ADVISORY COMMITTEE ON UNDERRIDE PROTECTION (ACUP)
Statement of Concurrence / Non-Concurrence

Voting Member Name	**Marianne W. Karth**
Voting Member Organization	**AnnaLeah & Mary for Truck Safety**
Stakeholder Representation	**Families of Underride Victims (& truck crash survivor)**

As a voting member and full participant of ACUP, I hereby acknowledge that I have reviewed the *ACUP Final Report* and make the following declaration regarding the Report:

1. **Concur with the Final Majority Report as written**

   Voting Member Signature _____ Date: _____

2. **Concur with the Final Minority Report as written**

   Voting Member Signature _____Date: _____

3. **Concur with the Final**
   ☒ Majority
   ☐ Minority
   Report as written with the following exception(s): (Fully explain the areas of exception below, providing specific page number if appropriate. Submission of additional pages is permitted.)

   Voting Member Signature Marianne W. Karth **Date: June 27, 2024**

   Note: Please see the detailed explanation in the attached pages.

4. **Non-Concur with both the Final Majority and Minority Reports as written. Letter of Dissent must be provided.**

   Voting Member Signature _____ Date: _____

Concur With the Majority Report -- "With Exceptions"
Marianne Karth

The Advisory Committee on Underride Protection (ACUP) was composed of truck trailer industry representatives, as well as advocates, victims, and many others. I think Congress intended to put these varied stakeholders together to share information and expertise, have informed discussions, and try to find mutual agreement to protect the public from underride death and injury. The ACUP heard multiple presentations, engaged in discussions, made and passed motions -- some of which passed with a simple majority, the same way the Supreme Court decides cases and Congress makes laws. Federal law (IIJA and FACA), guidance (GSA), the ACUP's by-laws, and NHTSA allowed ACUP to operate in this way. These were included in this Majority Report, as well as a general assessment that in 50 years NHTSA has made "no substantial progress" in preventing or mitigating side underride crashes. **I concur.** However, there are a number of important subjects **omitted** from the Majority Report, which I discuss below.

The Majority Report did not address a recurring impediment to the ACUP's efforts: some representatives of the trucking industry concealed relevant information that would have advanced the ACUP mission. For instance,

- The Truck Trailer Manufacturers Association (TTMA) representative and its member representatives on the ACUP — Utility Trailer Manufacturing and Wabash National — withheld a draft recommended practice on side impact guards that likely contains many relevant engineering details: specifications, testing protocol, and performance criteria for side impact guards.

- The American Trucking Associations (ATA) representative on the ACUP concealed the unpublished Volpe Center final report on side guards and pedestrian/bicyclist deaths, which ACUP asked NHTSA for and was denied. ATA's Dan Horvath, ACUP member, was thanked by name in the acknowledgements of the unpublished final report for "peer review, discussion, and feedback," and ATA's role in editing the report was disclosed by FRONTLINE/ProPublica. We finally received a copy of the Volpe Center final report from a whistleblower who felt compelled to make its suppressed findings see the light of day: it is cost-effective to prevent those fatalities with aero-side guards. Then NHTSA prohibited the ACUP from discussing it.

- Wabash National's representative on the ACUP, Kristin Glazner, concealed the details of her company's actions related to underride protection. Most of Wabash's trailers are sold without TOUGHGUARD rear guards. They offer it only as an Option and court records show that over 90% of recent trailer sales do not have the TOUGHGUARD Option installed. In 2022, Wabash sold 52,035 new trailers. That means at least 46,832 new trailers shipped out the door with a Rear Impact Guard which would not protect against 30% offset underride crashes. Additionally, she concealed the details of Wabash's own

development of a side impact guard, which had been discussed by its VP for Product Engineering, Robert Lane, at a public Underride Briefing for Congressional staff in October 2017. Lane told the audience, *"We're attempting to develop a device that will provide underride prevention and that is the side underride prevention -- as prescribed by the IIHS... We debuted this device at the North American Commercial Vehicle Show. And that was in Atlanta two weeks ago. It's a prototype. And we've got a ways to go. But we are fully committed to commercializing this device and making a commercially viable device. Wabash National has always been a safety leader in the industry, and we'll continue to be committed to work with our customers and our shareholders to make our highways safer."* Wabash Trailers, Side & Rear, Robert Lane, Underride Briefing on The Hill

- Utility Trailer Manufacturing's representative on the ACUP refused to disclose full documentation of all test results and protocols on its side impact guard and misrepresented its sales data when it said to the ACUP that "we can't even give it away," while telling DOT in a letter that their side impact guard "has been included on approximately 67 trailers, of which 51 have been sold to customers." Utility has also not sought to have their side impact guard independently tested, even after IIHS extended multiple invitations, and has never explained why it did not seek independent testing for its side impact guard. Additionally, Utility's representative on the ACUP complained to NHTSA and sought to have removed from the ACUP's Majority Report the notarized whistleblower statement and unpublished side guard research document. In the minority report he authored, he tried to disparage them by inaccurately calling the whistleblower a "disgruntled employee." There is no evidence for that epithet. In fact, the whistleblower received the Department's highest award for excellence, and he retired on his own terms at age 70. Trailer manufacturers apparently prefer that Congress does not probe the matter.

- The industry's preferred solution to preventing underride crashes is crash avoidance technologies. What they know, but don't publicly acknowledge, is that IIHS crash test research has shown that passenger vehicle AEB technology, even on many current models, is not reliably able to prevent a collision with the rear of a tractor-trailer. Likely, it will take years to improve the technology and resolve the auto industry's predictable litigation before the entire fleet of passenger vehicles will even have AEB. Even then, collision avoidance technologies, by themselves, will not sufficiently prevent underrides and deadly passenger compartment intrusion.

