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July 2, 1986

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The Honorable John D. Dingell
Chairman, Subcommittee on Oversight
and Investigations
Committee on Energy and Commerce
House of Representatives

Dear Mr. Chairman:

In your letter of January 2, 1985, you asked that we examine a number of issues concerning the importation into the United States of "nonconforming" motor vehicles, cars that are not in conformity with the applicable emission requirements of the Clean Air Act or the safety requirements of the National Traffic and Motor Vehicle Safety Act of 1966. We agreed to examine and report on these issues and, as we have advised your staff, that work will culminate in a report shortly. Because we have completed that portion of the work necessary to answer the legal questions you asked, we are providing those answers in advance of the report.

The major legal issues concern, first, exemptions from federal requirements for immigrants who import vehicles for personal use and for residents who import older cars for personal use, and second, the legal status of commercial importers of nonconforming vehicles as manufacturers.

With regard to the first issue, you asked what legal basis supports the Environmental Protection Agency's (EPA) policy to exempt individual and immigrant importers from conforming their vehicles to meet federal emission requirements and the legal basis for the Customs Service (Customs) to permit importation of nonconforming vehicles by releasing the importation bond which is required of importers of such vehicles. We found that both EPA's and Custom's actions are authorized as exercises of enforcement discretion granted by applicable law. This is discussed in part I of the enclosure to this letter.

The second issue concerned EPA's legal basis for designating independent commercial importers of nonconforming vehicles as manufacturers and giving them small-volume manufacturer status, and the legal basis for treating these

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importers as manufacturers without observing rulemaking procedures. We found that the definition of "manufacturer" in the Clean Air Act provides the legal basis for treating commercial importers as manufacturers. As an interpretation of the statutory definition, implementation of the definition is exempt from rulemaking. Part II of the enclosure deals with this issue.

Additionally, you asked us to examine whether use of the Mercedes-Benz logo by an importer not affiliated with that company violated federal law, what impact H.R. 6076, 98th Congress, might have on the problems caused by importing nonconforming vehicles, and the legality of treating importers of nonconforming vehicles as manufacturers under the Motor Vehicle Theft Law Enforcement Act of 1984 (Theft Act).

As to whether a "grey market" importer not affiliated with Mercedes-Benz is violating trademark law by using the Mercedes-Benz logo, registration of a trademark is generally prima facie evidence of the registrant's exclusive right to use the mark. 15 U.S.C. § 1115(a). Under certain conditions, the right can be incontestable, subject only to specific limited defenses. 15 U.S.C. §§ 1065, 1115. The law gives the registrant various remedies for infringement, depending on the type of infringement, including an injunction against further unauthorized use and damages. 15 U.S.C. § 1114.

The importer in question was not authorized by Mercedes to use its logo. The importer's use of the Mercedes logo appears to have been contrary to the exclusive right given to Mercedes by trademark law. We cannot, of course, tell whether Mercedes would have prevailed in an action against the importer, since that would depend on the facts brought out in litigation and on any defenses which the importer might assert. However, in agreeing, in response to Mercedes' complaint, to cease using the logo, the importer offered no defense except to say that it had done so "under the impression that [the logo] had become, in effect, generic."

You asked our views on the effect of enactment of a bill such as H.R. 6076, 98th Congress. As you point out, it is now possible under certain conditions for vehicles to be imported without meeting either federal emission or safety standards. H.R. 6076, which was not enacted, would have further restricted the importation of vehicles that did not comply with federal motor vehicle safety standards but was silent concerning emission standards.

H.R. 6076 would have required vehicles sold in or imported into the United States to be covered by a certificate of conformity with safety standards, issued by the manufacturer. "Manufacturer," in turn, would have been redefined to exclude persons importing motor vehicles unless they have the original manufacturer's express written authorization to import such motor vehicles.

Consequently, if H.R. 6076 were enacted, original manufacturers might attempt, by refusing to provide grey market importers with authorizations or certificates of conformity, to block the grey market importation of their cars. However, denial by a manufacturer of a certificate of conformity in circumstances where the car did in fact conform, solely to prevent importation of the car into the United States, might provoke litigation, with unpredictable results.

