

DATES: Effective Date: The effective date of the amendments made by this final rule is May 15, 2003. Applicability Dates: Various provisions of this final rule are applicable on the dates stated in the regulatory text. See 49 CFR 579.28. Petitions for Reconsideration: Petitions for reconsideration of amendments made by this final rule must be received not later than May 30, 2003.

ADDRESSES: Petitions for reconsideration of any amendments made by this final rule should refer to the docket and notice number set forth above and be submitted to Administrator, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590, with a copy to Docket Management, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590. See section VI "Privacy Act Statement" for electronic access and filing addresses.

FOR FURTHER INFORMATION CONTACT: For non-legal issues, contact Jonathan White, Office of Defects Investigation, NHTSA (phone: 202-366-5226). For legal issues, contact Taylor Vinson, Office of Chief Counsel, NHTSA (phone: 202-366-5263).

SUPPLEMENTARY INFORMATION:

I. Background

On July 10, 2002, NHTSA published a final rule implementing the early warning reporting (EWR) provisions of the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act, established by 49 U.S.C. 30166(m) (67 FR 45822). The reader is referred to that document, and the prior Notice of Proposed Rulemaking (NPRM) (66 FR 66190) for further information.

Petitions for reconsideration of the EWR rule were filed on or before August 26, 2002, by the Alliance of Automobile Manufacturers (the Alliance), General Motors Corporation (GM), the National Association of Trailer Manufacturers (NATM), the National Truck Equipment Association (NTEA), the Recreational Vehicle Industry Association (RVIA), and the Juvenile Products Manufacturers Association (JPMA).

GM and NATM filed untimely supplemental comments on October 15, 2002, and a petition for rulemaking was filed by the National Trailer Dealers Association (NTDA) on November 1, 2002, relating to the threshold for full reporting. On November 23, 2002, NATM filed a petition for rulemaking to delay the initial reporting date under the rule, as did NTEA and RVIA jointly, on December 5, 2002. Additional untimely comments were filed by Public Citizen on November 26, 2002, and

Stephen E. Selander on November 27, 2002. To the extent appropriate, given their untimeliness, we will address the late-filed comments in a future notice.

On October 10, 2002, the Alliance wrote to NHTSA requesting that certain issues it had raised in its petition be treated on a prioritized basis. It separated its issues into three groups and explained that "Generally, those issues given a priority '1' rating are those that require resolution to allow Alliance members to effectively plan and efficiently execute actions needed to develop compliant reporting systems." These issues concerned field reports, in-plant inspection records and other documents, one-time historical reports, and multiple "substantially similar" platforms. After reviewing the Alliance's comments and letter of October 10, the agency has concluded that granting this request may aid in an orderly implementation of the final rule and is issuing this notice addressing the Alliance's priority "1" issues.

We will address the Alliance's priority "2" and "3" issues in the future. We will also address other issues that were timely raised by the other petitioners for reconsideration.

II. Petitions Regarding Field Reports

The final rule defined "field report" as a "communication * * * regarding the failure, malfunction, lack of durability, or other performance problem of a motor vehicle or motor vehicle equipment * * * regardless of whether verified or assessed to be lacking in merit. * * *." It excluded "a document contained in a litigation file that was created after the date of the filing of a civil complaint that relates to the specific vehicle, component, or system at issue in the litigation." This reflected an attempt both to recognize the work product exclusion under the rules of evidence and to address it in a simplified manner based on the existence of a litigation file. We thought that this approach would have appeal because overall it would provide approximately the same coverage as a rule strictly based on the work product case law and would not require document by document review. The Alliance, however, asserted that this exclusion is too narrow and should be broadened to state that the definition "does not include documents that were prepared in anticipation of litigation." Similarly, GM commented that "documents prepared at the request of counsel, whether outside counsel or in-house attorneys, are also privileged if the work was done in anticipation of a lawsuit being filed." It asked the agency "to reconsider its decision to use the

filing of a civil complaint as a litmus test for determining whether or not a document is privileged." As GM recognized in a comment, the vast majority of field reports do not have any work product or privilege issues associated with them.

There is no need for this notice to provide a detailed discussion of the work product doctrine, given the facts that only a small minority of field reports would be considered work product and that the doctrine is well established under Federal law. We refer the reader generally to Edna Selan Epstein, *The Attorney—Client Privilege and the Work Product Doctrine* (3d Ed. 1997), published by the American Bar Association. In short, the work product exclusion applies to (1) documents in the broad sense of the word, (2) prepared in anticipation of litigation, where there is a reasonable prospect of litigation, and not for some other purpose such as a business practice, and (3) prepared or requested by an attorney or an agent for an attorney.

The Alliance's proposed modification to the definition of field report presents several problems. First, it does not expressly recognize that two mutually exclusive options have been considered: (1) A simplified approach based on the existence of a litigation file, as published on July 10, 2002, and (2) an approach based on the work product case law, which was advanced by the petitions for reconsideration. We will, as suggested by the petitions, adopt the latter approach in lieu of the simplified approach. Second, the Alliance's recommended exclusion is too broad, since it does not include some required elements of the work product doctrine. For example, more is required to meet the criteria for the exclusion than that a document has been created in anticipation of litigation.

Finally, we wish to underscore that the document truly must have been prepared "in anticipation of litigation." The Alliance's comment indicates that, in its opinion, counsel may anticipate litigation "after a claim is made, but prior to the filing of a lawsuit, or after the filing of a "notice" that a "claim" might be asserted." GM suggested that the work product exclusion cover reports prepared in anticipation of litigation after a claim has been filed and, although it would be less frequent, before a claim has been filed. In practice, reports prepared after a claim has been filed ordinarily would be more likely to be covered by the work product exclusion than reports prepared after a "notice" was received by a manufacturer. Under the early warning rule, § 579.4(c), "claim" includes a