Had the trailer industry contributed its expertise and knowledge in preventing and mitigating underride crashes, the work of the ACUP would have been more effective and efficient. But they did not.

In fact, it is hard to comprehend industry's seeming disregard for the marked difference in the severity of injuries which occur when a trailer is *guarded* from underride -- and a passenger vehicle's crashworthy features are allowed to work as intended or a Vulnerable Road User is

protected from being swept under the truck and crushed by the tires -- versus those that occur when a trailer is *unguarded* (or inadequately guarded). Crash dummy data from both side crash testing of the AngelWing at 40 mph in August 2017 by the Insurance Institute for Highway Safety (IIHS) -- see Tables 3-6, all indicating below serious injury thresholds -- and rear guard crash testing research conducted by the IIHS, confirm the life-saving difference made by adequate underride protection guards. This can also be observed in conclusions from the Texas A&M computer modeling study (2018) conducted under contract with NHTSA which states,

> *. . . it can be concluded that the SUPD [Side Underride Protection Device] designs are expected to perform acceptably for impacts near the ends of the SUPD. Some internal occupant compartment deformation of the impact side A-pillar was observed for the highest severity impact system, but the injury risk associated with this level of deformation in this area is considered low.* (p.67/77)

Additionally, data from crash test vehicles at the D.C. Underride Crash Test Event in March 2019 showed that the AngelWing and the SafetySkirt prevented life-threatening injuries. Likewise, a 2021 SAE research paper on side underride guards reports that,

> *The results of the analysis indicate that available side underride guards are effective at reducing passenger compartment intrusion (PCI) substantially in what are often fatal side underride crashes. This is supported by physical testing that has shown good performance up to 64 km/h. Nearly all passenger compartment intrusion above the beltline was mitigated other than in the purely lateral impact conditions. When intrusion did extend above the beltline, e.g., in the purely lateral sliding condition, the amount of PCI was similar to the intrusion generated in a 56 km/h side impact of a 5-star rated vehicle. Further, the average amount of PCI in the above tests was similar to the amount resulting from small overlap tests of the same vehicle. These results demonstrate that an underride guard can provide a sufficient reaction surface to allow for the vehicle's passive and active safety systems to protect the occupant. The underride guard also causes the location of PCI to move from near the occupant's head and torso to the lower extremities which reduces the likelihood of serious or fatal injury.*
> Protecting-Passenger-Vehicles-from-Side-Underride-With-Heavy-Trucks, p.8

The Majority Report did not address the fact that NHTSA, too, concealed relevant information from the ACUP and impeded the advisory committee's work in other ways as well. The IIJA imposed a number of requirements on NHTSA to advance progress toward underride protection, including the establishment of the ACUP. Section 23011(d)(5) required DOT to provide support to the ACUP: "On request of the Committee, the Secretary shall provide information, administrative services, and supplies necessary for the Committee to carry out the duties of the Committee." But NHTSA improperly denied information requested by the ACUP.

FRONTLINE/ProPublica's investigative documentary, *America's Dangerous Trucks*, provoked the ACUP to request the unpublished version of the Volpe Center research report that was reportedly revised by agency officials in response to pressure from the trucking industry.

NHTSA's designated federal officer (DFO) replied in writing to the ACUP that the agency would not provide "FOIA exempt" materials to the Committee, citing exemption 5 of the Freedom of Information Act that protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[1] The DFO's reply implied that the draft report requested by the ACUP was pre-decisional and deliberative and would receive privilege under the FOIA.

However, NHTSA was incorrect to apply the FOIA Exemption 5 to the ACUP's request. The FOIA applies to requests for information made by "the public." The ACUP members are not the general public but are Congressionally-mandated, agency-selected experts. Their information requests were made pursuant to IIJA Section 23011(d)(5), not FOIA.

The ACUP reiterated its request for information and submitted a six-page legal opinion from Professor Michael Oswalt, professor of law at Wayne State Law School. Professor Oswalt's memorandum concluded: "ACUP *may* receive deliberative materials; [and] ACUP *must* receive requested deliberative materials," citing appellate case law, a DOJ Office of Legal Counsel opinion, the General Services Administration Guidelines for federal advisory committees, and the IIJA.

In response, NHTSA wrote just four paragraphs when it denied again the ACUP's request for information. NHTSA's memorandum ignored most of the legal authorities cited by Professor Oswalt. Instead, NHTSA relied on narrow readings of the IIJA and the Federal Advisory Committee Act, concluding: "Neither the Federal Advisory Committee Act (FACA) nor IIJA compels this conclusion [that NHTSA must provide deliberative information to the ACUP]." To deny ACUP's request, NHTSA gave itself veto power not found in either law:

> the determination about what is necessary to provide for the ACUP to carry out its duties *resides with the chartering agency* based on the stated purpose of the committee. (emphasis added)

However, NHTSA misread the law. Nowhere in the IIJA or the FACA did Congress expressly assign to NHTSA or other chartering agencies a duty to determine what information the advisory committee needs to review or not to review. In fact, a more plausible interpretation of these laws is that advisory committees themselves are intended to determine what they need to perform their duties: they are composed of non-governmental experts and have responsibilities to provide independent advice and assessments to the Secretary and Congress.