Thus, under H.R. 6076, original manufacturers could bar grey market cars by means of their control over both importation authorizations and certificates of conformity with safety standards. A manufacturer's refusal to authorize a grey market dealer to import the manufacturer's cars into the United States would in effect bar importation by that dealer of grey market cars not meeting emission standards as well. However, for individual importers, while H.R. 6076 would bar importation of cars not meeting safety requirements, the current policy permitting exemption from emission requirements for individuals under certain conditions would not be affected. Hence, additional legislation addressing compliance with emission standards as a condition for importation would, as you suggest, eliminate any uncertainty in H.R. 6076 about the legal authority to restrict or prevent importation of nonconforming vehicles.

You also asked us to examine provisions of the Theft Act and provide our views on Department of Justice comments on a notice of proposed rulemaking by the National Highway Traffic Safety Administration (NHTSA) regarding who should be permitted to certify compliance with the Act's requirement that vehicles and parts be marked for identification purposes. The proposed rule would have permitted only original manufacturers of foreign-manufactured vehicles to certify compliance with theft prevention standards; Justice disagreed on both legal and economic grounds. NHTSA's final regulations will allow importers of nonconforming vehicles to be treated as manufacturers and certify compliance with the Theft Act. Part III of the enclosure discusses this issue.

Finally, you also asked that we examine "the adequacy of the applicable regulations and their conformity with the statutes." We considered the applicable statutes and regulations to answer your legal questions, and did not find any inconsistencies among them. Federal agencies' procedures under the laws and regulations will be further discussed in the forthcoming report.

We trust this information will be useful.

Sincerely yours,

Milton J. Socolar

for Comptroller General
of the United States

Enclosure

ENCLOSURE

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I.

Exemptions

A. Background

1. Environmental Protection Agency

The Clean Air Act (Act) generally prohibits, except as provided by regulation of the Administrator, persons (including manufacturers) from importing a motor vehicle unless it conforms to applicable federal emission standards. Clean Air Act, § 203(a)(1), 42 U.S.C. § 7522(a)(1). EPA may, however, allow conditional importation of nonconforming vehicles under bond (id. § 203(b)(2)), or permit other exemptions not at issue here (id. § 203(b)(1)). EPA may enforce violations of the provisions of the Act governing importation of vehicles by obtaining an injunction or imposing civil penalties. Id. §§ 204 and 205, 42 U.S.C. §§ 7523 and 7524.

Conditional importation under bond is governed by joint regulations of EPA and the United States Customs Service acting as delegate of the Secretary of the Treasury. A nonconforming motor vehicle may be brought into this country if the importer or consignee posts a bond with Customs and brings the vehicle into conformity with federal emission requirements within 90 days after importation. 19 C.F.R. § 12.73(c); 40 C.F.R. § 85.1508(b). (The time may be extended for good cause shown.) In addition to a potential civil penalty under the Clean Air Act, failure to bring the vehicle into conformity can result in forfeiture of the bond. 19 C.F.R. § 12.73(c), 40 C.F.R. § 85.1508.

On July 21, 1980, EPA proposed a change to the importation regulations which, among other things, would have "exempted from the Act's coverage those individuals who import nonconforming motor vehicles * * * for their own personal use and not for resale." 45 Fed. Reg. 48812. EPA did not take final action on this rulemaking. Instead, EPA accomplished essentially the same thing by means of a change in its enforcement policy. In October 1981, EPA decided that it would not take enforcement action either against immigrants

who import nonconforming vehicles for personal use or against residents who import (once in a lifetime) nonconforming vehicles for personal use that are at least five model years old. This enforcement policy was subsequently announced and explained by EPA in a Federal Register notice. 48 Fed. Reg. 16486 (April 18, 1983). (The notice made clear that this non-enforcement policy would not apply to federal safety standards administered by the Department of Transportation. Id. at 16487. See section 2 below for a discussion of bonded importation of cars not meeting safety standards.)

