

Summer 2004

## Separations, Blow-Outs, and Fallout: A Treadise on the Regulatory Aftermath of the Ford-Firestone Tire Recall, 37 J. Marshall L. Rev. 1073 (2004)

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### Recommended Citation

Kevin M. McDonald, Separations, Blow-outs, and Fallout: A Treadise on the Regulatory Aftermath of the Ford-Firestone Tire Recall, 37 J. Marshall L. Rev. 1037 (2004)

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# SEPARATIONS, BLOW-OUTS, AND FALLOUT: A *TREAD*ISE ON THE REGULATORY AFTERMATH OF THE FORD-FIRESTONE TIRE RECALL

KEVIN M. McDONALD\*

"It will be of little avail to the people . . . if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood. . . . Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?"<sup>1</sup>

"I learned the human body in four years; I've studied *TREAD* for six months and barely scratched the surface."<sup>2</sup>

## INTRODUCTION

This Article is the second of a two-part series on the Transportation Recall Enhancement, Accountability, and Documentation Act ("*TREAD*" or "*TREAD Act*" interchangeably).<sup>3</sup> The first Article, entitled "*Don't TREAD on Me*," appeared in the Fall 2001 edition of the *Buffalo Law Review*.<sup>4</sup> That article

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1. THE FEDERALIST NO. 62 (James Madison).

2. *The Implementation of the TREAD Act: One Year Later: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Prot. of the House Comm. on Energy and Commerce*, 107th Cong. 41 (2002) (statement of Dr. Jeffrey Runge, Administrator of NHTSA), available at <http://energycommerce.house.gov/107/action/107-92.pdf> [hereinafter *Hearing*].

3. Transportation Recall Enhancement, Accountability, and Documentation Act, Pub. L. No. 106-414, 114 Stat. 1800 (2000) (codified in scattered sections of 49 U.S.C.).

4. Kevin M. McDonald, *Don't TREAD on Me: Faster than a Tire Blowout, Congress Passes Wide-Sweeping Legislation that Treads on the Thirty-Five Year Old Motor Vehicle Safety Act*, 49 BUFF. L. REV. 1163, 1163-1218 (2001)

appeared shortly after passage of the TREAD Act and focused on three primary areas: (1) the high-profile events leading to the Ford-Firestone recalls; (2) the congressional investigations into the situation; and (3) the statutory requirements of the TREAD Act.<sup>5</sup> Readers of that Article will recall that, in response to Ford's and Firestone's actions and inactions as well as the lack of information available to the National Highway Transportation Safety Administration ("NHTSA"), Congress amended the Vehicle Safety Act<sup>6</sup> to require that NHTSA issue a series of implementing rulemakings to address perceived shortcomings in automotive safety law. Congress intended for NHTSA to undertake several key rulemakings to enhance its ability to carry out key provisions of the Vehicle Safety Act, namely, those provisions that allow NHTSA to identify vehicles and equipment that have safety-related defects.

At the heart of these rulemakings is a three-pronged string of obligations to report (1) overseas recalls and "other safety campaigns," (2) "early warning" information, and (3) sales of defective or noncompliant tires. The most extensive reporting rule is "early warning," which authorizes NHTSA to require manufacturers to provide information to the extent that such information may assist in identifying safety-related defects.<sup>7</sup> The purpose of requiring comprehensive early warning data is "to assure that NHTSA's Office of Defects Investigation (ODI) has relevant data to promptly identify possible safety defects."<sup>8</sup> That some of this data would come from sources located overseas reflects congressional intent that the TREAD Act in part apply extraterritorially, which in turn requires a sensitivity to U.S. law by affected multinational companies.<sup>9</sup>

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[hereinafter McDonald, *Don't TREAD on Me*].

5. *Id.* See generally Nicholas J. Wittner, *TREAD: The Long Road Ahead*, L.JNS PRODUCT LIABILITY L. & STRATEGY, June 2001, at 6 (providing another perspective on the statutory requirements of the TREAD Act and discussing the TREAD Act's requirements).

6. National Traffic and Motor Vehicle Safety Act, 49 U.S.C. §§ 30101-30170 (2000).

7. TREAD § 3(b). This requirement arose out of an en bloc amendment offered by Representative Cliff Stearns (R-FL) and passed on a voice vote during the House Subcommittee on Telecommunications, Trade, and Consumer Protection markup. See Michael Steel, *Panel Adds Teeth to TREAD Safety Bill*, NAT'L J. NEWS SERV., Sept. 27, 2000. See also H.R. REP. NO. 106-954, at 13 (2000) (analyzing the TREAD Act).

8. Reporting of Information and Documents About Potential Defects, 69 Fed. Reg. 3292, 3293 (Jan. 23, 2004). ODI is the arm of NHTSA that is responsible for conducting investigations to implement the Vehicle Safety Act by identifying and correcting safety-related defects in vehicles and vehicle equipment. See 49 C.F.R. § 554.5 (2003). See also *infra* note 100 and accompanying text.

9. For example, legal commentators in Germany have written about the

Since publication of the first Article in Fall 2001, NHTSA has implemented the congressional directives. NHTSA has also issued various amendments and interpretations. This Article examines these developments, picking up from the point in time where the first one left off. It is divided into three major sections: (1) "Background," which discusses the impact of the TREAD Act on both the automotive industry and NHTSA, as well as summarizes the congressional activities since passage of the Act; (2) "TREAD's Reporting Rules," which analyzes the requirements of TREAD's three-pronged reporting scheme; and (3) "Increased Penalties," which summarizes the increased civil and criminal penalties meant to buttress the new reporting requirements. The reader may find it helpful to reference the first Article for supplemental historical information.

## I. BACKGROUND

### A. Passage of the TREAD Act

During the late 1990s and 2000, a growing number of consumers began complaining to NHTSA about premature tread separation of Firestone tires mounted on Ford Explorers.<sup>10</sup> By May 2000, NHTSA opened a formal investigation into more than 59 million Firestone tires made in multiple sizes and lines over a period of more than ten years prior to the opening of the investigation.<sup>11</sup>

On August 9, 2000, Firestone announced the recall of 14.4 million P235/75R15-sized Radial ATX, Radial ATX II, and Wilderness AT tires.<sup>12</sup> Under the terms of the recall, Firestone agreed to replace all such recalled tires that were still on the road, or to pay up to \$100 per tire to consumers who chose to replace their tires with a competitor's brand.<sup>13</sup> At the time Firestone

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effect of the TREAD Act on companies doing business in the United States. See, e.g., Gerhard M. Hörstmann-Wilke, *TREAD Act – Neue Regelungen in den USA für Hersteller von Automobilen und Zubehör [TREAD Act – New Rules in the United States for Automobile and Equipment Manufacturers]*, 5 HAFTPFLICHT INTERNATIONAL 162 (May 2003).

10. Standards Enforcement and Defect Investigation; Defect and Noncompliance Reports; Record Retention, Advance Notice of Proposed Rulemaking (ANPRM), 66 Fed. Reg. 6532, 6533 (Jan. 22, 2001) [hereinafter ANPRM]; Federal Motor Vehicle Safety Standards: Tire Pressure Monitoring Systems; Controls and Displays, 66 Fed. Reg. 38,982, 38,989 n.13 (July 26, 2001) [hereinafter TPMS NPRM].

11. See ANPRM, 66 Fed. Reg. at 6533; TPMS NPRM, 66 Fed. Reg. at 38989 n.13. See also *Shields v. Bridgestone/Firestone, Inc.*, No. B-170,462 (D. Tex. Mar. 12, 2004) [hereinafter BFS Settlement] (order approving settlement and final judgment).

12. *Id.*

13. *Id.*

announced the August 2000 recall, it estimated that approximately 6.5 million tires subject to the recall were still on the road.<sup>14</sup> In May 2001, Ford conducted its own recall, which is the largest “product recall in automotive history,”<sup>15</sup> to replace 13 million of the Firestone Wilderness AT tires that were not subject to Firestone’s August 2000 recall, including 1.5 million tires that were mounted on the vehicles as replacements during the initial Firestone recall.<sup>16</sup> On October 4, 2001, NHTSA initially determined that Firestone should recall certain fifteen-inch and sixteen-inch Wilderness AT tires manufactured to specifications. . . of Ford. . . prior to May 1998 that were equipped on sport utility vehicles, and estimated that Firestone had produced about 3.5 million of those tires.<sup>17</sup> Firestone agreed to replace for free any additional affected tires on the road.<sup>18</sup> The August 2000 recall and the replacement program of October 2001 covered approximately 18 million of the nearly 60 million tires in the NHTSA inquiry.<sup>19</sup> In NHTSA’s October 4, 2001 decision, no concern was raised about the two-thirds of the Firestone tires that were part of the investigation that Firestone neither recalled nor replaced.<sup>20</sup> NHTSA ultimately closed its investigation into all of the remaining tires.<sup>21</sup>

Shortly after Firestone’s August 2000 recall, Congress held hearings to investigate the events that precipitated the tire recall and to consider passing legislation amending the Vehicle Safety Act of 1966.<sup>22</sup> After hearing testimony from senior executives of Ford and Bridgestone/Firestone,<sup>23</sup> safety experts, and consumer

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14. *Id.*

15. Joann Muller et al., *Ford: Why It’s Worse than You Think*, BUS. WK., June 25, 2001, at 80.

16. Keith Bradsher, *Ford Intends to Replace 13 Million Firestone Wilderness Tires*, N.Y. TIMES, May 23, 2001, at C1. Ford will replace all Firestone Wilderness AT tires, in fifteen, sixteen, and seventeen-inch sizes, on all Ford products, as well as all Wilderness tires purchased as replacement tires. *Id.* “Ford will pay up to \$110 per fifteen and sixteen-inch tire and \$130 per seventeen-inch tire.” *Id.* Ford “said it would take an after-tax write-off against earnings of \$2.1 billion to cover the expense of the recall.” *Id.*

17. BFS Settlement, *supra* note 11, at 3.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. S. REP. NO. 106-423, at 2-3 (2000).