Furthermore, based on the stated purpose of the committee — "to provide advice and recommendations to the Secretary on safety regulations to reduce underride crashes and fatalities" -- it is hard to imagine material *more* relevant than cost-benefit analyses of safety regulations to reduce underride crashes, which the unpublished final report contained. The standard NHTSA is misreading to deny the ACUP materials it requested in fact supports giving

[1] Department of Justice Guide to the Freedom of Information Act, Exemption 5 (online at https://www.justice.gov/archive/oip/foia_guide09/exemption5.pdf).

the ACUP those materials. NHTSA's attempts to hamper the ACUP from reviewing drafts of the suppressed safety report were overcome when Quon Kwan, the retired FMCSA project manager of the safety report, provided a notarized statement and the report the ACUP had sought to safety advocates, who attached them to a public letter to the Inspector General.

NHTSA also refused to comply with the ACUP's information request for the basis of determinations it made in relevant rulemakings. For example, the ACUP asked NHTSA why the cost-benefit analysis used in its side underride rulemaking *excluded* fatalities of Vulnerable Road Users. NHTSA misleadingly responded that the answers to that and other questions could be found in the cost-benefit analysis and referred the ACUP to review it. The cost-benefit analysis asserts that its scope is limited to crashes involving light passenger vehicles and large commercial trucks. But nowhere does it provide an explanation for why its scope excluded fatalities of Vulnerable Road Users.[2]

In other ways, too, NHTSA impeded the ACUP. NHTSA delayed formally organizing the committee, which deprived the ACUP of nearly half of its charter period. Under federal law, federal advisory committees are chartered for a two-year period (41 CFR § 102–3.55), unless Congress expressly authorizes a different duration, the charter is renewed, or the committee completes its work and terminates. DOT filed the ACUP's charter on June 22, 2022, but delayed organizing the first meeting of the ACUP until May 25, 2023. This delay deprived the advisory committee of 45% of its charter period (11 months out of a total of 24 months). NHTSA further delayed the Committee's work by scheduling the second meeting for November 15, 2023, nearly six months after the first meeting. At the ACUP's second meeting, Chairman Gildea requested that DOT extend the ACUP's charter, but she received no reply. At its third meeting, Chairman Jackson again requested an extension of the charter in order to allow the ACUP to meet monthly until October 2024. He received a reply only after the final meeting of the ACUP on May 22, 2024, when plans for the Report to the Secretary and Congress were already underway due to the expiration of the charter.

NHTSA also ignored the federal requirement to timely post advisory committee records (i.e., reports, transcripts, minutes, appendices, working papers, drafts, studies, agenda, or other documents) on the ACUP Federal Advisory Committee Act Database and make them available to the public. The General Services Administration (GSA) Final Rule for Federal Advisory Committee Management requires "...the contemporaneous availability of advisory committee records that, when taken in conjunction with the ability to attend advisory committee meetings, ensures that interested parties have a meaningful opportunity to comprehend fully the work undertaken by the advisory committee." In practice, NHTSA's implementation of the requirement

[2] Office of Regulatory Analysis and Evaluation, National Center for Statistics and Analysis, National Highway Traffic Safety Administration, "Side impact guards for combination truck-trailers: Cost-benefit analysis," Report No. DOT HS 813 404 (Apr. 2023) (online at https://downloads.regulations.gov/NHTSA-2023-0012-0087/attachment_2.pdf).

was exceedingly slow which, when combined with the truncated lifespan of the Committee, deprived the public of "timely access to advisory committee records," as the law requires.[3]

The Report did not address *why* the industry would conceal relevant information from a federal advisory committee they participated in, or why NHTSA would do the same. The industry's purpose could not have been to assist the ACUP in *recommending* underride guards. But it could have been to *thwart* agreement on side guards and enhanced rear guards. And that is what they have done, with their votes on policy recommendations and their comments in our deliberations. The latter were characterized by unsubstantiated, unscientific and untested engineering objections, including high-centering of side guards on railroad tracks, loading docks, secondary collisions from outward rotation following a 30% offset rear impact with a TOUGHGUARD, and so on.

Despite the fact that NHTSA has acknowledged that crashes at the corners of the rear guard result in more severe injuries than in center impacts, industry representatives on the ACUP objected to a federal requirement for rear impact guards that mitigate these more harmful crashes. The trailer manufacturing industry claims without support that such crashes are not frequent. In fact, there are many documented underride crashes where 30% overlap results in a driver surviving with minor injuries while a front seat passenger is killed, or vice versa -- because it's not the crash that kills but the underride (and any research of underride crash characteristics by NHTSA should address this). They have also asserted -- without data -- the dangers of unintended outward rotation causing secondary collisions with "innocent" (as Utility's Jeff Bennett put it) vehicles not involved in the primary collision. Besides the absurdity of implying that crash victims deserve all the blame for their death or injuries, these industry objections lack merit and display the indifference that some in the industry exhibit towards the human suffering that their trailers cause. According to a statement made during a discussion in February 2023 by Jared Bryson, a mechanical engineer from Virginia Tech, "If it collides at the rear corner, with or without guard, it will rotate." In other words, if there is a tendency for a colliding car that strikes the corner of a rear guard to rotate, it is true now and enhancing protection with a TOUGHGUARD standard will not change that. As for Bennett's hypothetical scenario of a second collision due to outward rotation, ACUP members received an analysis from engineer Salena Zellers, BioInjury LLC, which stated, "It is not possible to determine whether a vehicle that impacts the rear of a truck equipped with rear underride guards that are designed to protect in 30% offset impact, will spin out into traffic and impact a secondary vehicle resulting in mortality in a secondary accident. There are too many variables involved to gather data to prove or disprove that supposition." (See attachment.)