In the 1983 notice, EPA gave the following reasons for its nonenforcement policy. Many individuals importing nonconforming vehicles did not fully understand the complexity and expense of the modification and testing options, and learned of the EPA requirements only after importation of their vehicles. Administration of the regulations by EPA and Customs would require "substantial resources as compared to the air quality benefits" that were achievable. In this connection, the number of older vehicles imported by individuals and not brought into conformity was relatively small (1500, or one percent of the total number of vehicles imported each year). EPA concluded that a "massive increase in importations of such uncertified vehicles would have to occur before there would be any measurable effect on air quality". 48 Fed. Reg. 16486 (1983). Finally, EPA believed that importation of older cars by individuals would not significantly affect the purchase of new vehicles, and thus would not have a substantial effect on commercial importers or the American automobile industry.

EPA is currently reconsidering its policy on non-enforcement. EPA has proposed eliminating both the five-year personal use exemption and the exemption for immigrants importing vehicles for personal use. 50 Fed. Reg. 36838, 36845-46 (Sept. 9, 1985). With respect to the five-year personal use exemption, EPA now believes that the exemption is no longer necessary to reduce the agency's paperwork; fewer people are now unfamiliar with the rules; individuals and businesses may be fraudulently importing vehicles; and the increasing number of nonconforming cars may be significantly affecting air quality. With respect to the immigrant exemption, EPA is concerned that vehicles admitted under that exemption are being resold in violation of EPA requirements. (EPA's proposed regulations, however, retain certain "hardship exemptions" in limited circumstances such as for specially equipped vehicles for handicapped individuals.) EPA is

considering comments on the proposed rule and anticipates issuing a final rule by the end of 1986.

2. National Highway Traffic Safety Administration

Importation of motor vehicles which do not conform with applicable safety standards is prohibited, except that the Secretary of Transportation and the Secretary of the Treasury may, by joint regulation, authorize the importation of such vehicles upon terms and conditions, including posting a bond, that will insure that the vehicle will be brought into conformity. National Traffic and Motor Vehicle Safety Act of 1966, as amended (Vehicle Safety Act), §§ 108(a) and (b)(3), 15 U.S.C. §§ 1397(a) and (b)(3). NHTSA acts for the Secretary of Transportation on these matters.

Regulations provide that a nonconforming vehicle may enter under bond, and the importer has up to 180 days to bring the vehicle into compliance with federal safety standards. The bond will be released by Customs upon NHTSA's issuance of an approval letter stating that the vehicle has been brought into conformity. 19 C.F.R. §§ 12.80(b)(1)(iii) and (e). NHTSA apparently does not allow any exemptions from the requirement to post bond and conform the vehicle imported under this provision. See NHTSA, "Report to the Committee on Appropriations Dealing With Enforcement of Title 19, Code of Federal Regulations, Part 12.80, Importation of Motor Vehicles and Items of Motor Vehicle Equipment" (February 1985, at p.2). Several other regulatory exemptions exist whereby nonconforming vehicles, such as racing and experimental vehicles, can be imported without posting bond. Id. § 12.80(b)(1)(vii). Also, a nonresident may import a nonconforming vehicle for personal use without posting bond for a period of up to 1 year, after which the vehicle must be conformed or exported. Id. § 12.80(b)(1)(v).

3. United States Customs Service

As discussed in the previous sections, Customs, on behalf of Treasury, acts jointly with EPA and NHTSA in administering the automobile importation provisions of the Clean Air Act and the Vehicle Safety Act. See, 19 C.F.R. § 12.73 and § 12.80. With respect to posting the bond, EPA notified Customs in October 1981 that EPA did not intend to impose penalties under the Clean Air Act against individuals importing vehicles five or more model years old, and that a bond was not required for EPA purposes. Letter from the EPA Assistant Administrator for Air, Noise, and Radiation to the Assistant Commissioner,

Office of Commercial Operations, Customs, dated October 27, 1981. EPA asked Customs to determine whether Customs could waive the bonding requirement as it pertains to EPA in those cases where EPA did not intend to assess a penalty. We have found no record of further correspondence concerning Customs' waiver of the bond. However, we found that Customs does not waive the bond, but does follow procedures, agreed upon with EPA, to release the bond.

