractical as defined by OMB Circular A-119, only that the voluntary standards are not the same as the government-unique standard.

*D. The Practicality of Voluntary Standards for FMVSS No. 139: Two Case Examples*

1. Case Example: UNECE Regulation 30

As NHTSA discussed in their NPRM, the agency participated in the development of a draft international consensus tire standard under the auspices of the United Nations Economic Commission for Europe's World Forum for Harmonization of Vehicle Regulations, Working Party 29. Within WP.29, NHTSA participated with other countries in the Working Party on Brakes and Running Gear (GRRF) to develop a global tire standard. An industry-developed standard, Global Tire Standard 2000, served as the initial basis for the GRRF discussions.

The United States is a signatory to an international agreement<sup>1</sup> with the UNECE to establish global technical regulations for motor vehicles. The Agreement may be found on NHTSA's website<sup>2</sup>. The Preamble of the Agreement calls for parties to the Agreement to, use the global technical regulations established under this Agreement as a basis for their technical regulations.@

A year prior to NHTSA's publication of the NPRM, The Chairman of the group developing the tire regulation sent a letter and attachment to the NHTSA docket. The letter, which transmitted the latest version of the draft standard, noted the various governments, technical organizations and industry organizations which were participating in the tire standards development process. The document explained that, although the attached draft standard was intended primarily for passenger cars tires, it was in a form that could easily incorporate truck tire requirements. The letter also noted that there was an Annex to take into account the fact that the US and Europe have different regulatory control systems. The Chairman, on behalf of the GRRF, recommended that NHTSA adopt the current draft standard.

NHTSA's participation in the GRRF was in accordance with requirements of the Technology Transfer Act and OMB Circular A-119 since the agency was; participating in the development of a voluntary consensus standard useful to the agency, and working towards internationally harmonized standards in fulfillment of an international agreement.

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<sup>1</sup> Agreement Concerning the Establishing of Global Technical Regulations for Wheeled Vehicles, Equipment and Parts Which Can be Fitted and/or be Used on Wheeled Vehicles. Geneva, 25 June 1998.

<sup>2</sup> [http://www.nhtsa.dot.gov/cars/rules/international/Agree/GlobalAgreement/globalagreement\\_English.html](http://www.nhtsa.dot.gov/cars/rules/international/Agree/GlobalAgreement/globalagreement_English.html)

The conclusion is that it would be neither impractical nor contrary to law for NHTSA to adopt a tire standard which:

- a. NHTSA participated in developing along with Canadian, European, Japanese government officials and private sector technical experts from North America, Europe and Asia;
- b. NHTSA signed an international agreement declaring their intent to adopt;
- c. Was available in draft a year prior to publication of the NPRM; and
- d. NHTSA had additional opportunities to refine and shape following the February 2001 docket submission from the GRRF.

Furthermore, NHTSA's work on a government-unique tire standard at the same time that they were participating in an international consensus process to develop such a standard was in direct violation of 7(j) of OMB Circular A-119 which states, If a voluntary consensus standards body is in the process of developing or adopting a voluntary consensus standard that would likely be lawful and practical for an agency to use, and would likely be developed or adopted on a timely basis, an agency should not be developing its own government-unique standard and instead should be participating in the activities of the voluntary consensus standards body. [emphasis added]

2. Case Example: NHTSA's Proposed Use of 40<sup>N</sup> C. High Speed Test Ambient Temperature

NHTSA's proposal that the High Speed test be conducted at 40<sup>N</sup> centigrade is an example of the agency's reliance on non-standard testing parameters. Not only is the 38<sup>N</sup> C the current US standards under FMVSS No. 109, but 38<sup>N</sup> C is also the standard ambient test temperature used by countries around the world including Japan, Brazil and Australia. Use of the proposed 40<sup>N</sup> would require tire manufactures to test to two standards, one for the US and one for many other countries. The standard 40<sup>N</sup> testing requirement also imposes energy consumption and other costs over the current standard. NHTSA has not demonstrated that raising the ambient testing temperature by 2<sup>N</sup> would yield

any safety benefit nor have they explained why the non-standard temperature is necessary for programmatic reasons, i.e. they have provided no record indicating that the standard temperature is impractical under OMB Circular A-119.

#### **IV. Conclusions**

1. There are multiple voluntary consensus and non-consensus tire performance standards. These standards are discussed in the NHTSA docket.
2. Use of voluntary tire performance standards would not be inconsistent with applicable law and would improve motor vehicle safety.
3. Use of voluntary tire performance standards would not be impractical.
4. NHTSA use of a government-unique tire performance standard would violate the National Technology Transfer and Advancement Act.
5. NHTSA use of a government-unique tire performance standard would violate OMB Circular A-119.
6. NHTSA development of a government-unique tire performance standard while a practical consensus standard was being developed was a violation of OMB Circular A-119.
7. NHTSA use of a government-unique tire performance standard may violate an international agreement.