Trailer manufacturer members of the ACUP insisted on a supermajority standard for ratification of policy recommendations to prevent the ACUP from adopting policies the industry opposed. In their minority report they cited a dictionary definition for "consensus," but they ignored federal law, rules, and NHTSA's instructions to the ACUP. A supermajority standard was neither

[3] General Services Administration, Final Rule; Federal Advisory Committee Management, 66 FR 37728 (July 19, 2001) (online at https://www.gsa.gov/system/files/FACAFinalRule_R2E-cNZ_0Z5RDZ-i34K-pR.pdf).

required by nor consistent with the law and guidance on federal advisory committees. The ACUP asked NHTSA to provide a definition of consensus. NHTSA expressly directed the ACUP to choose its own threshold for consensus. By a majority vote on two occasions, the ACUP chose to utilize a simple majority standard to adopt motions for Advice and Recommendations to the Secretary. At no time did NHTSA ever advise or require the ACUP to use any other standard. Having lost the ability to veto recommendations disfavored by trailer manufacturers, the minority report attempts to discredit the validity of ACUP's recommendations by distinguishing between those recommendations that carried with industry's support and those that carried over the industry's opposition. Most of its pages are devoted to this red herring of the proper meaning of consensus. The minority's obsession inadvertently reveals their frustration with their inability to control the ACUP. It also exposes the trailer manufacturers' unreasonable bias against regulations requiring side impact guards and stronger rear guards. The trailer industry's cynicism is revealed by the minority report's call for "additional research" and "further investigation." Who can object to gathering information and expanding knowledge? But this industry is not interested in knowing what they can do to prevent fatalities caused by their trailers. This industry lobbied against the knowledge and research contained in the Volpe Center's study of preventing pedestrian and bicyclist fatalities with side guards, and NHTSA suppressed the research rather than publish it over the industry's objections. Their calls for more research disguise their opposition to safety regulation. Furthermore, their preference for AEB, the cost of which would be borne by automakers and consumers, as a solution to the underride problem exposes their unprincipled and unscientific opposition to safety regulations that would require them to pay the cost.

It should come as no surprise that a committee composed of members representing widely-divergent stakes in the underride issue would have difficulty finding common ground and tend to vote in blocks, which both industry representatives and safety advocates sometimes did. Yet, a similar group demonstrated that it *is* possible to advance safety when they crafted a consensus rear impact guard standard in June 2016. Stoughton Trailers displayed enthusiasm when a car driver and his passenger survived a 30% offset collision when a Stoughton TOUGHGUARD Rear Impact Guard prevented underride in 2017. Unfortunately, Stoughton did not have a company representative on the ACUP, though it was represented indirectly as a member of the TTMA.

But the trailer manufacturing industry did not exhibit corporate responsibility during ACUP's deliberations. Why would companies facing liability risk for fatalities, or a trade association comprised of those companies, obstruct a policy on guards that can *mitigate* the cost of that liability, not to mention prevent traffic fatalities?

Money. Most of the trailer industry apparently believes they will make more money by defending against judgments for fatalities caused by their trailers than by installing guards on their trailers to prevent those fatalities. That's how some big businesses operate. Utility was found negligent by a jury for the fiery underride death of a 16 year-old boy. Nevertheless, ACUP member and Utility executive Jeff Bennett disparaged Utility's own side impact guard as well as the SafetySkirt aftermarket/retrofit system developed by ACUP member Aaron Kiefer. SafetySkirt

provides a level of protection that exceeds Utility's side impact guard, since it prevents underride at locations around the periphery of a trailer. To such businesses, saving a penny today is preferable to saving two in the future, and preventing deaths caused by their products is not a top priority.

Over the past year of our deliberations, members of the trucking industry consistently raised technical objections about side impact guards and improved rear impact guards. To listen to them, these guards are infeasible. But their objections are implausible. Trailers are essentially boxes on wheels and impact guards are simply physical barriers. Trailer manufacturing requires basic engineering and metallurgy, not quantum physics. The United States has the best engineering schools in the world and produces many qualified people who possess the skills to prevent and mitigate underride crashes. As Aaron Kiefer said when interviewed in 2022 by PBS, "This is not rocket science, right? The trailer manufacturers have the engineers on staff who could create things like this overnight if they wanted to." Indeed, most of the needed research and development *has* already been performed: in TTMA's draft Recommended Practice, at Wabash, at Utility, and probably others as well.

Some American trailer manufacturers offer side underride protections on trailers they sell in foreign markets, where local regulations require them to install lateral protection devices. However, no trailer manufacturer has chosen to install side underride safety innovations on all of their products in the United States. Rather than discuss their patented knowledge with the ACUP to make safer American streets, industry representatives on the ACUP concealed important and relevant information, in apparent defense of their faith in lawyers to keep the costs of their negligence from landing on their balance sheets.

But why would NHTSA conceal information from the ACUP? We received troubling whistleblower testimony from a retired FMCSA project manager. According to his allegations, and confirmed by internal emails obtained through the Freedom of Information Act, NHTSA and Department senior officials in 2020 suppressed publicly-financed underride protection research and analysis, which concluded that it was cost-effective to prevent pedestrian and bicyclist fatalities with aerodynamic side guards. In 2023, many of the same senior officials oversaw the Advance Notice of Proposed Rulemaking on side impact guards. That rulemaking's cost-benefit analysis excluded consideration of the benefits of preventing pedestrian and bicyclist deaths, thereby reducing the benefits of regulation. At the root of both of these agency actions, confirmed by the whistleblower's assertion and FRONTLINE/ProPublica's revelation, is substantial evidence that the agency was accommodating industry opposition to side underride protection. Thus, the answer to our question: On the matter of underride protection at least, NHTSA behaves as if it has been captured by the industry it regulates.

We are at a crossroads. Thousands of lives have already been needlessly lost to dangerous trucks, and thousands more will predictably follow. My hope was that we could build upon what was done in 2016 when a group of diverse stakeholders found common ground and collaboratively addressed rear underride. That has obviously not occurred. NHTSA appears to be MIA, just as it has been for the past 50 years.