With respect to releasing the bond, an EPA official in May 1984 notified a Customs official that Customs could issue immigrant exemptions as a basis for Customs to release the bond on EPA's behalf. Letter from Chief, Manufacturers Programs Branch, EPA, to Director, Office of Trade Operations, Customs, May 8, 1984. (EPA policy had previously been that the immigrant must apply to EPA for the exemption.) The letter noted that vehicles imported under this procedure must still be bonded at the time of entry and must be modified to meet federal safety requirements. The letter identified the criteria that must be met before Customs should issue an immigrant exemption: (1) proof of immigrant status; (2) proof of vehicle ownership prior to importation; and (3) importer's signed statement that this is the first nonconforming vehicle brought into the United States and that it is for personal use and not for resale. Customs' determinations are to be recorded and reported to EPA.

B. Issues and Analysis

Question 1:

What is the legal basis supporting EPA's policy exempting individual and immigrant importers from conforming their vehicles to meet federal emission requirements?

Answer 1:

EPA's authority for its current enforcement policy is based, according to EPA, on an exercise of its enforcement discretion. 48 Fed. Reg. 16486 (1983). For the reasons discussed below, we see no basis upon which to challenge EPA's actions.

An agency's decision not to take an enforcement action is generally within that agency's discretion. Heckler v. Chaney, 105 S. Ct. 1649 (1985). More generally, agency decisions not to institute enforcement proceedings are presumptively not reviewable by the courts under the Administrative Procedure Act, 5 U.S.C. § 701(a). Id.

In Heckler, the Supreme Court held that the Food and Drug Administration's decision not to institute enforcement proceedings for alleged violations of the Food, Drug, and Cosmetic Act was within the agency's discretion. The Court found that the Act did not circumscribe agency discretion to decide how and when the Act's enforcement provisions, i.e., injunctions, criminal sanctions, and seizure, should be exercised. Moreover, the statute did not provide specific guidelines for the agency to follow in exercising its enforcement powers. Id. See Dunlop v. Bachowski, 421 U.S. 560 (1975); Adams v. Richardson, 480 F.2d 1159 (1973).

The provisions of the Clean Air Act governing enforcement of section 203(a) are fairly general. EPA may petition the federal district courts for injunctive relief, and persons violating section 203 are subject to a civil penalty. Clean Air Act §§ 204 and 205, 42 U.S.C. §§ 7523 and 7524. These provisions, similar to the ones in the Food, Drug, and Cosmetic Act analyzed in Heckler, afford the Administrator discretion to decide how and when they should be exercised. Further, we do not see any other provisions in the Clean Air Act that would circumscribe the Administrator's discretion concerning when and how to enforce the Act's requirements in certain circumstances.

EPA's exemption policy does not share the characteristics of cases where exercise of enforcement discretion has been held improper, i.e., where there is a violation of equal protection, Yick Wo v. Hopkins, 118 U.S. 356 (1886), or where the agency's enforcement decision was motivated by a personal or financial interest, Marshall v. Jerrico, Inc., 446 U.S. 238 (1980). As discussed above, EPA had a rational basis for its exemption policy, relying primarily on the limited adverse effect on the environment. 48 Fed. Reg. 16486 (1983).

Moreover, EPA has explicit statutory authority to issue regulations to permit exemptions from the Clean Air Act's importation requirements. The Act provides that "in the case of any person, except as provided by regulation of the Administrator, the importation into the United States of any new motor vehicle * * *" which does not conform to federal emission standards, is prohibited. Clean Air Act, § 203(a)(1), 42 U.S.C. § 7522(a)(1) (emphasis added). In fact, as noted above, EPA had proposed a number of regulatory revisions to its importation procedures, including an exemption for immigrants importing nonconforming vehicles for personal use on a one-time basis. 45 Fed. Reg. 48812 (1980). Thus, EPA is doing by policy implementation no more than what it is

explicitly permitted by the Clean Air Act to do under its regulatory authority.

