If adopted, the proposal would directly affect seventeen large single stage motor vehicle manufacturers.[236] The proposal would also affect four small domestic ingle stage motor vehicle manufacturers.[237] According to the Small Business Administration's small business size standards (*see* 13 CFR 121.201), a single stage automobile or light truck manufacturer (NAICS code 336111, Automobile Manufacturing; 336112, Light Truck and Utility Vehicle Manufacturing) must have 1,000 or fewer employees to qualify as a small business. All four of the vehicle manufacturers have less than 1,000 employees and make less than 1,000 vehicles per year. We believe that the rulemaking would not have a significant economic impact on the small vehicle manufacturers because under Part 525, passenger car manufacturer making less than 10,000 vehicles per year can petition NHTSA to have alternative standards set for those manufacturers. These manufacturers currently don't meet the 27.5 mpg standard and must already petition the agency for relief. If the standard is raised, it has no meaningful impact on these manufacturers, they still must go through the same process and petition for relief. Given that there already is a mechanism for handling small businesses, which is the purpose of the Regulatory Flexibility Act, a regulatory flexibility analysis was not prepared.

D. Executive Order 13132 Federalism

Executive Order 13132 requires NHTSA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." The Order defines the term "Policies that have federalism implications" to include regulations that have "substantial

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[236] BMW, Mercedes, Chrysler, Ferrari, Ford, Subaru, General Motors, Honda, Hyundai, Lotus, Maserati, Mitsubishi, Nissan, Porsche, Suzuki, Toyota, and Volkswagen

[237] The Regulatory Flexibility Act only requires analysis of small domestic manufacturers. There are four passenger car manufacturers we know of and no light truck manufacturers: Avanti, Panoz, Saleen, and Shelby.

direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under the Order, NHTSA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or NHTSA consults with State and local officials early in the process of developing the proposed regulation. The agency has complied with Order's requirements.

The issue of preemption of State emissions standard under EPCA is not a new one; there is an ongoing public dialogue regarding the preemptive impact of CAFE standards whose beginning pre-dates this rulemaking. This dialogue has involved a variety of parties (i.e., the States, the federal government and the general public) and has taken place through a variety of means, including several rulemaking proceedings. NHTSA first addressed the issue in its rulemaking on CAFE standards for MY 2005-2007 light trucks[238] and explored it at great length, after receiving extensive public comment, in its rulemaking for MY 2008-2011 light trucks.[239] Throughout this time, NHTSA has consistently taken the position that state regulations regulating CO_2 tailpipe emissions from automobiles are expressly and impliedly preempted.

NHTSA's position remains unchanged, notwithstanding the occurrence of several significant events since the issuance of the final rule for MY 2008-2011 light trucks in April 2006. In 2007, the Supreme Court ruled Massachusetts v. EPA that carbon dioxide is an "air pollutant" within the meaning of the Clean Air Act and thus potentially subject

[238] 67 FR 77015, 77025; December 16, 2002, and 68 FR 16868, 16895; April 7, 2003.
[239] 70 FR 51414, 51457; August 30, 2005, and 71 FR 17566, 17654-17670; April 6, 2006.

to regulation under that statute. Later that year, two Federal district courts ruled in Vermont and California that the GHG motor vehicle emission standards adopted by those states are not preempted under EPCA. Still later that year, Congress enacted EISA, amending EPCA by mandating substantial and sustained annual increases in the passenger car and light truck CAFE standards. As further amended by EISA, EPCA also mandates that standards be attribute-based and established and implemented separately for passenger cars and light trucks. As it did before EISA, EPCA permits manufacturers to adjust their product mix on a national basis in order to achieve compliance while meeting consumer demand.

NHTSA has carefully considered those events and reexamined the detailed technological and scientific analyses and conclusions it presented in its 2006 final rule. The agency reaffirms those analyses and conclusions.

The Supreme Court did not consider the issue of preemption under EPCA of state regulations regulating CO_2 tailpipe emissions from automobiles. Instead, it addressed the relationship of EPA and NHTSA rulemaking.

We respectfully disagree with the two district court rulings. We note that an appeal has been filed concerning the Vermont decision and that the appellants' briefs have already been filed. EPCA's express preemption provision preempts state standards "related to" average fuel economy standards. Under the relatedness test, preemption is not dependent on the existence or nonexistence of any inconsistency or any difference between those State standards and the CAFE standards. Likewise, it is not dependent upon a state standard or a portion of a state standard's being identical to or equivalent to a CAFE standard.

