U.S. Department of Transportation
National Highway Traffic Safety Administration

NHTSA

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VIA EMAIL

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NEF-230
ICD-2021-008

Re: Bisbee Importing, Inc.
Registered Importer No. R-09-365
NHTSA File No. ICD-2021-008

Notice of Denial of Request for Reconsideration of Automatic Suspension of the Registered Importer Registration of Bisbee Importing, Inc.

Dear Ms. Chaney:

We are writing to provide Bisbee Importing, Inc. ("Bisbee Importing") with written notice that the National Highway Traffic Safety Administration ("NHTSA" or "the agency") has considered and is denying Bisbee Importing's June 13, 2022 request for reconsideration ("Request for Reconsideration") of the previously imposed 270-day automatic suspension of Bisbee Importing's registered importer ("RI") registration. *See* 49 C.F.R. § 592.7(a)(2). The agency informed Bisbee Importing of this suspension by notice dated May 20, 2022 ("Notice of Automatic Suspension"). Bisbee Importing's contention that "irregularities" in its submissions to NHTSA did not constitute a "knowing false and misleading statement" to the agency does not support a change in NHTSA's determination. Even if Bisbee Importing did not have actual knowledge of the false and misleading nature of its certifications of conformance, it still acted "knowingly" under 49 C.F.R. § 592.7(a). Because NHTSA has denied Bisbee Importing's Request for Reconsideration, the agency's suspension of Bisbee Importing's RI registration remains in effect until February 14, 2023, or such earlier date as the agency may subsequently decide is appropriate. *See* 49 C.F.R. § 592.7(c)(2). The basis for the agency's decision is set forth in further detail below.

A. Effect of NHTSA's Decision

The suspension of Bisbee Importing's RI registration, effective May 20, 2022, remains in effect for a period of 270 days based on NHTSA's conclusion that Bisbee Importing knowingly submitted false and misleading certifications of conformance to the agency. *See* 49 U.S.C. § 30141(c)(4)(B); 49 C.F.R. § 592.7(a)(2). During the term of this suspension, Bisbee Importing is not considered a RI, does "not have the rights and authorities" of a RI, and "must cease importing, and will not be allowed to import, vehicles for resale." 49 C.F.R. § 592.7(d)(1). As required by the regulations, NHTSA notified U.S. Customs and Border Protection (CBP) of this suspension after providing Bisbee Importing with the Notice of Automatic Suspension. *See id.*

Within thirty (30) days of the Notice of Automatic Suspension and with respect to each nonconforming vehicle currently in its possession that was imported into the United States, Bisbee Importing must have either 1) conformed the vehicle, affixed to it a certification label, and submitted a certification of conformance to NHTSA (all within 120 days of the vehicle's entry into the United States) or 2) exported the vehicle. 49 C.F.R. § 592.7(d)(2)–(3). The Notice of Automatic Suspension separately required Bisbee Importing, with respect to any vehicle imported pursuant to 49 C.F.R. § 591.5(f)(2)(ii) that Bisbee Importing has agreed to bring into compliance with all applicable standards and for which it has not furnished a certification of conformance to NHTSA, to immediately notify the owner of the vehicle in writing that Bisbee Importing's registration has been suspended. *Id.* § 592.7(d)(4).

Bisbee Importing remains obligated under 49 C.F.R. § 592.6(i) to notify owners and to remedy noncompliances or safety related defects for each vehicle for which it has furnished a certification of conformance to NHTSA. *Id.* § 592.7(e).

The RI registration of Bisbee Importing will remain suspended until February 14, 2023, 270 days from the date of the Notice of Automatic Suspension, or on such earlier date as NHTSA may subsequently determine is appropriate. *Id.* § 592.7(c)(2). As a pre-condition of its reinstatement, Bisbee Importing will be required to pay any outstanding annual fees, submit any outstanding annual statements, and otherwise comply with the requirements applicable to RIs. *See* 49 C.F.R. Part 592. There is no further opportunity for administrative reconsideration of this decision. *See id.* § 592.7(a)(2). Judicial review of a final agency action is available in a United States District Court. *See* 5 U.S.C. § 704.

B. Summary of Enforcement Proceeding

On November 12, 2021, NHTSA sent Bisbee Importing notice that it was the subject of a compliance investigation. NHTSA sent Bisbee Importing the Notice of Automatic Suspension on May 20, 2022, pursuant to the applicable regulations, which provide that the registration of a RI may be automatically suspended if, among other things, the agency "decides that a Registered Importer has knowingly filed a false or misleading certification." 49 C.F.R. § 592.7(a)(2). The Notice of Automatic Suspension identified thirteen (13) separate false and misleading

certifications of conformance, which the agency determined Bisbee Importing knowingly submitted to the agency.[1]

As set forth in the Notice of Automatic Suspension, NHTSA determined that Bisbee Importing knowingly submitted false or misleading certifications of conformance with respect to thirteen (13) vehicles. Based on the violations, these vehicles fell into three groups. For each vehicle in Group 1 (identified as Vehicles J, K, L, and M), NHTSA determined that Bisbee Importing knowingly falsely and misleadingly certified: that it had not made any conformance modifications to the vehicle (or, alternatively, that its principal had personally witnessed modifications performed on the vehicle, and that the vehicle complied with all applicable FMVSS); the date on which the vehicle entered the United States; and that FMVSS 110, 118, 135,[2] 216, and 301 were inapplicable to the vehicle.