23. Bridgestone is the Japanese parent company of Firestone. See Chris Isidore, *Tire Recall Woes Continue*, at <http://money.cnn.com/2000/08/22/news/ford/> (Aug. 22, 2000) (explaining the relationship between Bridgestone and Firestone). Firestone is Bridgestone’s unit for tire manufacturing and sales in the Americas. Firestone brand tires account for approximately seventy percent of Bridgestone’s sales in the United States, whereas Bridgestone brand tires account for the remaining thirty percent. James B. Treece, *Firestone Tire Recall Punctures Bridgestone’s Profit*,

advocates, Congress became convinced that a number of existing legal gaps contributed to the Ford-Firestone situation. By October 20, 2000, a bill designed to fill these gaps was presented to President Clinton, who signed the TREAD Act into law on November 1, 2000.<sup>24</sup> At the heart of the TREAD Act is a host of reporting requirements: (1) overseas recalls; (2) "early warning" information; and (3) sales of defective or noncompliant tires. The new reporting requirements are buttressed by sharpened civil penalties and newly added criminal penalties.<sup>25</sup>

### *B. Impact of the Ford-Firestone Recall*

Aside from congressional reaction to Ford and Firestone's handling of the tire recall (i.e., passage of the TREAD Act)—which is the main focus of this article—it is important also to consider other consequences of the recall. As part of the "Background," this sub-section briefly assesses five other major consequences: (1) financial impact of the recall and ensuing litigation; (2) federal criminal indictments; (3) investigations by state attorneys general; (4) international responses; and (5) severed relationships.

#### *1. Financial Impact*

One of most dramatic consequences of the Ford-Firestone recalls is the financial impact on both companies. In addition to a drop in sales of the Ford Explorer and Firestone brand tires, the financial impact can be measured by (1) the cost of implementing the recalls and defending or settling ensuing litigation; (2) the cost of compensating victims who either died or were seriously injured as a result of the accidents; and (3) the cost of lost jobs from Firestone's decision to close a key plant that manufactured Wilderness AT tires.

First, the cost of implementing the recalls and defending (or settling) ensuing litigation costs is simply staggering. Implementing the August 2000 recall of 6.5 million tires cost Firestone more than \$1.1 billion.<sup>26</sup> Ford spent \$3.3 billion on its own tire recall (conducted in May 2001),<sup>27</sup> which is the largest product recall in automotive history.<sup>28</sup> This recall consisted of the replacement of 13 million of the Firestone Wilderness AT tires that were not subject to the initial recall, and included 1.5 million tires that were mounted on the vehicles as replacements during

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AUTOMOTIVE NEWS, Aug. 13, 2001, at 8.

24. TREAD, Pub L. No. 106-414, 114 Stat. 1800.

25. See McDonald, *Don't Tread on Me*, *supra* note 4, at 1187.

26. Alejandro Bodipo-Memba, *Tires Plague Ford Again; Recall to Affect Expedition and Navigator SUVs*, DET. FREE PRESS, Aug. 20, 2002. In October 2000, Firestone replaced 3.5 million more tires (Wilderness AT tires). *Id.*

27. *Id.*

28. See Muller et al., *supra* note 15, at 80.

the initial Firestone recall.<sup>29</sup> Obtaining precise dollar amounts on the Ford-Firestone rollover litigation is more difficult because many lawsuits are settled on a confidential basis and companies (such as Ford) do not disclose these figures.<sup>30</sup> That being said, one California plaintiff lawyer estimates that Ford has settled about 1,500 Explorer cases.<sup>31</sup> According to Ford's annual report, Ford defended Ford-Firestone related personal injury and class action lawsuits totaling over \$590 million.<sup>32</sup> Firestone set aside \$800 million to pay for lawsuits involving the recalled tires.<sup>33</sup> In 2000, Firestone was served "with at least 413 individual lawsuits filed in state and federal courts . . . seeking recovery for personal injuries."<sup>34</sup> As of July 23, 2001, Firestone had already settled 200 claims and lawsuits.<sup>35</sup> By July 2002, Firestone and Ford had reached undisclosed settlements in more than 600 cases.<sup>36</sup> By late 2003, the number of lawsuits that Firestone settled had ballooned to more than 1,300.<sup>37</sup> The document depository that Firestone established in Akron, Ohio, in order to respond to discovery requests eventually grew to about one million pages of documents.<sup>38</sup> On March 12, 2004, a Texas court approved the settlement of thirty class action lawsuits under which Firestone

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29. Bradsher, *supra* note 16. See also *supra* note 16.

30. Eric Mayne, *Explorer Verdicts Go Ford's Way*, DET. NEWS, Jan. 26, 2004, at 1A. "Ford won't disclose how many lawsuits it has been forced to defend because of defect allegations leveled against the Explorer." *Id.*

31. *Id.* Notably, as of January 2004, Ford had successfully defended the Explorer in ten consecutive jury trials. *Id.* Further, Ford claims never to have lost a jury verdict in an Explorer case on a design issue. *Id.*

32. 2000 FORD MOTOR CO. ANN. REP. 72. Recently, Ford won a dismissal of a class action lawsuit filed by Ford stockholders who claimed the company misled them about the safety of Firestone tires on Ford Explorers by, inter alia, issuing false financial statements by failing to disclose possible liability of all related lawsuits and recalls. See David Shepardson, *Court Upholds Dismissal of Ford Tire Safety Suit; Shareholders Claimed They Were Misled About Explorer Woes*, DET. NEWS, Aug. 24, 2004, at 1C.

33. Peter Landers & Todd Zaun, *Bridgestone Takes Gamble in Ford Case*, WALL ST. J., May 23, 2001, at A21.

34. BFS Settlement, *supra* note 11, at 14 n.3.

35. Stephen Power & Clare Ansberry, *Firestone Girds for Battle Against Bigger Recall*, WALL ST. J., July 23, 2001, at A2. See also NHTSA Updates Database to 174 Deaths; 6,000 Complaints Linked to Firestone Tires, PRODUCT SAFETY & LIABILITY REP., Feb. 12, 2001, at 174. Personal injury lawyer Tab Turner from Little Rock, Arkansas, has filed 174 suits against Ford and Firestone in state courts nationwide. *Id.* See Joseph B. White et al., *Agency to Comment on Ford Tire Safety, While Inquiry Into Explorer is Considered*, WALL ST. J., June 20, 2001, at A3.

36. Myron Levin, *California; Ford, Bridgestone Settle Case Just Before Trial*, L.A. TIMES, July 17, 2002, at 2.

37. See *Firestone, Ford Settle Foreign Accident Cases*, AUTOMOTIVE LITIG. REP., Nov. 4, 2003, at 1.

38. BFS Settlement, *supra* note 11, at 34-35.

agreed to pay \$149 million:<sup>39</sup> (1) \$70 million to replace any of the Wilderness ATX, ATX II, and Wilderness AT tires that may still be on the road; (2) \$41.4 million to manufacture certain tires with better high-speed capacity;<sup>40</sup> (3) \$19 million in legal fees; (4) \$15.5 million for a consumer awareness campaign about tire safety (“Firestone Consumer Education Program” (“FCEP”));<sup>41</sup> and (5) \$2,500 to each of the forty-five plaintiffs.<sup>42</sup>

Second, the human and economic cost of lives lost in rollover accidents involving Ford-Firestone has never been estimated, though such costs are very real. Accidents involving Firestone tires (mostly involving Explorer rollovers) caused between 271<sup>43</sup> and 476<sup>44</sup> deaths and around 800 injuries in the United States alone;<sup>45</sup> ten of these deaths are linked to tires that are among the 10-13 million tires Ford began to replace in the May 2001 round of recalls.<sup>46</sup> In addition to the deaths and injuries in the United States, dozens of people died in overseas markets, including seventy-nine who either died or were injured in Venezuela.<sup>47</sup>

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39. *Judge OKs Deals for Firestone Lawsuits*, L.A. TIMES, Mar. 16, 2004, at C7; Miles Moore, *BFS Gets Good News on 2 Class Action Cases*, RUBBER & PLASTICS NEWS, Mar. 22, 2004, at 3 [hereinafter Moore, *Good News*].

40. Specifically, Firestone is obligated from January 1, 2004 through December 31, 2010, “to manufacture certain specified tires designed for passenger highway or off-road use with designs that include cap belts/strips, nylon belts/strips, or other comparable technology intended to provide equivalent or better high-speed capability for such tires.” BFS Settlement, *supra* note 11, at 6.

41. *Id.* Under the FCEP, Firestone is required to spend \$5,150,000 annually for three years on activities that increase consumer awareness “about tire safety and maintenance, vehicle safety and maintenance, and/or driving safety.” *Id.* Firestone will also change and improve its Tiresafety.com website and sponsor other programs and events to encourage the improvement of tire safety. *Id.* at 17.

42. *Judge OKs Deals for Firestone Lawsuits*, *supra* note 39; Moore, *Good News*, *supra* note 39, at 3.

43. Jeff Plungis, *Auto Firms Rush to Share Crash Data; New Federal Law to Track, Report Complaints, Injuries, Deaths Hits Broad Reach of Companies*, DET. NEWS, Sept. 14, 2003, at 1D [hereinafter Plungis, *Auto Firms Rush*].

44. See Joseph Szczesny, *Carmakers’ Tire Warranties Vary*, CHI. TRIB., Sept. 29, 2002, at 3 (linking Firestone Wilderness AT tires to 476 deaths in accidents “mostly involving Ford Explorers”). Author Adam Penenberg places the number of deaths at 300. ADAM L. PENENBERG, TRAGIC INDIFFERENCE: ONE MAN’S BATTLE WITH THE AUTO INDUSTRY OVER THE DANGERS OF SUVs 299 (2003).