Congress is also at a crossroads. The ACUP Report's assessment of NHTSA's lack of progress on underride protection should spur Congress to action. When will Congress conduct oversight to address NHTSA's 50-year failure to address the underride problem?

We may all ask ourselves: What will we do going forward? Be guardians of public safety or bystanders to preventable underride deaths?

ATTACHMENTS

Legal Opinion of Professor Michael Oswalt on the ACUP's access to deliberative materials
Legal Opinion of NHTSA on the ACUP's access to deliberative materials
Email Communication from Salena Zellers on Biomechanics of Secondary Collisions

Legal Opinion of Michael Oswalt on the ACUP's Access to Deliberative Materials

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Michael M. Oswalt
Professor of Law

February 2, 2024

The Honorable Pete Buttigieg, Secretary, U.S. Department of Transportation
Ms. Adrienne Gildea, Chair, the Advisory Committee on Underride Protection (ACUP)
Ms. Marianne Karth and Members of the ACUP
Mr. James Myers, Designated Federal Official for the ACUP
U.S. Department of Transportation
1200 New Jersey Ave, SE
Washington, DC 20590

Dear Secretary Buttigieg, Chair Gildea, Members of the Committee, and Mr. Myers:

I write to provide my opinion on the Advisory Committee on Underride Protection's rights to information held by the Department of Transportation. Committee members seek this information because of their statutory mandate to provide advice, recommendations, and progress reports to the Secretary, and to Congress, under the Infrastructure Investment and Jobs Act of 2021.

Background

In 2021, Congress passed the Infrastructure Investment and Jobs Act (IIJA).[1] Among other provisions, IIJA included Section 23011, requiring the Department of Transportation (DOT) to finalize various rules and research about protecting the public from underride crashes, a particularly gruesome form of traffic death where a passenger vehicle, motorcycle, bicycle or pedestrian collides with the bottom edge of a large commercial truck's freight box or semitrailer and may pass under the rear axles, causing decapitation and crushing to death.[2]

Most relevant here, Congress gave DOT one year to issue a final rule equipping trucks with rear impact guards to prevent underride crashes and complete research into side underride protection.[3] Congress created the Advisory Committee on Underride Protection (ACUP) to help them do it.[4]

As set out in Section 23011(d)(1), (5) and (6):

(d) ADVISORY COMMITTEE ON UNDERRIDE PROTECTION.—

[1] Infrastructure Investment and Jobs Act of 2021, Pub. L. No. 117-58, 135 Stat. 429 (2021).
[2] Infrastructure Investment and Jobs Act of 2021 § 23011(b)(1)(A), 135 Stat. at 768.
[3] Infrastructure Investment and Jobs Act of 2021 § 23011(b), 135 Stat. at 768.
[4] Infrastructure Investment and Jobs Act of 2021 § 23011(d), 135 Stat. at 770.

> (1) ESTABLISHMENT.—The Secretary shall establish an Advisory Committee on Underride Protection to provide advice and recommendations to the Secretary on safety regulations to reduce underride crashes and fatalities relating to underride crashes
>
> . . .
>
> (5) SUPPORT.—On request of the Committee, the Secretary shall provide information, administrative services, and supplies necessary for the Committee to carry out the duties of the Committee.
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> (6) REPORT.—The Committee shall submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives a biennial report that—
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> (A) describes the advice and recommendations made to the Secretary; and
>
> (B) includes an assessment of progress made by the Secretary in advancing safety regulations relating to underride crashes.

ACUP has asked DOT for information relevant to completing Congress's required report laying out the committee's advice, recommendations, and assessment of the agency's progress. Questions about how DOT calculates preventable deaths, the costs and benefits of various options for preventing deaths, and the reasons why some categories of underride fatality, but not others, have been or will be used in the rulemaking process have, for example, been asked. Committee members—who include representatives from truck and trailer manufacturers, law enforcement, crash investigators, insurance officials, safety organizations, and families who have lost loved ones to underride crashes—have also requested information about a DOT safety report featured on the PBS documentary series "Frontline."[5] Redlined drafts of the report featured in the show suggest that portions of the report were "stripped and the results were changed."[6]

The agency has not responded.

Three questions have now arisen.

Questions Presented

1) Whether ACUP may receive intra- or inter-agency deliberative materials that would otherwise be barred from public disclosure under Exemption 5 of the Freedom of Information Act?

2) Whether ACUP must receive requested intra- or inter-agency deliberative materials that would otherwise be subject to Exemption 5?

3) Whether ACUP's information requests can cover materials related to pending rulemakings?

Conclusions and Analysis

As explained below,

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[5] Frontline, America's Dangerous Trucks (Jun. 13, 2023), https://www.pbs.org/wgbh/frontline/documentary/americas-dangerous-trucks/.

[6] *Id.*

- ACUP *may* receive deliberative materials,
- ACUP *must* receive requested deliberative materials, and
- ACUP's information requests *may* relate to pending, not just completed, rulemakings.

ACUP may receive intra- and inter-agency deliberative materials that would otherwise be barred from public disclosure under Exemption 5 of the Freedom of Information Act

As a longstanding matter of administrative law, federal advisory committees like ACUP are permitted to receive relevant agency deliberative materials because the D.C. Circuit Court of Appeals, the Department of Justice's Office of Legal Counsel, and the Federal Advisory Committee Act's own rules expressly anticipate, and acknowledge, that advisory committees regularly receive them. Disclosure issues have arisen only where the question is whether the general public can access deliberative materials *already provided* to an advisory committee by an agency. In that context, the consistent conclusion has been that the public cannot make an end run around Freedom of Information Act[7] (FOIA) exemptions by asking the committee, instead of the agency, to see them.