For each vehicle in Group 2 (identified as Vehicles N, O, P, Q, R, S, T, and U), NHTSA determined that Bisbee Importing knowingly falsely and misleadingly certified: the date on which the vehicle entered the United States; that FMVSS 135 was inapplicable to the vehicle; and that the vehicle as manufactured complied with FMVSS 404 and 500.

And for the one vehicle in Group 3 (identified as Vehicle H), NHTSA determined that Bisbee Importing knowingly falsely and misleadingly certified: the date on which the vehicle entered the United States; that the vehicle as manufactured complied with FMVSS 138, 404 and 500; that FMVSS 135 was inapplicable to the vehicle; and that the vehicle was eligible for import under Import Eligibility Code VSA-80.

The Notice of Automatic Suspension informed Bisbee Importing that its RI registration was suspended, effective immediately, for a period of 270 days. Consistent with the regulations, the Notice of Automatic Suspension also informed Bisbee Importing that it had an opportunity to seek reconsideration of the decision by presenting data, views, and arguments in writing and/or in person, within 30 days. 49 C.F.R. § 592.7(a)(2). Through its legal representative, Bisbee Importing requested reconsideration of the decision and submitted arguments in support of its request in its June 13, 2022 Request for Reconsideration. Bisbee Importing also submitted data, views, and arguments in support of its request at a June 14, 2022 meeting with NHTSA via teleconference ("Meeting").[3]

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[1] The Notice of Automatic Suspension includes specific facts, conclusions, and determinations regarding specific vehicles, violations, and certifications, together with supporting exhibits, which are incorporated by reference into this Notice of Denial and the record supporting it.

[2] The one exception to this FMVSS was Vehicle M, to which that standard did not apply.

[3] On behalf of NHTSA, the Meeting was attended by Otto Matheke, Director of NHTSA's Office of Vehicle Safety and Compliance; Brodie Mack, Chief of the Import and Certification Division of NHTSA's Office of Vehicle Safety Compliance; Sean Ward, Trial Attorney in NHTSA's Office of the Chief Counsel; and Stephen Hench, Trial Attorney in NHTSA's Office of the Chief Counsel. On behalf of Bisbee Importing, the Meeting was attended by Rebecca Chaney and Matthew Cohen of Crowell & Moring LLP as legal representatives of Bisbee Importing, and

Having considered the data, views, and arguments submitted by Bisbee Importing (both in its Request for Reconsideration and at the Meeting), NHTSA is issuing this Notice of Denial informing Bisbee Importing in writing of its decision, and the reasons for the decision. *See* 49 C.F.R. § 592.7(a)(2).

C. NHTSA's Analysis of Bisbee Importing's Request for Reconsideration

NHTSA suspended Bisbee Importing's RI registration based on its determination that Bisbee Importing knowingly submitted false and misleading certifications in statements of conformity to the agency. Bisbee Importing does not dispute that it submitted certifications for the thirteen (13) vehicles that included the falsities as outlined in the Notice of Automatic Suspension. Rather, Bisbee Importing argues that it did not make these submissions "knowingly" under 49 C.F.R. § 592.7(a) because, as Bisbee Importing argues, that provision requires actual knowledge of the falsity of the information—which Bisbee Importing contends it did not have because it "did not know of the inaccuracy of the information" that was auto-populated on statements of conformity by its customs brokers and submitted to NHTSA. Even assuming Bisbee Importing lacked actual knowledge of the falsity of the information to which it certified, we disagree with this interpretation, and for the reasons below deny Bisbee Importing's Request for Reconsideration.

1. Requirement of "Knowingly" Submitting a False or Misleading Certification

Under the regulations governing RIs, the agency is authorized to automatically suspend the registration of a RI if it "decides that a Registered Importer has knowingly filed a false or misleading certification." 49 C.F.R. § 592.7(a). This regulatory authority was enacted pursuant to a statutory mandate providing that NHTSA "shall establish procedures . . . for automatically suspending a registration . . . for knowingly filing a false or misleading certification under section 30146 of this title." 49 U.S.C. § 30141(c)(4)(B). Neither the regulation nor the statutory mandate, however, define the term "knowingly."

In the Notice of Automatic Suspension, NHTSA explained that "[a] RI has knowledge that a certification is false or misleading if it is in possession of information that makes the certification false or misleading." Bisbee Importing's argument in its Request for Reconsideration is, at its core, a disagreement with this articulation. Bisbee Importing contends that this is tantamount to a "strict liability standard" on the responding party, and that instead, an RI must actually know

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Mr. Vincent Bisbee, President of Bisbee Importing, Inc. The videoconference was recorded, and the recording is incorporated as part of the record supporting this Notice.

The substantive information and arguments Bisbee Importing presented at the Meeting were similar to those provided in its Request for Reconsideration. NHTSA, therefore, generally does not distinguish here between information and arguments presented in the Request for Reconsideration and those at the Meeting.

that the certification contains false or misleading information to satisfy the "knowingly" standard.[4] Bisbee Importing's argument here is unconvincing.