45. Plungis, *Auto Firms Rush*, *supra* note 43.

46. Jeff Plungis & Mark Truby, *Feds Launch Explorer Inquiry: Rollover Data on Ford’s Star SUV to be Studied*, DET. NEWS, June 20, 2001, at 1A. See also White et al., *supra* note 35. Through February 6, 2001, NHTSA has received over 6,000 complaints relating to the Firestone tires. To see the NHTSA’s report, visit <http://www.nhtsa.gov/hot/firestone/update.html> (last visited Aug. 30, 2004). Many of these complaints involve tire tread separation or blowout that led to a vehicle rollover. *Id.*

47. Ford, *Bridgestone Reach Settlement for 90 Lawsuits for Rollovers in*

Third, many workers lost their jobs as a result of the recalls.<sup>48</sup> Bridgestone/Firestone announced on June 27, 2001 that it was closing the Decatur, Illinois tire plant, which had employed 1,500 workers<sup>49</sup> and was linked to numerous quality problems.<sup>50</sup> Firestone lost approximately \$210 million for costs tied to closing the plant.<sup>51</sup> Although the Department of Transportation ("DOT") press statement did not specifically identify which Firestone tires would need to be recalled, the *Wall Street Journal* reports identified the "tires in question [as] "Wilderness AT tires in two sizes and from certain plants."<sup>52</sup> This includes the sixteen-inch tires manufactured in the Decatur plant.

In sum, the recall and related costs for Ford and Firestone were staggering. In 2001, Firestone lost \$530 million,<sup>53</sup> its parent company, Bridgestone, lost \$1.67 billion.<sup>54</sup> Another effect of the recalls was to drop Firestone's market capitalization by fifty percent.<sup>55</sup> The resulting restructuring of Firestone cost Bridgestone about \$2 billion.<sup>56</sup> Ford fared no better. In 2001, Ford lost a record \$5.5 billion.<sup>57</sup>

## 2. Federal Criminal Indictments

In addition to the severe financial costs noted above, Ford and Firestone are currently facing federal criminal indictments. Both Ford and Firestone are being investigated by a federal grand jury that could deliver criminal indictments for the fatal vehicle

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*South America*, at <http://www.afxnews.com> (Oct. 24, 2003).

48. David Barboza, *Bridgestone/Firestone to Close Tire Plant at Center of Huge Recall*, N.Y. TIMES, June 28, 2001, at C1. "About 1,500 employees, mostly union workers and many with more than 20 years of experience, will probably lose their jobs." *Id.* Firestone insists the decision to close the factory was made solely on the basis of economics. *Id.*

49. See Penenberg, *supra* note 44, at 298.

50. See *Firestone Says Defects Plus Other Factors Cause Increase Tire Tread Problems*, PRODUCT SAFETY & LIABILITY REP., Jan. 1, 2001, at 17. "Decatur is one of six Bridgestone/Firestone plants in North America that make passenger and light truck tires." Jennifer Dixon, *Troubled Tire Plant to Be Closed*, DET. FREE PRESS, June 28, 2001, at A1. The Decatur plant produces many different lines of tires. *Id.* Several are for light trucks, specifically Ford's Explorer. *Id.*

51. Barboza, *supra* note 48. See generally *supra* note 48.

52. Power & Ansberry, *supra* note 35.

53. Dixon, *supra* note 50.

54. Lindsay Chappell, *Bridgestone Boss Lampe to Retire*, AUTOMOTIVE NEWS, Jan. 7, 2004, <http://www.autonews.com/printStory.cms?newsId=7498>. In 2002, Bridgestone earned \$83 million in net profits. *Id.*

55. *Labor Strife Recipe for Trouble*, PITTSBURGH POST-GAZETTE, Jan. 11, 2004, at C-2.

56. Chappell, *supra* note 54.

57. Jamie Butters, *7,000 Jobs Cut During Ford '03 Downsizing; Automaker Says It Is on Track in Plan to Earn \$2 Billion in '04*, DET. FREE PRESS, Jan. 10, 2004, at 1A.

crashes blamed on faulty tires.<sup>58</sup> “Alan Hogan, who worked on a Firestone assembly line in Wilson, North Carolina, from 1991 to 1997, told the grand jury his employers [Firestone] forced him and his co-workers to make tires with steel belts that had lost their adhesion with age,” according to his attorney.<sup>59</sup> As of this writing, the grand jury is still investigating.

### 3. *State Investigations*

While the federal grand jury continues deliberating, state attorneys general have already settled with both companies. Late in 2002, Ford agreed to settle lawsuits brought by state attorneys general alleging that Ford violated state laws against false and misleading advertising by failing to inform or warn consumers about rollover dangers of sport-utility vehicles.<sup>60</sup> The settlement between Ford and the state attorneys general from the fifty states, Washington, D.C., Puerto Rico, and the Virgin Islands required Ford to do the following: (1) pay \$51 million; (2) include a disclaimer in future advertising that shows aggressive driving;<sup>61</sup> and (3) fund consumer education initiatives concerning *all* sport-utility vehicles, even non-Ford sport-utilities. The majority of the settlement—thirty million dollars—will be used to fund a nationwide “public service advertising campaign” about the safety of SUVs.<sup>62</sup> In addition, each state in the agreement will receive \$300,000, as well as an additional \$1 million each to Illinois, Florida, Iowa, Georgia, Washington, Connecticut, Tennessee, and Texas to pay for their investigations.<sup>63</sup> In 2001, Firestone settled with the state attorneys general on similar grounds for \$41.5 million.<sup>64</sup>

### 4. *International Consequences*

The international consequences of the Ford-Firestone matter break down into two main categories: the *foreign governmental* reaction and the *foreign victim* reaction. Perhaps because

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58. *Grand Jury Probes Bridgestone Tires; Ford Explorer Cases Targeted*, CHI. TRIB., Feb. 27, 2003, at 3N.

59. Susan Skiles Luke, *Grand Jury Considers First Criminal Charges Against Ford, Bridgestone/Firestone in Tire Case*, ASSOCIATED PRESS NEWSWIREs, Feb. 27, 2003.

60. See, e.g., Grace Aduroja, *\$51 Million SUV Safety Claims Bill for Ford*, CHI. TRIB., Dec. 21, 2002, at 1N (explaining the amounts that Ford had to pay); *Lack of SUV Rollover Warnings in Ads Forces Ford to Pay \$51 Million*, HIGHWAY & VEHICLE/SAFETY REP., Jan. 20, 2003, at 3.

61. *Lack of SUV Rollover Warnings in Ads Forces Ford to Pay \$51 Million*, *supra* note 60, at 3. The disclaimer will read: “Professional driver. Closed Course. Do not attempt.” *Id.*

62. Aduroja, *supra* note 60, at 1N.

63. *Id.*

64. *Id.*

Firestone tire separations also occurred in overseas markets, such as Saudi Arabia, Venezuela, Colombia, Thailand, and Mexico, some foreign governments looked closely at how the U.S. government responded as a guide to how to respond in their markets. One example of legislation similar to TREAD was the Chinese response, known as the "Stipulation on the Recall of Defective Automotive Products."<sup>65</sup> The legislation as drafted would require required manufacturers to "organize and carry out [a] recall action" once the existence of [a] defect has been identified.<sup>66</sup>

Victims in overseas markets have attempted to have their claims against Ford and Firestone heard in *U.S. courts*. For example, thirty-one lawsuits by *Mexican* nationals were heard in a Tennessee state court for injuries they sustained in *Mexico* as a result of alleged defective Firestone tires on Ford Explorers.<sup>67</sup> In each case, the vehicles and tires were purchased and serviced exclusively in Mexico, the medical treatment and the investigations occasioned by the accidents were conducted in Mexico, and all witnesses of the accidents reside in Mexico.<sup>68</sup> The plaintiffs, all of whom are citizens and residents of Mexico, asserted claims for negligence, strict liability, breach of the Tennessee "Consumer Protection Act," and civil conspiracy (alleging "Ford and Firestone conspired to conceal the defective nature of their products").<sup>69</sup> Firestone is headquartered in Tennessee.<sup>70</sup> The court of appeals found under principles of *forum non conveniens* that Mexico, not Tennessee, is the proper venue to try these cases.<sup>71</sup> Had the decision of the lower court been sustained, the implications would have been obvious: *foreign nationals* would bring their product liability lawsuits in U.S. state courts.<sup>72</sup> As of this writing, this case was on appeal to the

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65. Stipulation on the Recall of Defective Automotive Products, Draft for Review (May 2003) (photocopy on file with author) [hereinafter Stipulation]. See also *China Drafts Rules on Auto Recall System*, at [http://english.peopledaily.com.cn/200210/25/eng20021025\\_105656.shtml](http://english.peopledaily.com.cn/200210/25/eng20021025_105656.shtml) (last updated Oct. 25, 2002).

66. Stipulation, *supra* note 65, at art. 4.

67. *In re: Bridgestone/Firestone & Ford Motor Co. Tire Litig.*, No. M2002-02204-COA-R10-CV, 2003 Tenn. App. LEXIS 847, at \*2 (Tenn. Ct. App. Dec. 3, 2003).

68. *Id.* at \*2-3.

69. *Id.* at \*3.

70. *Id.* Firestone's principle place of business is Davidson County, Tennessee. *Id.*

71. *Id.* at \*21.

72. Foreign nationals have successfully used the Alien Tort Claims Act to sue for violations of international law. See generally Kevin M. McDonald, *Corporate Civil Liability Under the U.S. Alien Tort Claims Act for Violations of Customary International Law During the Third Reich*, 1997 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 167, 171-96 (1997).

Tennessee Supreme Court.<sup>73</sup>

Regardless of how this case ends, Ford and Firestone have already settled at least ninety lawsuits in Venezuela, Costa Rica, Columbia, and Argentina on claims of tread separations.<sup>74</sup> These cases were part of the more than 600 cases that were consolidated before the federal district court in Indianapolis.<sup>75</sup> According to Bridgestone/Firestone, “the vast majority of these lawsuits have been resolved through settlements, dismissals, and other dispositions.”<sup>76</sup>

### 5. *Severed Relations*

One of the most extraordinary events surrounding the recall since passage of the TREAD Act was Firestone’s announcement on May 22, 2001 that it would stop selling certain tires to Ford.<sup>77</sup> As dramatic as the announcement may seem, Ford and Firestone had not worked well together since the initial recall was announced on August 9, 2000. Ford accused Firestone of ignoring data that indicated higher than usual failure rates for the unrecalled Wilderness tires. Firestone accused Ford of questioning the safety of Firestone tires to divert attention from steering problems with the Explorer. John T. Lampe, Firestone’s CEO at the time,<sup>78</sup> told

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73. The decision of the Tennessee Court of Appeals contradicts a decision from the 7th Circuit, in which the court held that 121 of the cases originally filed in that jurisdiction by Venezuelan and Columbian nationals could not be dismissed on the basis of a motion for forum non conveniens because a court must consider whether an adequate alternative forum is available and whether private and public interest indicate that the alternative forum is superior. The trial court had used its discretion to credit an expert opinion that the Venezuelan courts would lack subject-matter jurisdiction, and to conclude that neither private nor public interest indicated superiority of alternative forums. *In re Ford Motor Co.*, 344 F.3d 648 (7th Cir. Nov. 13, 2002).