EPA has recently proposed to eliminate the immigrant and individual exemptions by regulation, citing changed circumstances since initiation of its policy. 50 Fed. Reg. 36838 (1985). Consequently, although EPA has legal authority to implement its current enforcement policy, it appears to be reconsidering that policy in light of recent concerns about the impact of imported vehicles on air quality, the consumer, and the domestic automobile industry.

Question 2:

What is the legal basis for Customs to release the importation bond covering EPA emission requirements?

Answer 2:

Customs' release of the importation bond is an exercise of its own enforcement discretion. However, Customs has no independent interest in regulating air quality. Its role in this arrangement is essentially to assist EPA in enforcing the Clean Air Act. In so doing, Customs' exercise of discretion is, for the most part, directed at ascertaining whether pursuant to EPA's criteria an importation bond should be released.

EPA and Customs regulations allow the conditional importation of a nonconforming vehicle provided that a bond is posted with Customs to insure that the vehicle will be brought into conformity with EPA emission requirements. 19 C.F.R. § 12.73; 40 C.F.R. § 85.1508. Customs and EPA have agreed that Customs may determine, on behalf of EPA, whether an importer is an immigrant covered by EPA's enforcement policy. Under this arrangement, Customs would release the importer's obligation on the bond without having the immigrant first produce an exemption document from EPA.

EPA advises us that, while Customs routinely releases the bonds without assessing penalties, it does so by exercising its own authority to apply EPA's guidelines:

> "When it is clear that an immigrant can meet EPA's criteria, this arrangement can avoid unnecessary delay and hardship for the individual involved and reduce the administrative burden on both EPA and

> Customs. Morever, it seems that in those cases where Customs does make such determinations on EPA's behalf, compliance with EPA's explicit, objective criteria is relatively easy to establish and that Customs' actions on behalf of EPA in those cases are essentially ministerial and require no exercise of any discretion." (Letter from William F. Pedersen, Jr., Associate General Counsel, EPA, May 14, 1985.)

If Customs' release of a bond were incorrect--if, that is, the immigrant did not, in fact, meet EPA's exemption criteria--EPA could still take enforcement actions under sections 204 and 205 of the Clean Air Act. 42 U.S.C. §§ 7523 and 7524. In view of its cooperative effort with EPA, Customs' release of the bond for certain importers, in accordance with EPA criteria, appears to be appropriate. See Heckler v. Chaney, supra.

II.

Legal Status of Importers as "Manufacturers"

A. Background

The "grey market" importers are independent commercial importers who do not have an agreement with foreign manufacturers to act as their authorized representatives for the distribution of vehicles into the United States market. 50 Fed. Reg. 36838, n.1. EPA has historically considered independent commercial importers as "manufacturers" under section 216(1) of the Clean Air Act, 42 U.S.C. § 7550(1). Id. at 36840. These importers are able to import nonconforming cars for resale under bond, modify the vehicles, and obtain a certificate of conformity that the vehicles comply with EPA requirements. Id. at 36839-40.

Some commenters during the rulemaking asserted that the definition of "manufacturer" in section 216(1) was not intended to apply to independent commercial importers. Id. at 36840. "Manufacturer" status is significant because it qualifies importers of fewer than 10,000 vehicles to use EPA's less stringent "small-volume" certification regulation. 40 C.F.R. § 86.084-14.

B. Issues and Analysis

Question 1:

What is EPA's legal basis for designating independent commercial importers of nonconforming vehicles "manufacturers" and for giving these importers "small-volume manufacturer" status?

Answer 1:

"Manufacturer" is defined in the Clean Air Act, as "any person engaged in the manufacturing or assembling of new motor vehicles or new motor vehicle engines, or importing such vehicles or engines for resale * * *." Clean Air Act, § 216(1), 42 U.S.C. § 7550(1) (emphasis added). This statutory definition provides EPA the legal basis for treating commercial importers as "manufacturers". (With respect to vehicles offered for importation, "new" vehicles need not be "new" as that word is used in everyday parlance: the law defines "new" in this context to mean manufactured after the effective date of applicable EPA emission standards. Id. § 216(3), 42 U.S.C. § 7550(3).)