Bisbee Importing points to certain conduct as examples of "knowingly" false or misleading filings that are cited in NHTSA's Notice of Proposed Rulemaking ("NPRM") issued in developing 49 C.F.R. § 592.7(a), and observes that those situations "occur[] upon very intentional conduct." Neither the statutory nor regulatory text uses the term "intent,"[5] and NHTSA specifically considered—and rejected—in the final rule a suggestion that an automatic suspension be limited to circumstances involving a deliberate attempt to deceive on a material issue relating to motor vehicle safety.[6]

By its nature, a certification assumes some level of care and inquiry into the truthfulness of what is certified. *See* 49 C.F.R. § 592.6(d)(3) (requiring "an original hand-written signature and not with a signature that is stamped or mechanically applied"). Indeed, the very point of certification is to attest to information. For instance, under the Safety Act, reasonable care is required when issuing certification that a new vehicle or equipment complies with applicable motor vehicle safety standards. 49 U.S.C. § 30115(a) ("A person may not issue the certificate if, in exercising reasonable care, the person has reason to know the certificate is false or misleading in a material respect."). In that context, "[w]hat constitutes 'reasonable care' in a particular case depends on many factors . . . above all, the diligence exercised by the manufacturer." Ltr. from P. Recht to M. Warlick (1995), *available at* https://www.nhtsa.gov/interpretations/10595. This provision is

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[4] Bisbee Importing also contends that NHTSA took the position that Bisbee Importing "knew the underlying facts because a reasonable person would have recognized that the information was incorrect." NHTSA did not affirmatively take such a stance in the Notice of Automatic Suspension.

[5] There is not even a "willful" requirement in the RI provisions, as there is elsewhere in the Safety Act. *Compare* 49 U.S.C. § 30141(c)(4)(B) (providing for an automatic suspension "for knowingly filing a false or misleading certification"), *with id.* § 30165(a)(4) (providing for civil penalties for "[a] person who knowingly and willfully submits materially false or misleading information to the Secretary, after certifying the same information as accurate").

[6] When NHTSA published this final rule, it explained:

> Congress also directed us to establish procedures for automatically suspending a registration of a RI that has knowingly filed a false or misleading certification. 49 U.S.C. 30141(c)(4)(B). We proposed rules to implement this provision. Two commenters supported our proposal. Auto Enterprises suggested that such a suspension should only occur if we found that the RI "knowingly and deliberately attempted to deceive NHTSA on a material issue that could be reasonably viewed as having the potential of endangering motor vehicle safety." However, this would limit the statutory provision, which refers only to knowingly filing a false or misleading certification. The limiting elements of "material issue" and "potential of endangering motor vehicle safety" are not specified by the statute. A RI is presumed to know the truth or falsity of what its principal has signed.

Certification; Importation of Vehicles and Equipment Subject to Federal Safety, Bumper and Theft Prevention Standards; Registered Importers of Vehicles Not Originally Manufactured to Conform with the Federal Motor Vehicle Safety Standards; Schedule of Fees Authorized by 49 U.S.C. 30141, 69 Fed. Reg. 52070, 52087 (Aug. 24, 2004) (hereinafter "Final Rule").

comparable to an imported vehicle being brought into compliance with FMVSS by a RI, and the certification of the other representations to which a RI attests on a statement of conformity.

Consistent with this, in the final rule promulgating 49 C.F.R. § 592.7, NHTSA concluded that "[a] RI is presumed to know the truth or falsity of what its principal has signed." Final Rule at 52087. NHTSA's regulation also provides in part that "[i]f the Registered Importer certifies that it has modified the vehicle to bring it into compliance with a standard and has, in fact, not performed all required modifications, the Administrator will regard such certification as 'knowingly false' within the meaning of 49 U.S.C. 30115 and 49 U.S.C. 30141(c)(4)(B).[7] 49 C.F.R. § 592.6(d)(2). And NHTSA's civil-penalty authority regulations promulgated for the purposes of penalty amount determinations define "knowledge" of one's obligations under the Safety Act as "all knowledge, legal and factual, actual, resumed, and *constructive*." 49 C.F.R § 578.4(b)(2) (emphasis added); *see* 49 U.S.C. § 30165(a)(4) (providing penalty for "knowingly and willfully submit[ting] materially false or misleading information"). These above authorities support that actual knowledge is not required to act "knowingly" under 49 C.F.R. § 592.7(a) when filing a certification.

Various other authorities include within "knowingly" something short of actual knowledge. For instance, other DOT agencies have defined "knowingly" in regulations as "having actual knowledge of the facts giving rise to the violation or that a reasonable person acting in the circumstances, exercising due care, would have had such knowledge." *See* 49 C.F.R. § 240.7 (qualification and certification of locomotive engineers); *id.* § 242.7 (qualification and certification of conductors); *see also* 49 C.F.R. § 107.1 (similar definition for HAZMAT program procedures). Some statutes have also defined "knowingly" similarly. *See, e.g.*, 49 U.S.C. § 5123(a) (transportation of hazardous material); 15 U.S.C. § 2069(d) (consumer product safety); *see also* 31 U.S.C. § 3729(b) (requiring, under False Claims Act, actual knowledge, deliberate ignorance of the truth or falsity, or reckless disregard of truth or falsity).

In the criminal context, in adjudicating cases under 18 U.S.C. § 1001[8] courts have found that the statute's knowledge requirement can be satisfied by proof of reckless disregard of the truthfulness of a statement with a conscious purpose to avoid learning its truthfulness. *See U.S. v. Evans*, 559 F.2d 244, 246 (5th Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978); *U.S. v. Schaffer*, 600 F.2d 1120, 1121–22 (5th Cir. 1979) (noting charges under this standard have been referred to as "deliberate ignorance" charges); *U.S. v. West*, 666 F.2d 16, 19 (2d Cir. 1981); *U.S. v. Puente*, 982 F.2d 156, 159 (5th Cir. 1993) (observing "reckless indifference" has been held to

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[7] Bisbee Importing argues the conduct cited here "would reflect a blatant disregard for the rules and intentional deception." Although it may, it may also not—the provision lacks any "actual" knowledge or intent requirement.