74. *Company News; Ford and Firestone Settle 90 Suits in Rollover Cases*, N.Y. TIMES, Oct. 25, 2003, at C5; Miles Moore, *BFS, Ford Settle 90 Rollover Suits*, RUBBER & PLASTICS NEWS, Nov. 3, 2003, at 4 [hereinafter Moore, *Settle*].

75. Moore, *Settle*, *supra* note 74.

76. *Id.*

77. Landers & Zaun, *supra* note 33. “The cutoff . . . with Ford applies only to Firestone tires sold for use on new vehicles in North America, Central America, and South America. Firestone will continue to provide tires to Ford in Europe and Asia.” *Id.* Firestone estimates that losing Ford as a customer will cost less than five percent of Firestone revenue, which totals about \$7.5 billion. See Richard Truett, *BFS, Ford Warm up to Each Other*, RUBBER & PLASTICS NEWS, Mar. 15, 2004; Keith Bradsher, *Firestone to Stop Sales to Ford, Saying It Was Used as Scapegoat*, N.Y. TIMES, May 22, 2001, at A1; Timothy Appell et al., *Firestone Quits as Tire Supplier to Ford*, WALL ST. J., May 22, 2001, at A3.

78. Mr. Lampe has since retired from Bridgestone/Firestone on March 31, 2004. Chappell, *supra* note 54. See also *Bridgestone Americas Chief Retiring*, DET. FREE PRESS, Jan. 8, 2004, at 2C (explaining Lampe’s decision to retire).

the *New York Times* that he ceased doing business with Ford after a meeting on May 21, 2001 with Carlos Mazzorin, the Ford vice president for purchasing.<sup>79</sup> “When Mr. Mazzorin said Ford would not share safety data on the Explorer, Mr. Lampe said that he handed Mr. Mazzorin a letter terminating the companies’ relationship.”<sup>80</sup> The rupture ended a close business relationship that began in the early 1900s, when Henry Ford first hired Harvey Firestone’s company to make tires for Ford cars.<sup>81</sup> Though the NHTSA ultimately (in 2002) blamed Firestone tires for the rollovers,<sup>82</sup> Firestone—citing a study undertaken by Ohio State University professor Dennis Guenther—continues to maintain that over-steering problems in the Explorer steering system make the vehicle difficult to control during a tire failure.<sup>83</sup> The rupture between Ford and Firestone, as well as the public criticism each company levied on the other, may have confused the public, but not the trial lawyers.<sup>84</sup>

Most recently, U-Haul broke its relationship with Ford, specifically by ceasing the rental of trailers to consumers who drive Ford Explorers.<sup>85</sup> The reason given by U-Haul was that the costs of defending product liability lawsuits related to the Explorer had become “excessive.”<sup>86</sup>

The constant barrage of negative media reports took its toll on Firestone and Ford. Even in 2004, several years after the recalls, the companies’ relationship with each other is still strained.<sup>87</sup> Ultimately, each company decided to change its top leadership. The first to go was Masatoshi Ono, the CEO of

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79. Bradsher, *supra* note 77.

80. *Id.*

81. Aepfel et al., *supra* note 77. Ford was Firestone’s largest customer, representing five percent of Firestone’s revenues. Dixon, *supra* note 50. Proving the old adage that “time heals all wounds,” outgoing Firestone CEO (John Lampe) has recently indicated that Firestone might become one of Ford’s suppliers again, although no time frame has been publicly set. Truett, *supra* note 77.

82. *U-Haul Won’t Rent to Ford Explorer Drivers*, N.Y. TIMES, Jan. 9, 2004, at C4 [hereinafter *U-Haul*]. “In 2002, the [NHTSA] cleared the Explorer after it found the vehicle no more rollover-prone than other SUVs.” Mayne, *supra* note 30.

83. See Plungis & Truby, *supra* note 46, at 1A. Firestone also claims that Florida accident data suggests that the Explorer rolled over four times more than comparable SUVs. *Id.*

84. See Aepfel et al., *supra* note 77 (quoting personal injury lawyer Mike Edison, co-lead plaintiffs’ counsel for more than 200 individual death and injury cases filed in federal courts nationwide against Ford and Firestone as saying, “[w]e couldn’t be in a better situation in any case than to have two defendants fighting each other”).

85. See *U-Haul*, *supra* note 82.

86. *Id.*

87. Eric Mayne, *Friction Still Exists Between Ford, Firestone*, DET. NEWS, Feb. 8, 2004, at 1B.

Bridgestone/Firestone, who resigned upon the request of Bridgestone President Yoichiro Kaizaki.<sup>88</sup> Bridgestone replaced not only Mr. Ono, but also Firestone's entire top management team. Ford held onto Mr. Nasser a bit longer, but the winds of change blew into Dearborn by late fall 2001. On October 30, 2001, Ford fired Jacques Nasser as President and CEO, though it denied that the firing had anything to do with the Firestone recall.<sup>89</sup> Interestingly, Mr. Nasser spends part of his time now as a business professor.<sup>90</sup>

## 6. Summary

Both Bridgestone/Firestone and Ford are continuing to recover from the controversial recalls of 2000. Bridgestone responded to the recalls by (1) reorganizing its U.S. operations, (2) putting greater emphasis on Bridgestone as its premium brand, and (3) shifting sales away from vehicle manufacturers toward the consumer market, where profit margins are more favorable.<sup>91</sup> The strategy seems to be working. By 2002, gross margins on U.S. tire sales grew by seven percent; sales in the United States recovered from lower levels in 2001; and full-year profits were around \$50 million.<sup>92</sup> On the Ford side, within two years of the recalls, Ford sold over 51,000 Explorer models in August 2002 in the United States, which represented the best sales month ever for the Explorer.<sup>93</sup> Less than a year after the recalls, a study in 2001

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88. See *Bridgestone President to Quit in March; Tire Recall Marred Kaizaki's Tenure*, WASH. POST, Jan. 12, 2001, at E3. Mr. Ono was replaced by John T. Lampe. See David Welch, *Meet the New Face of Firestone*, BUS. WK., Apr. 30, 2001, at 64 (providing background on Mr. Lampe). Mr. Lampe retired in March 2004 and was replaced by Mark Emkes. *Bridgestone Americas Chief Retiring*, *supra* note 78.

89. Ford replaced Mr. Nasser with William Clay Ford, Jr., the great-grandson of Henry Ford. Danny Hakim, *Ford Family Takes the Helm; Effort to Overcome Rift at Troubled Company*, N.Y. TIMES, Oct. 31, 2001, at C1. Mr. Ford said that Mr. Nasser's handling of the Firestone recall played no role in the forced resignation. *Id.* Because of (or despite) his handling of the Ford-Firestone recall, Ford paid Mr. Nasser \$12.1 million for his services in 2000, which represented a nineteen percent increase over his 1999 salary. Norihiko Shirouzu, *Ford Paid Its CEO Nasser \$12.1 Million in 2000, Up 19% Despite Tire Problem*, WALL ST. J., Apr. 11, 2001, at A8.

90. Luke Collins, *Out But Not Down*, AUSTRALIAN FIN. REV., July 11, 2003, at 34. Since his firing from Ford, Mr. Nasser has become a member of the international advisory board of Allianz AG, and a senior partner of One Equity Partners, which is the private equity business of Bank One Corporation. *Id.* In addition, Nasser also lectures at INSEAD, the business school based in Fontainebleau, France, for a few weeks during the year. *Id.*

91. Ken Belson & Micheline Maynard, *A Return to Profitability; Big Recall Behind It, Tire Maker Regains Its Footing*, N.Y. TIMES, Aug. 10, 2002, at C1. Consumers pay twice as much for tires as vehicle manufacturers pay. *Id.*

92. *Id.*

93. See Mark Truby, *Resilient Explorer Rides High Again*, DET. NEWS,

conducted by Polk found that despite the negative media reports during the recall controversy, the Explorer enjoyed the “second-highest owner loyalty rate among SUVs,” trailing only the Jeep Grand Cherokee.<sup>94</sup> The strong sales figures and loyal customer base led the *Detroit News* to conclude “[w]ith the exception of Tylenol, which rebounded from an ugly package-tampering controversy, it is nearly unheard of for a consumer product [such as the Explorer] to pass through a blizzard of negative publicity and safety questions virtually unscathed.”<sup>95</sup>

### C. Post-TREAD Events

#### 1. DOT Audit of NHTSA

On January 3, 2002, the DOT Office of Inspector General (“IG”)<sup>96</sup> issued an audit report of NHTSA.<sup>97</sup> This report audited not only NHTSA’s implementation of the TREAD Act, but also how NHTSA conducts defects investigations. The IG performed the audit “at the request of Senator John McCain [R-AZ], Ranking Minority Member of the Senate Committee on Commerce, Science, and Transportation.”<sup>98</sup> The careful observer will recall that Senator McCain had pushed strongly during the Ford-Firestone hearings for his own bill, which ultimately lost to the House version.<sup>99</sup> During the Senate committee’s Ford-Firestone hearing on September 12, 2000, the committee questioned ODI’s<sup>100</sup> ability

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Sept. 5, 2002, at 1A.