You asked us to respond to the assertion of one franchised commercial importer that there is some evidence that, at the time the definition was enacted in 1965, Congress considered as "manufacturers" only entities in the standard chain of production; independent importers apparently did not exist at the time. See, e.g., 111 Cong. Rec. 25054 (September 24, 1965) (remarks of Reps. Rogers and Halpern); id. at 25062 (remarks of Rep. Howard).

In our view, EPA's treatment of a commercial importer of a nonconforming car as a manufacturer is consistent with the statutory definition in section 216(1). It is a general rule of statutory construction that a statute applies to persons, subjects, and businesses that are within the statute's general scope, although they may come into existence after its enactment. Cain v. Bowlby, 114 F.2d 519 (10th Cir. 1940). In this instance, while independent importers may not have existed when Congress statutorily defined "manufacturer," they share many of the same basic attributes of franchised importers and can fairly be considered to fall within the general scope of the statutory definition.

A question also has been raised whether commercial importers are excluded from the definition of manufacturer

because many commercial importers sell the vehicles which they import. The Act defines "manufacturer" as

> "any person engaged in the manufacturing or assembling of new motor vehicles or new motor vehicle engines, or importing such vehicles for resale, or who acts for and is under the control of any such person in connection with the distribution of [such vehicles], but shall not include any dealer with respect to [such vehicles] received by him in commerce." Clean Air Act § 216(1), 42 U.S.C. § 7550(1) (emphasis added).

The definition, it is contended, excludes from the category of manufacturer any importer who is a dealer. EPA disagrees with this reading of the statutory definition, on the basis that the exclusion of dealer is only applicable to the third category of manufacturer, i.e., one "who acts for and is under the control of" a person manufacturing, assembling, or importing such vehicles. Letter from Richard D. Wilson, Director, Office of Mobile Sources, EPA, to Jerome N. Sonosky, dated November 5, 1982. Under this interpretation, commercial importers would not be precluded from being manufacturers under the Act, since they are covered by either of the first two categories of manufacturer (which are not subject to the dealer exclusion). EPA's interpretation of its legislation in this manner is consistent with the language and purpose of the Clean Air Act and, under rules of statutory construction, is to be given deference. Train v. Natural Resources Defense Council, 421 U.S. 60 (1975).

EPA also points out that even if the last phrase in section 216(1) applied to all three categories of manufacturers, it would not exclude the commercial importers from being considered manufacturers, because they do not "receive vehicles in commerce", as defined. Id. The definition of "commerce" in the Clean Air Act provides in effect that at least one portion of the transaction must occur within the United States: "The term 'commerce' means (A) commerce between any place in any State and any place outside thereof * * *". Id. § 216(6), 42 U.S.C. § 7550(6).

As a result of this definition, trade that normally occurs between two parties outside the United States, such as the purchase of foreign-manufactured vehicles by a commercial importer, would not be deemed "commerce". It follows that,

although many commercial importers are dealers since they sell directly to consumers, they do not "receive vehicles in commerce" as that term is defined in the Clean Air Act. Thus, commercial importer/dealers are not excluded from being treated as manufacturers under the Clean Air Act.

You also expressed concern that independent commercial importers might qualify for "small-volume manufacturer" status. EPA has, by regulation, established an optional procedure for small-volume manufacturers to certify compliance with emission standards. 40 C.F.R. § 86.084-14. Small-volume manufacturers are defined as manufacturers who sell fewer than 10,000 vehicles per model year in the United States. Id. Under these optional procedures, the manufacturers must demonstrate compliance with most of EPA's general certification procedures in full, comply with several procedures as modified, and need not comply with others at all. Id. The optional procedures for small-volume manufacturers were established by EPA regulation. Since importers are included within the Clean Air Act definition of "manufacturer", EPA may include them within its regulation for small-volume manufacturers.

Question 2:

What is EPA's legal basis for treating importers of nonconforming vehicles as "manufacturers" without observing rulemaking procedures?