[8] This criminal statute makes it an offense to provide false statements to the federal government. In addition to a knowledge element, the statute also—unlike NHTSA's RI statute and regulations—contains a "willful" element.

satisfy the statute's scienter requirement "so that a defendant who deliberately avoids learning the truth cannot circumvent criminal sanctions").[9] [10]

Accordingly here, for purposes of dispositioning Bisbee Importing's Request for Reconsideration based on the additional information it has provided, it should be recognized that "knowingly" need not require actual knowledge, and that Bisbee Importing has not presented information sufficient to cause the agency to reconsider its conclusion that Bisbee Importing "knowingly" submitted false or misleading certifications. Bisbee asserts that it "did not know of the inaccuracy of the information" it submitted to NHTSA, but as explained in the Notice of Automatic Suspension, it had in its possession (and submitted with its statements of conformity) information demonstrating that the certifications were false. Based on Bisbee's contentions, it at a minimum ignored such information in favor of relying on the automatic population of certification fields through its customs brokers. Bisbee Importing cannot evade responsibility here for the inaccuracy of auto-populated information that Bisbee Importing "thought" was correct and later signed off on as a part of its certifications. Under these facts, NHTSA finds that Bisbee Importing had the requisite knowledge that its certifications were false and misleading and acted "knowingly" in violation of 49 C.F.R. § 592.7(a).

2. Bisbee Importing's Violations

In the Notice of Automatic Suspension, NHTSA explained it determined that Bisbee Importing had knowingly submitted false and misleading certifications for each of thirteen (13) vehicles, categorized below in three groups. NHTSA finds that Bisbee Importing has not presented information sufficient to cause the agency to reconsider its conclusion that Bisbee Importing "knowingly" submitted false and misleading certifications for these vehicles.

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[9] *Puente* further explained that "a defendant who deliberately avoids reading the form he is signing cannot avoid criminal sanctions for any false statements contained therein," and that "[a]ny other holding would write § 1001 completely out of existence." *Id.*; *Evans*, 559 F.2d at 246 (observing that deeming one to have knowledge of a statement and its truthfulness (or lack thereof) where statement is made with reckless disregard for its truth and with conscious purpose to avoid learning its truth prevents individuals "from circumventing criminal sanctions merely by deliberately closing [their] eyes to the obvious risk that [they are] engaging in unlawful conduct"); *see also Thompson v. Lynch*, 788 F.3d 638, 647 (6th Cir. 2015) (quoting *Haskins v. Prudential Ins. Co. of Am.*, 230 F.3d 231, 239 (6th Cir. 2000)) (internal quotation marks omitted) (alteration in original) ("As this and other courts have noted in various contexts . . . one's signature on a form or contract establishes a strong presumption that '[o]ne who accepts a written contract is conclusively presumed to know its contents and assent to them.'").

[10] Some courts have also applied a "collective knowledge" doctrine in certain contexts, which attributes to corporations the totality of the knowledge that its employees acquire in the scope of their employment. *See, e.g.*, *United States v. Bank of New England*, 821 F.2d 844, 856 (1st Cir. 1987); *In re WorldCom, Inc. Sec. Litig.*, 352 F. Supp. 2d 472, 95 (S.D.N.Y. 2005); *U.S. v. T.I.M.E-D.C., Inc.*, 381 F. Supp. 730, 738 (W.D. Va. 1974) ("[T]he corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly.").

i. Group 1 Vehicles

For these vehicles, designated Vehicles J, K, L, and M in the Notice of Automatic Suspension, Bisbee Importing or its agent submitted a sworn declaration (HS-7 form) to the government stating that the vehicle was noncompliant with all applicable FMVSS. The "Entry and PGA [Partner Government Agency] data" maintained by CBP for each of these vehicles confirms the "Box 3" declaration made by Bisbee Importing stating that the vehicle does not conform with all applicable FMVSS and also documents the date on which CBP first released the vehicle for entry into the United States. The statement of conformity that Bisbee Importing submitted to NHTSA for each of these vehicles reflected that, as of the date of the certification, no FMVSS conformance modifications were made to the vehicle. However, Vincent Bisbee, the Bisbee Importing principal who signed the certifications for each of these vehicles, certified that:

> I know that the vehicle I am certifying conforms with all applicable Federal motor vehicle safety and bumper standards because I personally witnessed each modification performed on the vehicle to effect compliance.

Mr. Bisbee signed and dated each of these certifications on the same date on which the vehicle was first permitted entry into the United States by CBP. Mr. Bisbee also signed and dated the certification for each vehicle on the same day he signed and dated the HS-7 Form.

As a further part of its statements of conformity submitted to NHTSA for each of these vehicles, Bisbee Importing certified the actual date of entry of the vehicle into the United States with a date of entry earlier than the date on which the vehicle was released by CBP for entry into the United States. In addition, on the statements of conformity it submitted to NHTSA for these vehicles, Bisbee Importing certified that FMVSS 110, 118, 135,[11] 216, and 301 were inapplicable to the vehicles (by filling in the "N" oval).

Bisbee Importing admits that these were all incorrect certifications. However, Bisbee Importing argues that these were "unintentional errors committed by Bisbee working in tandem with its trusted and experienced customs brokers who service much of the Registered Importer industry," and were "anything but knowingly false and misleading certifications." With respect to whether modifications were made on these vehicles, Bisbee Importing "acknowledges that it should have bubbled 'M'" to denote that the vehicles had been modified for FMVSS 101. Bisbee Importing explains that its customs broker incorrectly auto-populated each of the statements by checking "O" for FMVSS 101, but that Bisbee Importing visually inspected each vehicles' instrument clusters, determined they required modification, and modified the vehicles.