94. *Id.*

95. *Id.*

96. The IG works independently “within the DOT to promote effectiveness and head off, or stop, waste, fraud and abuse in departmental programs . . . through audits and investigations.” Dep’t of Transp. Office of Inspector Gen., *Background and Responsibility*, at <http://www.oig.dot.gov/about.php> (last visited Sept. 1, 2004). The current Inspector General of the DOT is Kenneth M. Mead, who has served in this position since his confirmation by the U.S. Senate on May 27, 1997. See Dep’t of Transp. Office of Inspector Gen., *Kenneth Mead*, at [http://www.oig.dot.gov/emp\\_bio.php?id=253](http://www.oig.dot.gov/emp_bio.php?id=253) (last visited Sept. 1, 2004) (providing a biography of Mead).

97. NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., REVIEW OF THE OFFICE OF DEFECTS INVESTIGATION (2002) [hereinafter IG REPORT], available at [http://www.oig.dot.gov/show\\_pdf.php?id=662](http://www.oig.dot.gov/show_pdf.php?id=662). In comparison with media coverage of the underlying events that triggered the TREAD Act, media coverage of this report was scant and superficial. See, e.g., Jayne O’Donnell, *Report: Auto Defects Still Slipping by NHTSA*, USA TODAY, Jan. 10, 2002, at 3B; Caroline E. Mayer, *Highway Safety Agency Faulted on Probes; Internal Study Calls NHTSA System for Collecting Data ‘Seriously Flawed,’* WASH. POST, Jan. 10, 2002, at E02.

98. IG REPORT, *supra* note 97, at Memo 1 (incorporating a memorandum from Alexis M. Stefani to the NHTSA).

99. See McDonald, *Don’t TREAD on Me*, *supra* note 4, at 1180.

100. ODI is the abbreviation for “Office of Defects Investigation,” which is the arm of NHTSA that is responsible for conducting investigations in order to

to handle information that could contain early warning signs of product defects,<sup>101</sup> because ODI had on file twenty-five consumer complaints as well as notifications from State Farm officials warning of Firestone tire problems that went back several years *before* ODI ever opened a preliminary evaluation into the matter.<sup>102</sup>

In auditing NHTSA, the IG's objectives (as specifically requested by Senator McCain<sup>103</sup>) were the following:

(1) evaluate NHTSA's progress and challenges in implementing the TREAD Act; (2) assess the adequacy of NHTSA's processes and procedures for assessing potential defects and opening investigations; (3) evaluate the risks associated with NHTSA's approach for developing a new defect information management system (DIMS); and (4) identify notification, investigation, and recall requirements considered as 'best practices' by other regulatory agencies that may be used as models for improving ODI.<sup>104</sup>

This Section discusses the IG's findings and recommendations, NHTSA's response to the IG, and the IG's *counter-response* to NHTSA.

a. NHTSA's Progress and Challenges in Implementing the TREAD Act

The IG's first objective in auditing NHTSA was to examine how effective NHTSA was (or was not) in implementing the TREAD Act. Of the fifteen rulemakings mandated under TREAD, Congress laced eight with rather tight statutory deadlines, ranging from only a year to just over eighteen *months*.<sup>105</sup> Usually, the DOT requires 3.8 *years* to complete significant rules, which is well over double the time envisaged in TREAD.<sup>106</sup> In its zeal to force additional regulation in record time, Congress appears to have ignored, or at least failed to appreciate, the necessary checks and balances of the regulatory process. These checks and

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implement the Vehicle Safety Act by identifying and correcting safety-related defects in vehicles and vehicle equipment. See 49 C.F.R. § 554.5. See also Kevin M. McDonald, *Judicial Review of NHTSA-Ordered Recalls*, 47 WAYNE L. REV. 1302, 1313-17 (2002) [hereinafter McDonald, *Judicial Review*] (providing further background on ODI).

101. IG REPORT, *supra* note 97, at i.

102. McDonald, *Don't TREAD on Me*, *supra* note 4, at 1173, 1176. Unfortunately, ODI's apparent oversight of this early data was mainly overlooked by Congress, which chose to focus almost entirely on the conduct of Ford and Firestone. Had Congress studied this matter more thoroughly, it would have found that NHTSA had plenty of "early warning data" by which to order a recall months, if not years, before NHTSA ever even opened a preliminary evaluation.

103. IG REPORT, *supra* note 97, at 27.

104. *Id.* at i.

105. TREAD Act, Pub. L. No. 106-414, 14 Stat. 1800 (2002).

106. *Id.*

balances, which may “slow down” the regulatory process and result in the 3.8-year average to complete significant rules, include: (1) the need for agencies to consider differing views on the substance of the proposed rule; (2) requirements for a cost/benefit analysis; and (3) the need to have other entities, such as the Office of Management and Budget (“OMB”), review and approve a proposed rule.<sup>107</sup>

Not surprisingly, the IG found that NHTSA faced substantial challenges in meeting TREAD’s statutory deadlines.<sup>108</sup> Although NHTSA had already issued nine proposed rules and three final rules by the time of the report (January 3, 2002),<sup>109</sup> it had already missed the statutory deadline of November 1, 2001 for the final rule regarding the tire pressure monitoring system (TPMS).<sup>110</sup>

To minimize the risk of NHTSA not completing a number of rulemakings in the time mandated in the TREAD Act, the IG recommended that NHTSA consult with DOT and begin routinely informing Congress of the milestone dates, budget estimates, and actions required to complete the rulemakings (consulting with OMB where needed).<sup>111</sup> NHTSA concurred with this recommendation,<sup>112</sup> although NHTSA said it would brief congressional *committee* staff as opposed to the full Congress on the status of TREAD implementation and provide additional information when specifically requested by Congress.<sup>113</sup>

#### b. Adequacy of NHTSA’s Processes and Procedures for Assessing Defects

The IG’s second objective in auditing NHTSA was to examine ODI’s current defect analysis and investigative processes.<sup>114</sup> In short, the IG found that ODI’s processes “are in need of major improvements”<sup>115</sup> because of three major shortcomings: (1) defective processes; (2) limited information range; and (3) a problematic defect database.<sup>116</sup>

The first process shortcoming identified by the IG was the ODI process for analyzing defect trend data.<sup>117</sup> Generally speaking, the ODI process reflected “an unstructured approach for analyzing

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107. IG REPORT, *supra* note 97, at vi.

108. *Id.*

109. *Id.* at 3.

110. *Id.*

111. *Id.* at 21.

112. *See id.* at 36 (providing the Memorandum from Jeffrey W. Runge to Thomas J. Howard, Deputy Assistant Inspector General for Maritime and Highway Safety Programs, dated December 4, 2001).

113. IG REPORT, *supra* note 97, at 23.

114. *Id.* at i.

115. *Id.* at vi.

116. *Id.*

117. *Id.*

data and determining if a potential defect exists and warrants further investigation.<sup>118</sup> Specifically, ODI's process provided no methodology for analyzing consumer complaints.<sup>119</sup> For instance, ODI procedures do not inform staff how to undertake a sufficient search of the available consumer complaint data or even how to study the data to identify defect trends.<sup>120</sup> Further, in contrast to the Consumer Product Safety Commission (CPSC),<sup>121</sup> ODI staff is *not* required to notify senior management when they receive complaints that involve a serious injury.<sup>122</sup> Perhaps most troubling to the IG was that ODI, according to NHTSA's own Associate Administrator for Safety Assurance, does not even have "specific processes or procedures for opening [defect] investigations."<sup>123</sup> Rather, ODI opens investigations "based on the seriousness and frequency of the complaint(s)."<sup>124</sup> ODI's failure to prioritize investigations leads to troubling inconsistencies, as the IG noted in the following observation:

[O]ver a 4-month period, ODI received three complaints alleging front suspension torsion bar breakage in 1993-94 minivans, that could cause the driver to lose control of the vehicle and increase the risk of a crash; however, no investigation was opened. In contrast, another case had three complaints with no reports of crashes over a 1-year period alleging front suspension coil spring breakage that could pose a potential compromise to the driver's ability to control the vehicle, and ODI opened an investigation.<sup>125</sup>

To fix ODI's process inconsistencies, the IG recommended that NHTSA establish a peer review panel<sup>126</sup> so as to "bring management together to identify high priority cases and to ensure a degree of consistency in the decision making process."<sup>127</sup> A peer review "can be effectively used to provide a thorough and consistent assessment of the quality of ODI's support for recommending and opening an investigation" while offering the benefit of providing an effective mechanism "for answering

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118. *Id.*

119. *Id.* at vi.

120. *Id.*

121. See *infra* notes 160, 171 and accompanying text. The CPSC is an Independent Federal Regulatory Agency. U.S. Consumer Prod. Safety Comm'n, *Frequently Asked Questions*, at <http://www.cpsc.gov/about/faq.html> (last visited Sept. 1, 2004). It works to keep consumers safe "by reducing the risk of injuries and deaths associated with consumer products." *Id.*

122. IG REPORT, *supra* note 97, at vi.

123. *Id.*

124. *Id.*

125. *Id.* at vii-viii.

126. *Id.* at viii. The panel would be made up of the Chiefs of the Defects Analysis and Investigations Divisions and staff members of those divisions. *Id.*

127. *Id.* at viii.

questions such as how data supporting the opening of an investigation compare to the data in a similar case that was investigated.<sup>128</sup> Additionally, the IG recommended that ODI “develop new defect analysis and investigative processes that define parameters for analyzing data and opening investigations” as well as providing corresponding training to the staff.<sup>129</sup>

The second process shortcoming identified by the IG was the limited range of information utilized by ODI in gathering defect information.<sup>130</sup> Specifically, ODI fails to solicit “internal and external information sources, such as NHTSA’s accident databases,<sup>131</sup> insurance companies, and plaintiff attorneys, to determine the scope of a potential defect.”<sup>132</sup> To fix this shortcoming, the IG recommended that ODI consult regularly with additional outside sources of information and “develop innovate techniques” in collecting and analyzing information “from a wider range of sources to help identify potential trends sooner.”<sup>133</sup>

The third process shortcoming identified by the IG was the ODI’s defect database, which is hindered by “the limited amount and poor quality of data ODI uses to spot defect trends.”<sup>134</sup> ODI’s defect database, which ODI uses as its “primary tool” to identify potential defect trends, “significantly underestimates the number of potential safety defects.”<sup>135</sup> The database contains one-tenth the amount of complaints on file with manufacturers.<sup>136</sup> In addition, the database contains incomplete and incorrectly recorded information.<sup>137</sup> For example, consumer complaints describing problems with “failed brakes that led to accidents in which airbags did not deploy” was only recorded as an airbag problem.<sup>138</sup> Further, keyword searches yield different results that vary according to the word used.<sup>139</sup> For instance, searching under the word “brake” as opposed to “braking” on the same 1995 minivan produced radically different results.<sup>140</sup> As a result, “relevant

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128. *Id.* at 16.