Answer 2:

Since section 216(1) already defines manufacturer to include importers, it provides the legal basis for EPA to apply this definition without an additional rulemaking proceeding. Clean Air Act, § 216(1), 42 U.S.C. § 7550(1). The statutory definition is incorporated by reference in EPA's regulation defining terms for purposes of certification. 40 C.F.R. § 86.082-2. EPA's treatment of importers as manufacturers constitutes its interpretation of the statutory definition in section 216(1), and as such does not require rulemaking procedures. 5 U.S.C. § 553.

Under its recent proposed rulemaking, EPA is considering several options which would eliminate or limit the importation of nonconforming vehicles by independent commercial importers. One option is to prohibit the importation of all nonconforming vehicles and prohibit independent commercial importers from obtaining certification. An alternative is to provide that a

nonconforming vehicle may be imported only if it belongs to a class of vehicles for which a certificate of conformity has been obtained and, along with this, to impose stringent certification requirements for the independent commercial importers who hold such certificates. 50 Fed. Reg. 36838 (1985). EPA is considering comments on these proposed options and anticipates issuing a final rule by the end of 1986.

III

Motor Vehicle Theft Law Enforcement Act of 1984

A. Background

The Theft Act (Pub. L. 98-547) requires the Secretary of Transportation to establish a standard for marking major parts and major replacement parts of high-theft passenger cars by "inscribing or affixing numbers or symbols". Theft Act, § 101(a), adding a new section 602(a) to the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. § 2022(a). Every manufacturer of a motor vehicle or a major replacement part subject to the standard is required to furnish, at the time of delivery, a certification that each vehicle or replacement part conforms to the applicable standard. Id., § 606, 15 U.S.C. § 2026. The Secretary of Transportation may issue rules prescribing the manner and form of such certification. Id. These tasks have been delegated to NHTSA.

The applicable statutory definition of "manufacturer" (15 U.S.C. § 1901(7)) expressly includes persons "importing motor vehicles or motor vehicle equipment for resale." In a Notice of Proposed Rulemaking, proposing standards and criteria under the Theft Act, NHTSA "tentatively" took the position that only original manufacturers and not importers should be allowed to certify compliance with the applicable theft prevention standards. 50 Fed. Reg. 19728, 19738-40 (1985). NHTSA reasoned, among other things, that the prosecutorial goals of the statute would best be achieved by limiting the number of persons in possession of the tools and equipment needed to mark the cars. NHTSA also said that, if only original manufacturers can apply markings and certify compliance, the enforcement and inspection burden on NHTSA would be much simpler. However, NHTSA solicited comments on whether it would be consistent with the Theft Act to construe the term "manufacturer" to permit entities other than the original manufacturer to certify compliance with the standard. Id. at 19740.

The Department of Justice (Justice), speaking as the agency charged with both criminal and antitrust responsibilities, disagreed with NHTSA's preliminary determination. Comments of the Department of Justice, NHTSA Docket No. T84-01 (June 14, 1985) (Justice Comments). Justice stated that the certification restriction would have the effect of

> "substantially reducing, if not eliminating, the 'gray market' for certain cars by denying admission to foreign-manufactured cars not intended by the original manufacturer to be sold in the United States."

Justice believed that the potential harm to United States consumers far outweighed the benefits of any incremental increase in theft prevention.

Justice also asserted that the proposed rule went beyond the statutory language. That is, the proposed rule, defining manufacturers to mean only original manufacturers, and not importers, is contrary to the definition in the law of manufacturer, which includes importers. (This argument is analyzed below.)

In response to comments by Justice and others, NHTSA reexamined the issue and, on October 24, 1985, issued final regulations. The final regulations allow importers of nonconforming vehicles to certify compliance with the theft prevention standard, but set forth special requirements for such importers. 50 Fed. Reg. 43166 (1985).

B. Issues and Analysis

Question: What is the legal basis for treating importers of nonconforming vehicles as "manufacturers" for purposes of the Theft Act?