As to the dates of entry in the statements of conformity, Bisbee Importing again explains that through its broker's auto-population the dates on the statements of conformity appear to reflect

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[11] The one exception to this FMVSS was Vehicle M, to which that standard did not apply.

the day on which Bisbee Importing sent its customs broker the information regarding the vehicle's importation into the United States—not the date on which the vehicle actually entered the United States. Bisbee Importing characterizes this as "an innocent mistake, an inadvertent misunderstanding" and not "an effort to avoid [its] duty to . . . modify the vehicle to bring it into FMVSS compliance."

Last, for the certified inapplicability of FMVSS 110, 118, 135, 216, and 301, Bisbee Importing explains that, again, as a result of auto-populated information from its broker, these standards were incorrectly certified as inapplicable, and that Bisbee Importing was not aware that the certification was inaccurate.

As Bisbee Importing admits the inaccuracies in its submissions, it is undisputed that a Bisbee Importing principal signed the certifications with false and misleading information and that Bisbee Importing submitted each of these forms to NHTSA. Bisbee Importing disputes, however, that each of these certifications was submitted "knowingly." NHTSA finds that they were. Even assuming that Bisbee Importing lacked actual knowledge that some or all these certifications were false and misleading (*i.e.*, that Mr. Bisbee was unaware of the falsity of the certification when he signed it), Bisbee Importing cannot absolve itself of responsibility for their inaccuracy simply because the information was auto-populated. Bisbee Importing had in its possession information that revealed falsities in the auto-populated fields, and Bisbee Importing's explanation indicates that it simply signed off on those representations.

As the importer of record for each of these vehicles, Bisbee Importing had information that confirmed: the date of each vehicle's entry into the United States and when Bisbee Importing took possession of the vehicle at one of its authorized facilities; whether the vehicle conformed with applicable FMVSSs; and whether the vehicle had modifications performed on it. The incongruity between the representations that no conformance modifications had been made to the vehicles, and Mr. Bisbee's certifications that he witnessed modifications being performed on the vehicles should have been apparent.

Further, based on photographs of the certification labels that Bisbee Importing submitted to NHTSA with each of its certifications, Bisbee Importing had information confirming that the GVWR of each of the vehicles was less than 10,000 pounds and that therefore, with one exception, each of the FMVSSs referenced above applied to each vehicle. That this information was included with the certifications themselves when they were submitted to NHTSA rendered the packages internally inconsistent and highlights the proximity and availability of information to Bisbee Importing that its certifications were, in fact, false and misleading.

Bisbee Importing submitted no clear evidence of steps it took to avail itself of this information in certifying the accuracy of its statements of conformity—despite the inconsistencies in the conformity packages and discrepancies that were apparent on the statement of conformity

itself.[12] Instead, Bisbee Importing points to the fact that these representations that had been auto-populated. At a minimum, Bisbee Importing ignored information in its possession that demonstrated the false and misleading nature of its certifications, and cannot evade responsibility here for the inaccuracy of auto-populated information.[13]

Accordingly, for the Group 1 Vehicles, Bisbee Importing has not presented information sufficient to cause the agency to reconsider its conclusion that Bisbee Importing "knowingly" submitted false and misleading certifications.

ii. Group 2 Vehicles

For these vehicles, designated Vehicles N, O, P, Q, R, S, T, and U in the Notice of Automatic Suspension, Bisbee Importing certified the dates of entry of into the United States with a date earlier than that on which the vehicle was released by CBP for entry into the United States. In addition, on the statement of conformity it submitted to NHTSA for each of these vehicles, Bisbee Importing represented that FMVSS 135 was inapplicable to the vehicles (by filling in the "N" oval). And further, Bisbee Importing certified that these vehicles, as originally manufactured, complied with FMVSS 404 and 500.

Bisbee Importing admits that these, too, were all incorrect certifications. However, Bisbee Importing again explains that "these mistakes [were] committed unintentionally by Bisbee working in tandem with its trusted and experienced customs brokers."[14] As to its certifications that the Group 2 vehicles complied with FMVSS 404 and 500, Bisbee Importing explains that "it understood at the time of certification that both standards applied to passenger vehicles generally" and also notes that, similar to as described for Group 1, "the customs broker auto-populated the form a certain way based on vehicle type."

Similar to what is described above for the Group 1 vehicles, as Bisbee Importing admits the inaccuracies in its submissions, it is undisputed that a Bisbee Importing principal signed the certifications with false and misleading information, and that Bisbee Importing submitted each of these forms to NHTSA. What Bisbee importing disputes, again, is that each of these certifications was submitted "knowingly." NHTSA finds that, like those for the Group 1 vehicles, they were in fact submitted knowingly. Even assuming that Bisbee Importing lacked actual knowledge that some or all these certifications were false and misleading, Bisbee

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[12] Bisbee Importing states that it "erred in not catching and correcting the auto-populated applicability determination[s]" and that it "was not aware that the certification was inaccurate." It also states that among its corrective actions are to "eliminat[e] the auto-populating function in its brokers' systems, so that Bisbee independently populates each field in each Statement of Conformity."

[13] As Bisbee Importing explained, it is a small business with 40 to 60 employees. That the above information—critical to the certification of the statement of conformity—would not have been communicated as necessary and taken into account when certifying to the agency, cannot be excused.