The enactment of EISA has increased the conflict between state regulations regulating CO_2 tailpipe emissions from automobiles and EPCA. A conflict between state and federal law arises when compliance with both federal and state regulations is a physical impossibility or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Contrary to the recommendations of NAS, the judgment of NHTSA, and the mandate of Congress, the state regulations regulating CO_2 tailpipe emissions, which are equivalent in effect to fuel economy standards, are not attribute-based, thus presenting risks to safety and employment. Contrary also to EISA, the state regulations do not establish separate standards.

In reaffirming its position, NHTSA fully appreciates the great importance to the environment of addressing and reducing GHG emissions. Given that substantially reducing CO_2 tailpipe emissions from automobiles is unavoidably and overwhelmingly dependent upon substantially increasing fuel economy through installation of engine technologies; transmission technologies; accessory technologies; vehicle technologies; and hybrid technologies, increases in fuel economy will produce commensurate reductions in CO_2 tailpipe emissions. And as noted above, through EISA, Congress has ensured that there will be substantial and sustained, long term improvements in fuel economy.

Given the importance of an effective, smooth functioning national program to improve fuel economy and in light of the fact that district court considered this agency's analysis and carefully crafted position on preemption, NHTSA is considering taking the further step of summarizing that position in appendices to be added to the parts in the

Code of Federal Regulations setting forth the passenger car and light truck CAFE standards. That summary is as follows:

> (a) To the extent that any state regulation regulates tailpipe carbon dioxide emissions from automobiles, such a regulation relates to average fuel economy standards within the meaning of 49 USC 32919.
>
> 1. Automobile fuel economy is directly and very substantially related to automobile tailpipe emissions of carbon dioxide.
>
> 2. Carbon dioxide is the natural by-product of automobile fuel consumption.
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> 3. The most significant and controlling factor in making the measurements necessary to determine the compliance of automobiles with the fuel economy standards in this Part is their rate of tailpipe carbon dioxide emissions.
>
> 4. Most of the technologically feasible reduction of tailpipe emissions of carbon dioxide is achievable only through improving fuel economy, thereby reducing both the consumption of fuel and the creation and emission of carbon dioxide.
>
> 5. Accordingly, as a practical matter, regulating fuel economy controls the amount of tailpipe emissions of carbon dioxide to a very substantial extent, and regulating the tailpipe emissions of carbon dioxide controls fuel economy to a very substantial extent.
>
> (b) As a state regulation related to fuel economy standards, any state regulation regulating tailpipe carbon dioxide emissions from automobiles is expressly preempted under 49 U.S.C. 32919.
>
> (c) A state regulation regulating tailpipe carbon dioxide emissions from automobiles, particularly a regulation that is not attribute-based and does not separately regulate passenger cars and light trucks, conflicts with
>
> 1. The fuel economy standards in this Part,
>
> 2. The judgments made by the agency in establishing those standards, and
>
> 3. The achievement of the objectives of the statute (49 U.S.C. Chapter 329) under which those standards were established, including objectives relating to reducing fuel consumption in a manner and to the extent consistent with manufacturer flexibility, consumer choice, and automobile safety.
>
> (d) Any state regulation regulating tailpipe carbon dioxide emissions from automobiles is impliedly preempted under 49 U.S.C. Chapter 329.

We have closely examined our authority and obligations under EPCA and that statute's express preemption provision. For those rulemaking actions undertaken at an agency's discretion, Section 3(a) of Executive Order 13132 instructs agencies to closely

examine their statutory authority supporting any action that would limit the policymaking discretion of the States and assess the necessity for such action. This is not such a rulemaking action. NHTSA has no discretion not to issue the CAFE standards proposed in this document. EPCA mandates that the issuance of CAFE standards for passenger cars and light trucks for model years 2011-2015. Given that a State regulation for tailpipe emissions of CO_2 is the functional equivalent of a CAFE standard, there is no way that NHTSA can tailor a fuel economy standard so as to avoid preemption. Further, EPCA itself precludes a State from adopting or enforcing a law or regulation related to fuel economy (49 U.S.C. 32919(a)).

E. Executive Order 12988 (Civil Justice Reform)

Pursuant to Executive Order 12988, "Civil Justice Reform,"[240] NHTSA has considered whether this rulemaking would have any retroactive effect. This proposed rule does not have any retroactive effect.

F. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires Federal agencies to prepare a written assessment of the costs, benefits, and other effects of a proposed or final rule that includes a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million in any one year (adjusted for inflation with base year of 1995). Adjusting this amount by the implicit gross domestic product price deflator for 2006 results in $126 million (116.043/92.106 = 1.26). Before promulgating a rule for which a written statement is needed, section 205 of UMRA generally requires NHTSA to identify and consider a reasonable number of regulatory alternatives and adopt the least

[240] 61 FR 4729 (Feb. 7, 1996).