As the D.C. Circuit in 1976 put the question and the answer where the public wanted to attend an advisory committee meeting including discussion of a privileged agency document with "various proposals and recommendations . . . relating to future planning of programs, policies and objectives":[8]

> "Here, we are concerned with a memorandum prepared by the agency and shown to the advisory committee. *A fortiori*, an intra-agency memorandum supplied by the agency to an advisory committee, is subject to exemption five of the Freedom of Information Act."[9]

Similarly, advisory committees themselves are enabled by the Federal Advisory Committee Act (FACA),[10] and when asked to consider the scope of FACA section 10(b), which mandates the "public inspection" of advisory committee "working papers, drafts," and other materials,[11] the Office of Legal Counsel (OLC or Office) in 1988 concluded, first, that FOIA exemption 5[12] "is not generally applicable to materials prepared by or for an advisory committee[.]"[13] Just like the D.C. Circuit, OLC then assumed that committees do, of course, possess privileged agency materials, necessitating the same carve-out from the public's right to information:

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[7] 5 U.S.C. § 552.

[8] *Aviation Consumer Action Project v. Washburn*, 535 F.2d 101, 104 (D.C. Cir. 1976).

[9] *Id.*

[10] Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. app. 2 §§ 1-16).

[11] 5 U.S.C. app. 2 § 10(b).

[12] Exemption 5 states that FOIA's disclosure rules are not applicable "to matters that are—(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). As summarized by the Office Legal Counsel, "Exemption 5 of FOIA exempts inter-agency and intra-agency deliberative or predecisional documents from disclosure." Office of Legal Counsel, U.S. Department of Justice, 12 Op. O.L.C. 73, 74, April 29, 1988.

[13] Office of Legal Counsel, U.S. Department of Justice, 12 Op. O.L.C. 73, 77, April 29, 1988.

"[B]ut . . . [exemption 5] does extend to protected privileged documents *delivered from the agency to an advisory committee.*"[14] (emphasis added)

Confirming this, the Office called its conclusion "consistent with the holding in *Aviation Consumer Action Project v. Washburn*, 535 F.2d 101, 107-108 (D.C. Cir. 1976) that agencies may disclose predecisional documents to advisory committees without waiving their ability to protect the records under exemption 5 . . . ."[15]

The General Services Administration would later rely entirely on OLC's analysis in a final Federal Advisory Committee Act rulemaking in 2001.[16]

But it is not only the case that advisory committees may be provided with privileged agency documents. The requested materials must be provided.

ACUP must receive documents requested from the DOT

DOT must provide ACUP members, but not the public, with requested deliberative documents because the committee's right to request and receive DOT information is created by IIJA, not FOIA. Simply put, FOIA has exemptions and IIJA does not. Indeed, under Section 23011(d)(5), upon "request of the Committee, the Secretary *shall* provide information . . . necessary for the Committee to carry out the duties of the Committee."[17] The Secretary's disclosure duty is without exception, and the statute states no limits on what materials ACUP members might deem "necessary" to adequately advise Congress.

ACUP committee members, moreover, are decidedly not the "public." The Federal Advisory Committee Act itself arose from rapid advisory body growth that some compared to an emerging "fifth branch of government" or administrative "mini-republic of ideas."[18] FACA responded with numerous transparency reforms but also the inclusion of a range of government-like formalities, from expense accounting, to minute-keeping, to term limits, to the requirement that membership be "fairly balanced in terms of the points of view represented and the functions" performed.[19] In 2017, the federal government funded over a thousand total committees at a cost of nearly $400 million, not counting over $90 million on committee member travel and honoraria.[20]

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[14] *Id. See also id.* at 83 ("For the foregoing reasons, exemption 5 properly applies under FACA when the agency has transmitted to an advisory committee a document that would be protected from disclosure if in possession of the agency.").

[15] *Id.* at 82 ft. 29.

[16] Federal Advisory Committee Management, 66 Fed. Reg. 37,731-32 (Jul. 19, 2001) ("The opinion further states that: . . . 'documents prepared by an agency do not lose the protection of exemption 5 by virtue of the fact that they are delivered to an advisory committee.'" (citing Office of Legal Counsel, U.S. Department of Justice, 12 Op. O.L.C. 73, April 29, 1988)).

[17] Infrastructure Investment and Jobs Act of 2021 § 23011(d)(5), 135 Stat. at 771 (emphasis added).

[18] Brian D. Feinstein & Daniel J. Hemel, *Outside Advisors Inside Agencies*, 108 GEO. L.J. 1139, 1141-42, 1147-48 (2020) (citing SHEILA JASANOFF, THE FIFTH BRANCH: SCIENCE ADVISORS AS POLICYMAKERS (1990) and Sheila Jasanoff, *(No?) Accounting for Expertise*, 30 SCI. & PUB. POL'Y 157, 161 (2003)).

[19] *Id.* at 1148-49.

[20] *Id.* at 1150-51.

So while FACA committees are not the government,[21] their unique role and function within the bureaucracy equips them to appropriately, and discretely, access privileged agency information in ways FOIA does not contemplate for the general public. In ACUP's case, Congress could have cabined access to DOT documents in any number of ways at the committee's founding. By the IIJA's plain terms it did not.

Finally, and relatedly, the universe of materials subject to the DOT's mandatory disclosure is not limited to any step in the agency's deliberative timeline, and certainly not to completed actions or rulemakings.