Answer: NHTSA's rule treating importers of nonconforming vehicles as "manufacturers" for purposes of the Theft Act is based upon the legislative history and requirements of that law. For the reasons discussed below, we believe that NHTSA's position (which adopts most of Justice's legal views) is legally sound.

The Theft Act was added by Public Law 98-547 as Title VI of the Motor Vehicle Information and Cost Savings Act (Cost

Savings Act), 15 U.S.C. 1901 and following. The term "manufacturer" as used in the Theft Act is defined by the Cost Savings Act as "any person engaged in the manufacturing or assembling of passenger motor vehicles or passenger motor vehicle equipment including any person importing motor vehicles or motor vehicle equipment for resale." (Emphasis added.) This definition applies to the Theft Act. 15 U.S.C. § 1901.

In its discussion of the basis for its rule, NHTSA first pointed out that several phrases in the Theft Act, wherein the Congress specifically referred to original manufacturers, indicate that the Congress did not consider importers to be manufacturers for purposes of the Theft Act. Sections 602(a)(1), and 602(d)(1), 15 U.S.C. §§ 2022(a)(1), (d)(1), refer to major parts which are installed by manufacturers. Importers may alter, but do not install, major parts. See 50 Fed. Reg. 43181 (1985). Also, as NHTSA notes, Senator Percy, the original sponsor of the Senate version of the anti-theft bill, stated during floor debate that "under the bill, motor vehicle manufacturers would be required to apply these numbers before the vehicle leaves the factory." 130 Cong. Reg. S13585 (October 4, 1984). Since importers of nonconforming vehicles would not be in a position to apply identification numbers before the vehicle leaves the factory, this statement, it is argued, supports the view that only original manufacturers may certify compliance with the requirement.

NHTSA then considered the views of proponents of permitting certification by persons other than the original manufacturer. They pointed out that the language in the Theft Act referring to major parts "installed by manufacturers" is part of a section which in effect defines which parts of a vehicle are to be covered by the standards. The fact that the theft prevention standards apply to those major parts which are installed by a manufacturer (and replacements for those parts) is entirely consistent with a definition of "manufacturer" which includes importers, and with the idea that an importer can be permitted to certify compliance with the standards.

Moreover, as those in favor of certification by persons other than the original manufacturer noted, the law itself does not specify that the identification numbers must be applied in the factory. Instead, the requirement is simply that "manufacturers certify," at the time of delivery, that the vehicle conforms to the applicable theft prevention

standard. Theft Act § 606(c)(1), 15 U.S.C. § 2026(c)(1). (The term "delivery" is not defined.) However, the provision further states that certification shall accompany the vehicle or part until delivery to the first purchaser. The Theft Act defines that term to mean first purchaser for purposes other than resale. Theft Act, § 601(5), 15 U.S.C. § 2021(5).

NHTSA, in its final regulation, concluded that the theft prevention regulation should not prohibit imports of nonconforming vehicles. 50 Fed. Reg. 43166 (1985). However, to maintain the effectiveness of the theft standard for law enforcement purposes, NHTSA imposed special provisions for certification by importers of nonconforming vehicles. The vehicles must be marked with the European vehicle identification number; the markings must be inscribed on the parts; and the markings must be inscribed before the vehicle or parts are imported into the United States. Id. at 43183-85.

On the latter point, NHTSA concluded that, contrary to Justice's comments, it has no authority to admit noncomplying vehicles under bond. Unlike the bonding provisions of the Clean Air Act and National Traffic and Motor Vehicle Safety Act, Congress did not grant such authority in the Theft Act. Id. at 43185. Accordingly, the vehicles and parts must be marked with the required identification number before they are brought into the United States. Id.

As the agency charged with implementing the Theft Act, NHTSA has authority to interpret that law reasonably to best accomplish its purposes. NHTSA's regulation allowing all manufacturers as defined in the Cost Savings Act, including importers, to certify compliance is consistent with the statute, and its interpretation is entitled to deference, as a principle of statutory construction. Train v. Natural Resources Defense Council, 421 U.S. 60 (1975); Udall v. Tallman, 380 U.S. 1 (1965).