[14] Bisbee Importing generally incorporates by reference its explanation for Group 1 vehicles with respect to the entry date discrepancies and inapplicability of FMVSS 135.

Importing cannot absolve itself of responsibility for their inaccuracy simply because the information was auto-populated. Bisbee Importing had in its possession information that revealed falsities in the auto-populated fields, and Bisbee Importing's explanation indicates that it simply signed off on those representations.

As the importer of record for each of these vehicles Bisbee Importing had information that confirmed: the date of each vehicle's entry into the United States and when Bisbee Importing took possession of the vehicle at one of its authorized facilities; whether the vehicle conformed with applicable FMVSS; and the FMVSS that applied to the vehicle. Based on photographs of the certification labels that Bisbee Importing submitted to NHTSA with each of its certifications, Bisbee Importing had information confirming that the GVWR of each of the vehicles was less than 7,716 pounds and that therefore FMVSS 135 applied to each vehicle. Also based on photographs submitted to NHTSA, as well as its possession of each vehicle, Bisbee Importing had information confirming that none of the vehicles was equipped with a platform lift (FMVSS 404) or was a low-speed vehicle (FMVSS 500).[15] That this information was included with the certifications themselves when they were submitted to NHTSA rendered the packages internally inconsistent and highlights the proximity and availability of information to Bisbee Importing that its certifications were, in fact, false and misleading.

Again, Bisbee Importing submitted no clear evidence of steps it took to avail itself of this information in certifying the accuracy of its statements of conformity—despite the inconsistencies in the conformity packages.[16] Instead, Bisbee Importing points to the fact that these representations had been auto-populated. At a minimum, Bisbee Importing ignored information in its possession that demonstrated the false and misleading nature of its certifications, and cannot evade responsibility here for the inaccuracy of auto-populated information.

Accordingly, for the Group 2 Vehicles, Bisbee Importing has not presented information sufficient to cause the agency to reconsider its conclusion that Bisbee Importing "knowingly" submitted false and misleading certifications.

iii. The Group 3 Vehicle

For this one vehicle, designated Vehicle H in the Notice of Automatic Suspension, Bisbee Importing certified the date of entry into the United States with a date earlier than that on which

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[15] It is unpersuasive that Bisbee Importing purportedly "understood at the time of certification that both standards applied to passenger vehicles generally." As a RI, Bisbee Importing is expected to be familiar with FMVSS and their applicability to the vehicles that they import. Bisbee Importing also certifies on an annual basis that it is familiar with and complies with regulations applicable to RIs. 49 C.F.R. § 592.5(f)(2)(i). In any event, it is unclear whether this understanding had any impact on the information to which Bisbee Importing certified here, as the certification fields were auto-populated.

[16] Bisbee Importing notes that it "now understands that a more nuanced approach is necessary" than auto-populating the forms.

the vehicle was released by CBP for entry into the United States. In addition, on the statement of conformity it submitted to NHTSA for this vehicle, Bisbee Importing certified that FMVSS 135 was inapplicable (by filling in the "N" oval). Bisbee Importing also certified that this vehicle, as originally manufactured, complied with FMVSS 138, 404, and 500. And Bisbee Importing certified that the vehicle was eligible for import under Import Eligibility Code VSA-80 (which requires compliance with FMVSS 138).

Bisbee Importing admits that these were all incorrect certifications, generally incorporating by reference its explanations for the vehicles in Groups 1 and 2 with regard to this vehicle, with the exception of the vehicle's eligibility for import under Import Eligibility Code VSA-80 (and FMVSS 138)—for which Bisbee Importing provides a separate explanation. Specifically, Bisbee Importing explains that its "practice is to decline to import vehicles that are not equipped with a tire pressure monitoring system (TPMS), in accordance with FMVSS 138," and that it "does not expect to import any vehicles that do not comply with FMVSS 138." According to Bisbee Importing, it determines whether a vehicle is equipped with a TPMS with reference to appendices that NHTSA supplies that indicate vehicles that are not equipped with a TPMS. With regard to Vehicle H, Bisbee Importing explains that the employee "cleared the vehicle [a MY 2018 Subaru WRX/STI] because only the Subaru WRX for model years 2015-2016 lacked TPMS, without appreciating the distinction with the WRX/STI, which lacked TPMS in 2017 and 2018."

Similar to the information described above for the Groups 1 and 2 vehicles, as Bisbee Importing admits the inaccuracies in its submissions, it is undisputed that a Bisbee Importing principal signed the certifications with false and misleading information, and that Bisbee Importing submitted each of these forms to NHTSA. What Bisbee Importing disputes, again, is that each of these certifications was submitted "knowingly." NHTSA finds that—with the possible exception of eligibility under VSA-80 discussed further below—like those for the Group 1 and 2 vehicles, they were submitted with the requisite knowledge. Even assuming that Bisbee Importing lacked actual knowledge that some or all these certifications were false and misleading, Bisbee Importing cannot absolve itself of responsibility for their inaccuracy simply because the information was auto-populated. Bisbee Importing had in its possession information that revealed falsities in the auto-populated fields, and Bisbee Importing's explanation indicates that it simply signed off on those representations.