ACUP's right to access DOT deliberative information includes materials relating to pending rulemakings

ACUP has the right to relevant information and documents at any stage in DOT's deliberative processes because its primary statutory duty "includes an assessment of progress made by the Secretary in advancing safety regulations."[22] A "progress" report surely encompasses interim steps, not just analysis of the final product. The word itself means "a forward or onward movement (as to an objective or to a goal),"[23] confirming that Congress expected ACUP to be engaged in iterative oversight, including evaluation of the agency's momentum.

In fact, a contrary interpretation—one that would restrict disclosure to completed rulemakings—would defeat Congressional intent with respect both to ACUP and the underlying FACA statute. Like all advisory committees, ACUP is "by its very nature . . . a group of 'outsiders' called upon because of their expertise to offer views and comments unavailable within the agency."[24] FACA's procedural guardrails are in place to ensure that ACUP's core function of providing "advice and recommendations"[25] is not "inappropriately influenced by the appointing authority or any special interest but will instead be the result of the advisory committee's independent judgment."[26] But if important decision-making data is available or unavailable based on the Secretary's personal assessment of its internal decisional timeline, true independence, and true independent judgment, is impossible. Advising meaningfully and recommending meaningfully—including what political scientists studying committees have called "sound[ing] the fire alarm when agencies deviate from their statutory mandates"[27]—requires connecting the deliberative dots in something close to real time. When it comes to assisting in the ins-and-outs of rulemaking, hindsight is not just 20/20, it's just not useful.

It is for this reason that although scholars suggest that the "major impediment" to Congressional oversight is a basic lack of information about administrative decision making,[28]

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[21] *See* Office of Legal Counsel, U.S. Department of Justice, 12 Op. O.L.C. 73, 81, April 29, 1988 ("Several courts, as well as this Office, have construed the statutory distinction to signify that advisory committees are not agencies.").

[22] Infrastructure Investment and Jobs Act of 2021 § 23011(d)(6)(b).

[23] Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/progress (quoting definition "2," where definition "1" refers generally to processions).

[24] *See* Office of Legal Counsel, U.S. Department of Justice, 12 Op. O.L.C. 73, 82, April 29, 1988.

[25] Infrastructure Investment and Jobs Act of 2021 § 23011(d)(6)(a).

[26] Federal Advisory Committee Act, 5 U.S.C. app. I, § 5(b)(3).

[27] Feinstein & Hemel, *supra* note 18, at 1153 (citing Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984)).

[28] Steven J. Balla & John R. Wright, *Can Advisory Committees Facilitate Congressional Oversight of the Bureaucracy?*, in CONGRESS ON DISPLAY, CONGRESS AT WORK 167, 172 (2000). *See also id.* (stating that "one way

the general fix is equally simple: FACA "committee members must have access to agency information."[29] The Senators and Representatives waiting for their IIJA Section 23011(d)(6)(B) "assessment of progress" would no doubt add: at any stage of agency lawmaking.

Thank you for the opportunity to submit this opinion.

Sincerely,

Michael M. Oswalt
Professor of Law

Institutional affiliation is provided for identification purposes only. Views expressed are my own and not necessarily shared by my employer.

for Congress to reduce its informational disadvantage is to provide [advocates] with access to [agency] decision making" and "suggest[ing] that Congress routinely establish[] access of this sort through advisory committees").

[29] *Id.* at 173.

Legal Opinion of NHTSA on the ACUP's Access to Deliberative Materials

U.S. Department
of Transportation
**National Highway
Traffic Safety
Administration**
Office of the Chief Counsel

1200 New Jersey Avenue SE.
Washington, DC 20590

MEMORANDUM

February 26, 2024

From: John Donaldson
Acting Chief Counsel

To: The Advisory Committee on Underride Protection

Through: James Myers
Designated Federal Officer

Subject: February 2, 2024 Opinion of Michael M. Oswalt

I am responding to a document the Advisory Committee on Underride Protection (ACUP) recently received about information available to Federal advisory committees. That document, from Professor Michael M. Oswalt of Wayne State Law School to the Secretary of Transportation and to the ACUP, states, among other things, that the Infrastructure Investment and Jobs Act (IIJA) *requires* that the ACUP be provided access to internal deliberations of Federal officials upon request. NHTSA respectfully disagrees. Neither the Federal Advisory Committee Act (FACA) nor IIJA compels this conclusion.

As a longstanding requirement of committee creation under the FACA, the chartering Federal agency is obligated to provide necessary administrative support for the committee. The language in IIJA does nothing more than echo this FACA requirement, allowing the ACUP to make requests for information, administrative services, and supplies and requiring the Secretary to provide those "necessary for the committee to carry out the duties of the committee." However, neither the FACA nor IIJA contains a mandate to provide deliberative materials—the determination about what is *necessary* to provide for the ACUP to carry out its duties resides with the chartering agency based on the stated purpose of the committee.

This approach applies to the ACUP and to all other advisory committees at DOT. The ACUP is not entitled as a matter of law to all information or services it might request, including pre-decisional or deliberative agency documents. We have determined that such documents are not necessary for the ACUP to fulfill its role of providing advice and recommendations, drawing on the varied perspectives of its members, on safety regulations to reduce underride crashes.

The Department will continue to respond to questions and provide all necessary support consistent with its statutory obligations. We appreciate the important advisory role of the ACUP, and we look forward to its next meeting on March 13.

Email Communication from Salena Zellers on Biomechanics of Secondary Collisions

It is not possible to determine whether a vehicle that impacts the rear of a truck equipped with rear underride guards that are designed to protect in 30% offset impact, will spin out into traffic and impact a secondary vehicle resulting in mortality in a secondary accident.