129. IG REPORT, *supra* note 97, at vi.

130. *Id.* at 12-13.

131. NHTSA databases, such as the Fatality Analysis Reporting System (“FARS”) and the National Automotive Sampling System (“NASS”), contain information on motor vehicle accidents, which could be “useful for identifying trends by comparing the complaints with accident results.” *Id.* at 13.

132. *Id.* at 12.

133. *Id.* at 13.

134. *Id.* at vi.

135. *Id.* at viii. The database contains “consumer complaints to NHTSA, past and ongoing ODI investigations, manufacturer recalls, and manufacturer-issued technical service bulletins.” *Id.* at 10.

136. IG REPORT, *supra* note 97, at 11.

137. *Id.*

138. *Id.*

139. *Id.* at 11.

140. *Id.* at 11-12.

complaints and a potential defect trend may not be identified.”<sup>141</sup> Finally, ODI staff must process over 34,000 complaints a year, which comes out to about 200 per week, allowing each staff member an average of twelve minutes per complaint (per person) “to review the information and search the defect database for similar complaints, related investigations and recalls” and decide whether to recommend an investigation.<sup>142</sup> With the additional manpower provided for under TREAD, this situation should improve.<sup>143</sup>

In NHTSA’s response to the IG’s recommendations for improving ODI processes, NHTSA maintained that ODI procedures “have worked well”<sup>144</sup> (a point in turn strongly refuted by the IG, which cited the Firestone case as “clearly illustrat[ing] that ODI’s processes and procedures need major improvements”<sup>145</sup>), but agreed to: (1) develop and formalize new defect analysis and case opening procedures used by the ODI screeners in the Defect and Recall Information and Analysis Division and train personnel in these new procedures;<sup>146</sup> (2) a peer review panel made of the “Division Chiefs and selected staff investigators that would review the screeners’ recommendations for opening defect investigations;”<sup>147</sup> and (3) identify techniques for collecting and analyzing defect information from a wide range of sources.<sup>148</sup>

### c. Risk Evaluation of NHTSA’s New Defect Information Management System

The IG’s third objective in auditing NHTSA was to “evaluate the risks associated with NHTSA’s approach for developing a new defect information management system” (DIMS).<sup>149</sup> An efficient and accurate DIMS is particularly important considering the amount of data NHTSA will receive from manufacturers under the new early warning reporting (“EWR”) requirement.<sup>150</sup> For this reason, the IG recommended that NHTSA “develop a new [DIMS] to replace the currently flawed system. . . because the success of

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141. *Id.* at 12.

142. *Id.* at 11.

143. *Id.* (“ODI is planning to hire 18 additional staff – a 39 percent increase in staff. ODI intends to hire four defects analysis staff, seven investigators, one statistician, two data entry and control staff, and four administrative staff. ODI has hired four defects analysis staff, three investigators, and three administrative staff.”)

144. IG REPORT, *supra* note 97, at 37.

145. *Id.* at 24.

146. *Id.* at 38.

147. *Id.* NHTSA stated that this process commenced with the first panel meeting on November 29, 2001. *Id.*

148. *Id.*

149. *Id.* at i.

150. *See infra* notes 207-221 and accompanying text.

the TREAD Act depends on the quality and usefulness of the new information system and ODI's ability to identify potential defects."<sup>151</sup> To ensure that the new DIMS functions properly, the IG recommended that NHTSA have "an independent assessment. . . to ensure that [the system]. . . meets quality, cost, and schedule goals."<sup>152</sup> As correctly identified by the IG, the "success of the TREAD Act will ultimately rise or fall on the quality and usefulness of the new information system and ODI's ability to identify potential defects."<sup>153</sup>

The new system replaced the then-current defect database with a new information system by the fall of 2002. The new system, which is designed to process the early warning information submitted by manufacturers on a quarterly basis (such as warranty data and customer complaint data on every vehicle sold), is "at risk because of poor project planning and management,"<sup>154</sup> according to the IG, which doubted NHTSA's ability to have the off-the-shelf \$5 million system from Volpe National Transportation Systems Center (Volpe) fully operational by fall 2002. (In testimony to Congress, the IG noted that the software (even if "off-the-shelf") will need modifications and "involve systems development work").<sup>155</sup> The IG claims an independent assessment of NHTSA's plan could help it "spot problems before they result in major cost increases and schedule slippages."<sup>156</sup> In its response, NHTSA did *not* agree with the IG's *draft* recommendations to assign a full-time project manager to the new information system project.<sup>157</sup> The IG dropped this draft recommendation, however, because NHTSA did agree to "obtain the services of an independent entity to validate and verify the contractor's [i.e., Volpe's] progress" and reduce development risk.<sup>158</sup>

#### d. "Best Practices" of Other Regulatory Agencies

The IG's fourth (and last) objective in auditing NHTSA was to "identify notification, investigation and recall requirements considered as 'best practices' by other regulatory agencies and that may be used as models for improving ODI."<sup>159</sup> In looking for

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151. IG REPORT, *supra* note 97, at ii.

152. *Id.* at iv.

153. *Id.*

154. *Id.*

155. *Hearing, supra* note 2, at 2, iv, 5.

156. IG REPORT, *supra* note 97, at v.

157. *Id.* at 39. "NHTSA does not agree that it would be beneficial to hire a 'full-time project manager,' particularly at this point in the project." *Id.* NHTSA has the Chief of the Information Management Division of the Office of Safety Assurance as the project manager "responsible for assuring that ODI's needs are met in a proper and timely manner." *Id.*

158. *Id.* at 25, 39.

159. *Id.* at i.

examples of better investigative practices, the IG looked at similar federal agencies and decided the Consumer Product Safety Commission (CPSC) provided the best model.<sup>160</sup> The IG noted that the CPSC “employs several methods” that ODI could use “to identify defects, prioritize investigations, publicize recalls, and involve senior management in the decision making process.”<sup>161</sup> The IG explains that:

First, the CPSC draws on *multiple* “sources of information and databases to detect safety-related problems in products.”<sup>162</sup> Sources include coroners, fire departments, hospitals, field data collected by investigators, and compliance data on manufacturer actions.<sup>163</sup>

Second, the CPSC prioritizes investigations and recalls based on the severity of the hazard.<sup>164</sup> The prioritization is based on criteria that “include the severity of the risk, the intended or foreseeable use or misuse of the product, and the population group exposed to the products including children, the elderly, and the handicapped.”<sup>165</sup> A hazard priority system also assists in developing the corrective action. For example, a Class A hazard (the highest priority) represents “product defects that present a strong likelihood of death or grievous injury” and therefore justifies the highest level of manufacturer and CPSC attention.<sup>166</sup>

Third, corrective actions and notifications of defects are developed by both the CPSC and the manufacturer.<sup>167</sup> Although the CPSC develops the wording of the press release, the press release is ultimately issued jointly with the manufacturer.<sup>168</sup> Manufacturers might have to employ other methods to make the recall public, such as “television announcements, recall posters in stores that sold the defective product, and website announcements.”<sup>169</sup>

Fourth, CPSC commissioners meet weekly with senior compliance managers to discuss the status of investigations and emerging hazards data.<sup>170</sup> Commissioners are informed immediately of complaints or notices that deal with a “death or risk of serious injury.”<sup>171</sup>

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160. *See id.* at 20 (finding that the “scope and extent of CPSC’s regulatory authority most closely parallels NHTSA’s”).

161. *Id.*

162. IG REPORT, *supra* note 97, at 20.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 21.

168. *Id.*

169. *Id.*

170. IG REPORT, *supra* note 97, at 21.

171. *Id.*

As part of its recommendation that NHTSA “ensure consistency in recommending and opening investigations and that highest priority cases” are appropriately investigated,<sup>172</sup> the IG recommended that NHTSA evaluate these “best practices” and use them “as appropriate.”<sup>173</sup> NHTSA responded that, while “concurring” in the “appropriateness” of identifying best practices, it has “previously considered” some of the best practices used by CPSC in the IG Report and decided “that they would not be practical in the ODI context,” because NHTSA does not, for example, “have the field staff that the CPSC uses to contact local coroners and other individuals across the country.”<sup>174</sup> The IG appears to find NHTSA’s response incomplete, calling (again) on NHTSA “to specify how it plans to evaluate the best practices and which best practices it will use.”<sup>175</sup>

## 2. *Congressional Oversight Hearings*

On February 28, 2002, the House Subcommittee on Commerce, Trade, and Consumer Protection, which has oversight authority over NHTSA,<sup>176</sup> held a two-hour hearing entitled “Implementation of the TREAD Act: One Year Later.” According to Representative Clifford Stearns (R-FL), Chairman of the Subcommittee, this hearing was designed to examine “NHTSA’s implementation of the TREAD Act.”<sup>177</sup>

The Subcommittee invited only three witnesses (all government employees) to testify: (1) Dr. Jeffrey W. Runge, Administrator of NHTSA; (2) John D. Graham, Ph.D., Administrator of OMB’s Office of Information and Regulatory

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172. *Id.* at 21.

173. *Id.* at 22.

174. *Id.* at 38.

175. *Id.* at 24.

176. The Subcommittee on Commerce, Trade, and Consumer Protection, which is a subcommittee of the House Committee on Energy and Commerce, has jurisdiction over the following:

1. Interstate and foreign commerce, including all trade matters within the jurisdiction of the full [House] committee;
2. Regulation of commercial practices (the FTC), including sports-related matters;
3. Consumer affairs and consumer protection, including general privacy matters, consumer product safety (the CPSC), product liability, and *motor vehicle safety*; and
4. Regulation of travel, tourism, and time.