As the importer of record for this vehicle, Bisbee Importing had information that confirmed: the date of each vehicle's entry into the United States and when Bisbee Importing took possession of the vehicle at one of its authorized facilities; whether the vehicle conformed with applicable FMVSS; and the FMVSS that applied to the vehicle. Based on photographs of the certification labels that Bisbee Importing submitted to NHTSA with each of its certifications, Bisbee Importing had information confirming that the GVWR of the vehicle was less than 7,716 pounds and that therefore FMVSS 135 applied to the vehicle. Also based on photographs, as well as its possession of the vehicle, Bisbee Importing had information confirming that the vehicle was not equipped with a platform lift (FMVSS 404), or was a low-speed vehicle (FMVSS 500). That this

information was included with the certifications themselves when they were submitted to NHTSA rendered the packages internally inconsistent and highlights the proximity and availability of information to Bisbee Importing that its certifications were, in fact, false and misleading.

Bisbee Importing submitted no clear evidence of steps it took to avail itself of this information in certifying the accuracy of its statements of conformity—despite the inconsistencies in the conformity packages. Instead, Bisbee Importing points to the fact that these representations had been auto-populated. At a minimum, Bisbee Importing ignored information in its possession that demonstrated the false and misleading nature of its certifications, and cannot evade responsibility here for the inaccuracy of auto-populated information.

Bisbee Importing's explanation for having certified that the vehicle was eligible for import under VSA-80 may suggest more of a "mistake" than its explanations for the other certifications (results of auto-population in the statement of conformity). It appears that an employee was manually reviewing relevant information and may have inadvertently confused the vehicle with another of a similar name. That said, Bisbee Importing was also, similar to the representations above, in possession of information that could have alerted it to the falsity of the certification—including photographs of the instrument cluster that Bisbee Importing submitted as part of its certification that confirm the lack of a TPMS malfunction telltale. In any event, NHTSA declines to determine whether the conduct bearing on this violation rose to the level of "knowingly"—it would not excuse the other conduct at issue for the Group 3 Vehicle here, nor otherwise give cause for NHTSA to revisit the length of the suspension (explained below).

Accordingly, for the Group 3 Vehicle as well, Bisbee Importing has not presented information sufficient to cause the agency to reconsider its conclusion that Bisbee Importing "knowingly" submitted false and misleading certifications, although NHTSA declines to make a determination on whether such a certification was made with respect to the vehicle's import eligibility under Import Eligibility Code VSA-80.

D. Length of Suspension

The regulations specifying the basis and process for RI suspensions do not include factors to be considered regarding the appropriate length of a suspension. *See* 49 C.F.R. § 592.7. Instead, in the context of making a final decision on a proposed suspension under 49 C.F.R. § 592.7(b), NHTSA's primary consideration is whether the available information, including any "data, views, and arguments" submitted by the RI, supports a finding that one or more of the alleged violations occurred, and, if so, whether the RI's registration should be suspended as previously proposed. *Id.* § 592.7(b)(2). Where, as here, the agency finds that the evidence supports some of the alleged violations but declines to make a determination on others, the agency considers whether the violations that did occur nonetheless support the proposed suspension or a shorter suspension, or whether there is any new information or evidence (not considered by the agency when it proposed a suspension) supporting a departure from the proposed suspension. *See id.*

Bisbee Importing argues that the length of its suspension "is not commensurate with the violations alleged," explaining that the errors in its submissions "were the result of oversight in an otherwise detailed process," and that it "did not falsify any documentation and made no intentional efforts to mislead or deceive the government, or to otherwise evade its Registered Importer obligations." Bisbee Importing also states that it acknowledges its errors and takes responsibility for them, and notes that NHTSA has neither assessed penalties or fines against Bisbee Importing, nor suspended or revoked its RI registration.

There is no dispute that Bisbee Importing understood its obligations as a RI. Bisbee Importing has been a RI for over 24 years, and all RIs annually certify their familiarity with and understanding of those obligations and their continued compliance with those obligations. *See* 49 C.F.R. § 592.5(f)(2)(i). In addition, the violations here were serious. NHTSA has previously explained that as part of its responsibilities, an RI has the duty to ensure that an accurate statement of conformity is submitted to NHTSA certifying the vehicle's compliance. The agency approves RIs for the specific purpose of carrying out this responsibility, among other important safety responsibilities. In this respect, each RI occupies a position of public trust to ensure that nonconforming vehicles imported under its auspices are properly conformed to all applicable standards before they are operated on public roads in the United States.[17]

The violations here were serious and systemic, and cannot be simply characterized as an oversight. Even if Bisbee Importing did not have actual knowledge of the falsity and misleading nature of their statements of conformity as it claims, at a minimum Bisbee Importing implemented a system where it avoided availing itself of information that revealed falsities in the statements of conformity. As explained above, Bisbee Importing had in its possession information that contradicted the auto-populated fields—critical information, including whether modifications had been made to vehicles, vehicles' date of entry, and the applicability of and conformance to FMVSSs. Indeed, sources of contradicting information were included in its certification packages to NHTSA, and some discrepancies should have been apparent from the statement of conformity itself. But Bisbee appears to have simply assumed—or at least claims to have simply assumed—the accuracy of the auto-populated fields, and considers the falsities a mere "mistake." A RI cannot absolve itself of responsibility for the inaccuracy of information simply because it was auto-populated on the statement of conformity and turned out to be incorrect. Bisbee Importing was operating in a manner such that it did not incorporate readily available, germane information into its certification process. This approach disregarded the public trust placed in a RI and abdicated Bisbee Importing's responsibility to provide the agency with accurate certifications of conformance.

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[17] *Certification; Importation of Vehicles and Equipment Subject to Federal Safety, Bumper, and Theft Prevention Standards; Registered Importers of Vehicles Not Originally Manufactured to Conform to the Federal Motor Vehicle Safety Standards*, 76 Fed. Reg. 2631, 2632 (Jan. 14, 2011).