There are too many variables involved to gather data to prove or disprove that supposition. Here are just a *few* of the variables that would have to be considered:

1. Which side of the truck is impacted (road side or shoulder side)?
2. Does the car deflect into traffic or off the road?
3. Does the driver regain control of their vehicle after deflecting off the truck?
4. What is the speed of the primary vehicle?
5. What is the percentage of offset?
6. What is the impact angle?
7. If it deflects into traffic, are there other car(s) in the vicinity? (Dependent on variables that result in people driving their cars, as well as the location of the incident, time of day, time of year, etc.)
8. If there is a car in the vicinity of the impact and the primary vehicle spins off impacting that secondary vehicle:
    1. What type of vehicle is the secondary vehicle (truck, SUV, passenger car, etc)?
    2. What is the Delta V of that impact?
    3. Where is the impact to the secondary vehicle? (front/side/rear)
    4. Which seats are occupied, what are the demographics and health status of those occupants, what active safety features are being used, what passive safety features are available on that vehicle?
    5. Is the impact in the area of the occupant(s)?
    6. Is the impact such that the safety features of the secondary vehicle would protect those occupants?

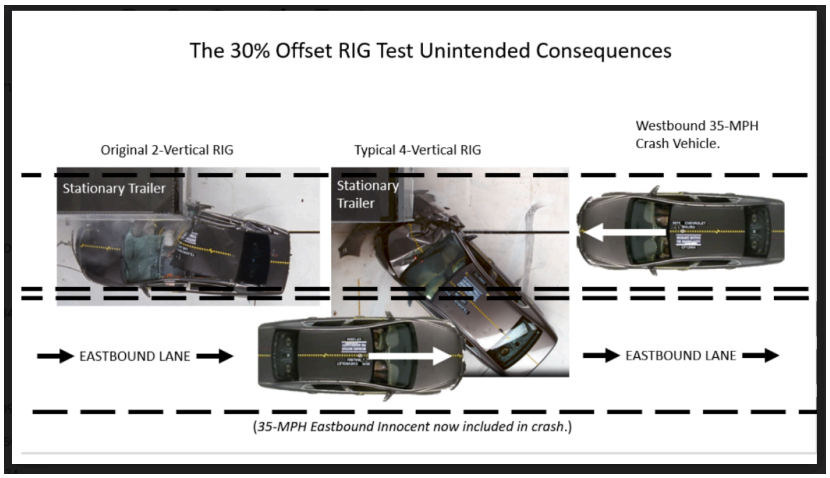
While the FARS data show that 24% of impacts between a vehicle and the rear of a truck involve more than one vehicle, most, if not all, of these crashes do not involve a truck with reinforced rear guards that protect in a 30% offset impact. Therefore, the crashes in FARS that involve secondary vehicles involve the other vehicles **because** the primary vehicle under rode the rear of the truck, not because they rotated into traffic. It is possible to analyze those crashes to determine if the secondary vehicles would have been affected by the primary vehicle spinning off. In fact, it is possible that the secondary vehicle could avoid the crash if the primary vehicle rotated out of the way.

In reality, the FARS data will not be helpful in determining if a vehicle impact into the rear of a truck equipped with rear underride guards designed to protect in 30% offset impact, will spin out into traffic and impact a secondary vehicle resulting in mortality in a secondary accident. Because most trucks are not equipped with these types of rear underride guards, you would need to determine how many vehicles in the vicinity of a vehicle to truck rear impact were **not**

involved in the crash, would be involved if the primary vehicle rotated into traffic. There is no way to determine that from FARS or any other data because vehicles that are not involved in the crash are not reported.

With respect to conducting a comparative biomechanical assessment of injuries between a 30% offset underride crash with intrusion into the occupant survival space and a secondary collision from a car rotating outboard into another lane of traffic, there are so many variables, including those listed above, that this assessment would not be predictive across the board.

However, the illustrations* provided, which show a vehicle spinning off into traffic after the impact, show the front of the secondary vehicle impacting the primary vehicle. Vehicle safety features for front seat occupants are finely tuned in frontal impacts and have been shown to protect occupants in crash severities including Delta Vs of 40 to 50 mph.



Jeff Bennett, Utility Trailer Manufacturing, PowerPoint Slide, 2/8/24 (*insert, mwk)

A History of the Trailer Rear Impact Guard from Utility's Perspective

A similar problem was addressed in the FHWA's evaluation criteria for guardrails place[d] along roadways. While the purpose of a guardrail is to redirect the car back onto the road rather than going off the road, the vehicle trajectory hazard is addressed by the design of the guardrail when possible. However, while a secondary impact is a risk, it is outweighed by the risk of the primary vehicle going off the road.

According to the FHWA [Guardrail 101 (dot.gov)]

> "The guardrail can operate to deflect a vehicle back to the roadway, slow the vehicle down to a complete stop, or, in certain circumstances, slow the vehicle down and then let it proceed past the guardrail."
> "The Guardrail Face. The face is the length of the guardrail extending from the end terminal alongside the road. Its function is always to redirect the vehicle back onto the roadway."

The National Cooperative Highway Research Program NCHRP Report 350 - Recommended Procedures for the Safety Performance Evaluation of Highway Features (part a) (trb.org), which was the standard for FHWA acceptance until 2018, stated the following:

> "Test article should contain and redirect the vehicle" [p 53]
> "After collision it is preferable that the vehicle's trajectory not intrude into adjacent traffic lanes." [p 55]
> "Vehicular trajectory hazard is a measure of the potential of the post-impact trajectory of the vehicle to cause a subsequent multivehicle accident, thereby subjecting occupants of other vehicles to undue hazard or to subject the occupants of the impacting vehicle to secondary collisions with other fixed objects. As indicated in Table 5.1, it is preferable that the vehicle trajectory and final stopping position intrude a minimum distance, if at all, into adjacent or opposing traffic lanes." [p 55]

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