The House Comm. on Energy & Commerce, *Committee Jurisdiction*, at <http://energycommerce.house.gov/107/jurisdiction.htm> (last visited Sept. 1, 2004) (emphasis added). Representative Clifford Stearns (R-FL), Chairman of the subcommittee, believes the subcommittee’s oversight jurisdiction over NHTSA is “one of [the subcommittee’s] most important oversight” functions. *Hearing, supra* note 2, at 1.

177. *Id.*

Affairs (OIRA); and (3) Kenneth M. Mead, DOT's Inspector General.<sup>178</sup>

The following eleven legislators attended the hearing: (1) Subcommittee Chairman Clifford Stearns (R-FL); (2) Subcommittee Ranking Member<sup>179</sup> Edolphus Towns (D-NY); (3) Full Committee Ranking Member John Dingell (D-MI);<sup>180</sup> (4) Fred Upton (R-MI); (5) John Shimkus (R-IL); (6) Ed Bryant (R-TN); (7) Joseph Pitts (R-PA); (8) Charles Bass (R-NH); (9) Diana DeGette (D-CO); (10) Edward Markey (D-MA); and (11) Thomas Sawyer (D-OH).<sup>181</sup>

The hearing focused on four areas: (1) congressional intent of the TREAD Act; (2) the forthcoming early warning reporting rule; (3) the DOT IG's Audit of the ODI; and (4) the tire pressure monitoring rule.<sup>182</sup>

#### a. Congressional Intent Behind TREAD

The first theme of the hearings was the congressional sentiment behind TREAD. The lawmakers' prepared statements (many of which the congressmen read in total before questioning the witnesses) offer further insight into the congressional intent behind the TREAD Act. Although some lawmakers addressed narrow issues of particular relevance to constituencies in their districts (e.g., addressing concerns of factory employees in tire manufacturing plants regarding an increased health risk as a result of proposed requirements of labels on both sides of a tire<sup>183</sup>), some lawmakers emphasized the "big picture" of TREAD.

Perhaps most effective in providing substantive insight into congressional action was Subcommittee Chairman Clifford Stearns. In describing why Congress passed the TREAD Act,

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178. *Id.* at iii (Table of Contents).

179. The term "Ranking Member" is used in both the House and the Senate and refers to the second highest rank (after the Chairperson) on a committee. *C-Span Congressional Glossary*, at <http://www.c-span.org/guide/congress/glossary/rankmem.htm> (last visited Sept. 1, 2004).

180. By virtue of his position as Ranking Democratic Member of the House Committee on Energy and Commerce, Representative Dingell serves *ex officio* as a member of the subcommittee. See The House Comm. on Energy & Commerce, *Subcommittee Members*, at <http://energycommerce.house.gov/107/members/ctcpmembers.htm> (last visited Sept. 1, 2004) (listing the names of the members).

181. Representative Sawyer is not a member of the subcommittee; however, he is a member of the Full House Committee on Energy and Commerce. See The House Comm. on Energy & Commerce, *107th Congress Members*, <http://energycommerce.house.gov/107/members/members.htm> (last visited Sept. 1, 2004).

182. In his testimony, Dr. Runge noted that completing the TPMS rulemaking was "one of [his] highest priorities." *Hearing, supra* note 2, at 15. A discussion of the TPMS rulemaking is outside the scope of this article.

183. *Id.* at 33.

Chairman Stearns explained that “Congress had to act in order to protect American lives, because in some respects NHTSA had failed.”<sup>184</sup>

Additional statements from Chairman Stearns suggest that the TREAD Act may have been premised on false assumptions. Chairman Stearns claimed that “many of the fatalities and injuries on American roads arise from vehicle defects.”<sup>185</sup> This claim is highly problematic. First, the statement presupposes an understanding of the term “vehicle defect.” Yet, there is no commonly understood meaning of “vehicle defect.” What a layperson may consider a “defective” automobile part may in fact be a part that has deteriorated due to either normal wear and tear or abuse. Vehicle manufacturers and the NHTSA struggle with this definition on a case-by-case basis, and the determination of the existence of a defect can often only be made after extensive technical engineering and legal analysis.

Second, even if one could settle upon an agreed definition of “vehicle defect,” the fact is that the overwhelming majority of fatalities and injuries on American roads arise *not* from vehicle defects, but from driver error: (1) drunk driving; (2) failure to wear safety belts; (3) failure to observe posted speed limits; and (4) driver fatigue. In 2000, 41,821 people were killed and 3,189,000 people were injured in vehicle crashes.<sup>186</sup> In 2003, vehicle crashes killed 42,643 people and injured 2.89 million.<sup>187</sup> According to the DOT’s official figures, “alcohol involvement is the single greatest factor in motor vehicle deaths and injuries.”<sup>188</sup> Indeed, alcohol was involved in forty percent of fatal crashes and eight percent of all crashes.<sup>189</sup> Failure to wear safety belts is also a major contributor to deaths and injuries. Between forty-one and forty-five percent of occupants involved in fatal crashes did not wear safety belts.<sup>190</sup> NHTSA estimates that if all passenger vehicle occupants over age four wore safety belts, then 21,127 lives could have been saved in 2000.<sup>191</sup> Speeding (i.e., exceeding the posted speed limit, driving

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184. *Id.* at 2.

185. *Id.*

186. 2000 U.S. DEP’T OF TRANSP. TRAFFIC SAFETY FACTS 1 [hereinafter TRAFFIC SAFETY FACTS 2000].

187. See Press Release, NHTSA, DOT Announces Historic Low Highway Fatality Rate in 2003 (Aug. 10, 2004), available at <http://www.nhtsa.dot.gov/nhtsa/announce/press/pressdisplay.cfm?year=2004&filename=pr35-04.html>.

188. Fed. Highway Admin., *General Facts Regarding the Driver*, at [http://safety.fhwa.dot.gov/fourthlevel/brakes\\_facts.htm](http://safety.fhwa.dot.gov/fourthlevel/brakes_facts.htm) (Oct. 10, 2001) [hereinafter *General Facts*].

189. TRAFFIC SAFETY FACTS 2000, *supra* note 186, at 3.

190. *Id.* at 2. Forty-one percent of passenger car occupants and forty-five percent of light truck occupants involved in fatal crashes were unrestrained.

*Id.*

191. *Id.*

too fast for conditions (weather, etc.), or racing) is, according to NHTSA, "one of the most prevalent factors contributing to traffic crashes."<sup>192</sup> Speeding was a contributing factor in twenty-nine percent of all fatal crashes (12,350 lives).<sup>193</sup> Speeding and alcohol are intertwined as well: forty percent of the *intoxicated* drivers (i.e., with a blood alcohol concentration of 0.10 or higher) involved in fatal crashes were speeding, compared with only thirteen percent of the *sober* drivers (blood alcohol concentration of 0.00) involved in fatal crashes.<sup>194</sup> Driver distraction, from using a cell phone to smoking, contributes to twenty-five percent of vehicle crashes.<sup>195</sup> Finally, driver fatigue alone causes at least 40,000 fatalities and 5 million injuries a year.<sup>196</sup>

Third, there is simply no reliable data from which to conclude that vehicle "defects" cause "many fatalities and injuries." NHTSA itself, which provides the most authoritative and exhaustive statistical data on vehicle crashes,<sup>197</sup> does not even track such data, perhaps because it recognizes the inherent difficulty involved in drawing such conclusions from available crash data. The last major in-depth study into causes of vehicle crashes was conducted by the Indiana University in 1977.<sup>198</sup> This study found that vehicle "factors" (not necessarily *defects*) were "definite, probable causal or severity increasing" in a little over twelve percent (plus or minus three percent) of the 420 crashes studied.<sup>199</sup> Given the number of added safety features (e.g., airbags, anti-lock braking systems, anti-slip regulation, etc.) and product structural improvements (e.g., stronger front ends to better absorb crashes<sup>200</sup>) over the twenty-five years since this study, vehicle "factors" causing

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192. *Id.* at 4.

193. *Id.*

194. *Id.*

195. Press Release, Jane C. Stutts, Ph.D., University of North Carolina Highway Safety Research Center, Testimony for Presentation at the Subcommittee on Highways and Transit Hearing on Driver Distractions: Electronic Devices in the Automobile (May 9, 2001), *available at* [http://www.hsrb.unc.edu/pressrelease/distraction\\_testimony.htm](http://www.hsrb.unc.edu/pressrelease/distraction_testimony.htm). Driver distraction is present when a driver delays in recognizing information that is necessary to "safely accomplish the driving task," because something either inside or outside the vehicle draws her attention away from the driving task. *Id.* The growing use of cell phones continues to contribute to vehicle crashes. Though numbers data are hard to find, according to the National Safety Council, conversing on cell phones leads to "significant decrements in driving performance." *Id.*

196. *General Facts*, *supra* note 188.

197. *See, e.g.*, TRAFFIC SAFETY FACTS 2000, *supra* note 186.

198. Report, J.R. Treat et al., Tri-level Study of the Causes of Traffic Accidents: Indiana University Final Report to the US DOT (Mar. 1977).

199. *Id.*

200. *See, e.g.*, *Safety Is Improving Among Small Cars, Crash Tests Show*, WALL ST. J., Mar. 21, 2002, at A8 (summarizing crash test results from the Insurance Institute for Highway Safety).

crashes are most certainly far less than twelve percent today. A survey conducted by the Colorado State Patrol (CSP) supports this assertion.<sup>201</sup> In 2001, the CSP investigated 12,262 vehicle crashes that involved injuries or fatalities.<sup>202</sup> Vehicle defects were classified as the cause of the crash in only 2.6% of all crashes, which is consistent with numbers recently published by the "Detroit News," in which "vehicle defects" were identified as the cause of only 3 percent of all highway accidents in 2003.<sup>203</sup>

Whether 2.6% (or even 3%) constitutes "many" of the vehicle crashes is questionable (at best). The word "many" means "consisting of a great number, numerous, not few."<sup>204</sup> Is 2.6% or any number less than 2.6% "a great number, numerous, not few?" The answer is debatable, yet an important distinction must be made between "many" and "some." In the context of assigning fault for vehicle crashes, claiming that vehicle defects cause "many" fatalities and injuries may seem to imply a number that is more than the actual number, because some people may understand "many" to mean a majority or at least a number greater than the actual number. By attributing an overly inflated number of fatalities and injuries to vehicle defects, one may draw false conclusions, such as (1) vehicles are inherently unsafe, (2) the government needs to legislate more "safety" into vehicles, and (3) other factors, such as driver error, are not as prevalent in vehicle crashes as in fact such factors are.