Bisbee Importing's citations to other suspension decisions is unpersuasive. No consent order has been issued to Bisbee Importing that addresses the issues herein, and DVS was suspended for a longer period than here (365 days) prior to, as Bisbee Importing acknowledges, entering into a consent order that imposed a shorter suspension. *See Notice of Denial for Reconsideration of Automatic Suspension of the Registered Importer Registration of Diversified Vehicle Services, Inc.* (Aug. 12, 2021) (involving, *inter alia*, pre-populated fields inputted by customs broker). Similarly, as Bisbee Importing recognizes, Newport International's suspension was pursuant to a consent order with the agency. VIP Traders was suspended for a longer period than the suspension here, *see Notice of Suspension, VIP Traders Inc.* (Dec. 15, 2021) (340-day suspension), and the Northern Imports suspension involved six violations (reduced to three). *See Notice of Suspension of Northern Imports, LLC* at 7 (Dec. 15, 2021) (observing importer admitted violations that were the result of mistakes because of "rushed and overloaded staff people").

Bisbee Importing additionally argues that a 270-day suspension "will cause devastating economic consequences to Bisbee" as a small business, "effectively forc[ing] the company to shutter." Bisbee Importing did not submit any specific business or financial information supporting this contention. In any event, in determining an appropriate suspension, NHTSA has taken into account that Bisbee Importing is a small business and has considered options other than the proposed suspension. The agency has also considered that, by electing to become a RI, Bisbee Importing assumed the legal responsibilities of that program and is bound by the statutory and regulatory provisions governing that program, including the prospect of a suspension or revocation for failure to do so.

In its Request for Reconsideration and at the Meeting, Bisbee Importing also explained that it takes its duties as a Registered Importer seriously, and is "implementing an aggressive corrective action plan to ensure that the types of errors described do not occur again." This includes, among other things, developing written guidance to ensure statements of conformity are correctly completed, developing training programs, and eliminating auto-population from broker systems. The agency does not have any reason to question that these corrective steps have been or are in the process of being implemented. The agency also notes, however, that Bisbee Importing's assurances that it takes its RI duties seriously contradicts the findings that led to this suspension.

Accordingly, NHTSA finds the 270-day suspension here consistent with its previously imposed suspensions, and in all events appropriate when considering the specific facts of this matter. *See Notice of Automatic Suspension of the Registered Importer Registration of Bisbee Importing, Inc. for 270 days*, at 17 (May 20, 2022) ("NHTSA considers the unique facts of each enforcement action, including the number of and the nature of the violations committed by the RI.").

E. Conclusion

After consideration of Bisbee Importing's Request for Reconsideration, NHTSA has affirmed its determination that Bisbee Importing knowingly submitted false or misleading certifications for thirteen (13) vehicles. Bisbee Importing possessed information at the time it signed and at the time it submitted these certifications to NHTSA that demonstrated the information it submitted was false and misleading. With the possible exception of VSA-80 import eligibility, Bisbee Importing ignored other evidence proximately available to it as the importer of record. Indeed, inconsistencies were present within the conformity packages submitted to NHTSA, and in some cases even on the statements of conformity—highlighting the availability of information to Bisbee Importing that its certifications were, in fact, false and misleading.

Bisbee Importing's arguments—primarily that the false and misleading certifications were the result of automatically populated fields inputted by its custom brokers—do not persuade the agency to reconsider the length of suspension. The violations committed by Bisbee Importing were serious and the result of a systemic practice. They reflect a disregard for the rules applicable to the RI program that are intended to protect public safety. Even assuming the conduct here was unintentional, the system in place and Bisbee Importing's reliance thereupon disregarded the public trust placed in a RI and abdicated Bisbee Importing's responsibility to provide the agency with accurate certifications of conformance that are not false or misleading.

Absent specific evidence to the contrary, a RI is presumed to know the truth or falsity of what its principal has signed in a certification to the agency. To suggest otherwise would render the entire certification meaningless, which, in turn, would undermine the entire RI program and the public trust that accompanies a RI registration. NHTSA therefore affirms its determination that Bisbee Importing knowingly submitted each of the thirteen (13) false or misleading certifications in violation of 49 U.S.C. § 30146(a)(1) and 49 C.F.R. § 592.6(d)(1).

The regulations provide for an immediate and automatic suspension following a RI's submission of a false or misleading certification to NHTSA because a false or misleading certification has a direct and substantive impact on public safety. The certification of conformance is necessary to ensure that a nonconforming vehicle, which otherwise would not have been permitted entry into the United States, has been inspected, properly modified into conformance, and then certified as being in conformance with all FMVSS. This certification is also necessary for NHTSA to provide oversight over the safety of these imported vehicles and the RIs responsible for conforming them, and is essential to ensuring motor vehicle and public safety.

For all the above reasons, NHTSA denies Bisbee Importing's Request for Reconsideration of the 270-day suspension imposed in the May 20, 2022 Notice of Automatic Suspension. The RI registration of Bisbee Importing will remain suspended until February 14, 2023, or such earlier date as the agency may subsequently decide is appropriate. *See* 49 C.F.R. § 592.7(c)(2).

Sincerely,

ANNE LOUISE COLLINS

Digitally signed by ANNE LOUISE COLLINS
Date: 2022.07.14 12:05:32 -04'00'

Anne L. Collins
Associate Administrator for Enforcement

cc: Matthew Cohen (MCohen@crowell.com)
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