Based on all of the above, one must conclude that the premises underlying the TREAD Act are based on some false assumptions. Contrary to the impressions left by the subcommittee, *driver error*, not vehicle defect, is the leading cause of death and injury in vehicle crashes. Whether "vehicle defects" cause "many" fatalities and injuries is also doubtful, because, even presuming a coherent definition of "vehicle defect," existing data would not appear to support the Chairman's claim that "many" vehicle crashes are caused by vehicle defects.<sup>205</sup> This criticism is

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201. Colorado State Patrol, *Crash Trends*, available at <http://csp.state.co.us/Stats/Crash.htm> (last visited Sept. 1, 2004).

202. *Id.*

203. *Id.* See Jeff Plungis, *Feds Aim to Curb Auto Crashes*, DET. NEWS, July 18, 2004, at 1A (identifying "driver-related factors" as the leading factor in all highway accidents in 2003 (eighty-nine percent of the accidents), followed by "unfavorable road surfaces" causing eight percent).

204. See BLACK'S LAW DICTIONARY 965 (6th ed. 1990).

205. In a survey conducted by *Tire Business*, fifty independent tire dealers were asked how often they encounter tires they would consider "defective." Nearly seventy-one percent of the dealers taking part in the survey responded that they "seldom encounter a genuine product defect in the tires they purchase from manufacturers and resell to consumers." Approximately twenty-six percent said that they "occasionally" encounter tires that are defective. Chuck Slaybaugh, *Dealers Say Many Tires Die from User Neglect*, TIRE BUS., Sept. 22, 2003, at 8.

more than just semantics, because public policy decisions based on false assumptions can lead to poor law at an otherwise avoidable cost to the regulated stakeholders and, ultimately, the voting public.<sup>206</sup>

b. Early Warning Reporting Rule

The second theme of the hearings was how NHTSA was interpreting and implementing the early warning reporting rulemaking mandate.<sup>207</sup> Though Congressman Dingell correctly noted that NHTSA/ODI was “awash in information”<sup>208</sup> long before opening investigations into the Ford-Firestone matter, the oversight hearing nevertheless seemed to encourage NHTSA to gather as much information as possible from manufacturers, even if some of that information is not even a reliable indicator of defect trends. For reasons discussed (in this subsection) below, the best example of unreliable information is consumer complaint data. Nevertheless, the subcommittee clearly indicated a desire that the early warning reporting rule contain data “from a variety of sources, including . . . consumer complaints.”<sup>209</sup> Dr. Runge, too, supported the inclusion of “statistical data about consumer complaints,” because “these submissions will help [NHTSA] . . . identify potential safety defects in a timely manner, without unduly burdening the manufacturers.”<sup>210</sup> After all, according to Chairman Stearns, if the early warning provisions are implemented as intended, thousands of lives may be saved.<sup>211</sup> Chairman Stearns, however, offered no support for this proposition.

Congress’s and NHTSA’s desire to include consumer complaints as part of the early warning rule is misguided for two main reasons: (1) NHTSA has questionable case law supporting the inclusion of consumer complaint data; and (2) even if the case law is read to support the reliability of consumer complaint data as an indicator of defect trends, the de facto reality is that these data are highly subjective accounts of *symptoms*, not objective reports of technical defects. For both these reasons, NHTSA should not have included consumer complaint data in the early

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206. Law premised on false assumptions for some reason also seems to generate congressional promises of delivering successes that are vague and unsupported by empirical evidence. For example, Chairman Stearns claimed that TREAD “could save hundreds if not thousands of lives” if it is implemented as Congress envisioned. *Hearing, supra* note 2, at 2. Yet, Chairman Stearns offered no specific analysis supporting this assertion.

207. See TREAD, § 3(b). See also McDonald, *Don’t TREAD on Me, supra* note 4, at 1191-94.

208. *Hearing, supra* note 2, at 5.

209. *Id.* at 2.

210. *Id.* at 14.

211. *Id.* at 2.

warning rule.

First, in the Notice of Proposed Rulemaking (“NPRM”), NHTSA relies in part on a strained reading of case law to support the inclusion of consumer complaint data: “the federal courts have recognized that consumer complaints can be a valuable source of evidence of the existence of a safety-related defect in motor vehicles.”<sup>212</sup> However, such a reading fails to recognize the difficulty in drawing any conclusions from consumer complaints, especially when submitted only in raw number form, as required by NHTSA.

A more precise reading of case law reveals that NHTSA—prior to ordering a recall—must demonstrate that *failures* occur, not just that consumers complain.<sup>213</sup> The reason is that the courts recognize that consumer complaints often offer little assistance in identifying safety-related trends because “drivers can describe only what happened to them, which is an altogether insufficient basis upon which to make a judgment as to the technical adequacy of . . . their cars.”<sup>214</sup> In fact, where NHTSA relies on circumstantial evidence to establish the existence of a safety-related defect, such as relying on consumer complaints of skidding to establish performance failures, then the courts have granted manufacturers the right to rebut with testing data that undermines the claim that vehicle malfunction caused the incidents described by the consumer complaints.<sup>215</sup> Such data could show, for example, either that causes other than vehicle malfunction could cause the phenomenon that consumers complained about, or that the vehicle is “no more likely than other [competitive] vehicles to be involved in such incidents.”<sup>216</sup> However, this type of rebuttal is not included in the TREAD rulemaking, which mandates the submission of raw consumer complaint numbers, even if the underlying complaints have nothing to do with safety-related issues. NHTSA’s inclusion of consumer complaints that do not involve safety, such as complaints about treatment at the dealership or a perceived inadequate size of the cup holder, exceeds even the stated purpose of requiring customer complaints in the first place—as an indicator of safety-related defect trends.

Second, even if one discounts the case law, the fact remains that consumer complaints by their very nature usually reflect merely a subjective observation of a *symptom*, whereas other data

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212. Reporting of Information and Documents About Potential Defects Retention of Records that Could Indicate Defects, 66 Fed. Reg. 66,190, 66,203 (proposed Dec. 21, 2001) (to be codified at 49 C.F.R. pts. 574, 576, 579).

213. *United States v. Gen. Motors Corp.*, 656 F. Supp. 1555, 1577 (D.D.C. 1987) [hereinafter GM II].

214. *Id.*

215. *United States v. Gen. Motors Corp.*, 841 F.2d 400, 415 (D.C. Cir. 1988).

216. *Id.*

(warranty claims or field reports) are inherently *causal* (and thus more reliable as an indicator of a defect trend), such as explaining why a broken part was replaced or repaired. The following example clarifies this point: If a consumer complains that her steering wheel vibrates, NHTSA (or the manufacturer) would probably record the complaint as a steering problem in its consumer complaint database. Yet, depending on the cause, the same problem would likely be recorded (correctly) as a wheel, tire, or brake problem in the *warranty* database. To the extent that both consumer complaint data and warranty data are included in the final rule, inconsistent reporting will result and “problems” will appear that are in fact not problems. Add to this inconsistency the fact that most consumer affairs personnel do not possess the technical expertise to translate consumer complaints about symptoms into reliable and accurate component or system codes, and the result is a prescription for further problems at ODI, which will waste already stretched resources chasing down red herrings. Yet, NHTSA could avoid this problem by simply not mandating dumps of consumer complaint data.

Just because NHTSA relies heavily on consumer complaint data when deciding whether to open an investigation and potentially order a recall<sup>217</sup> does not mean that such data are per se reliable indicators of a potential defect trend. Rather, what this indicates is what the IG noted in its audit, namely, that NHTSA fails to adequately consider *other* sources, such as insurance data, when studying a potential product defect. Further, as the IG indicated in its audit report, the NHTSA consumer complaints database is riddled with inconsistencies and other problems.<sup>218</sup>

Finally, the *way* NHTSA defines “consumer complaint” makes its value as a reliable early warning indicator highly doubtful. As will be discussed in detail below (in the context of discussing the Final Rule on Early Warning), NHTSA has defined “consumer complaint” so broadly as to remove *any nexus* to safety-related defects.<sup>219</sup>

Aside from the scope of the early warning rule, particularly the inclusion of consumer complaints, the hearings touched briefly on the issue of cost of complying with the rule. The IG told Congress that “[s]ignificant disagreements are likely between NHTSA and automobile manufacturers over the scope and parameters of the reporting requirements in the proposed rule.”<sup>220</sup> Specifically, the IG pointed out the industry’s concern that NHTSA

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217. IG REPORT, *supra* note 97, at iv. Seventy-five percent of NHTSA defect investigations are opened on the basis of consumer complaints. *Id.*

218. See, e.g., *Hearing, supra* note 2, at 21 (explaining problems with the database).

219. See *infra* notes 320–322 and accompanying text.

220. *Hearing, supra* note 2, at 23.

grossly underestimated the burden imposed by the early warning NPRM, from the resources (staff) to the money needed to comply.<sup>221</sup>

c. DOT Inspector General Audit Report of ODI

The third (final) theme of the hearings was the DOT IG's Audit Report of ODI.<sup>222</sup> Dr. Runge explained that the IG Report, published January 3, 2002, would be submitted by NHTSA to satisfy NHTSA's obligation under TREAD to provide Congress<sup>223</sup> with a "comprehensive review . . . [and] undertake such steps as may be necessary to update and improve such standards, criteria, procedures, and methods, including data management and analysis" used by NHTSA in determining whether to open a defect or noncompliance investigation.<sup>224</sup> In submitting the IG Report as NHTSA's own TREAD report, Dr. Runge stated that NHTSA concurred with all the IG recommendations and had already implemented many of them, such as establishing a peer review panel to evaluate potential defects as well as hiring a contractor to independently review the project of creating the new defect information management system.<sup>225</sup>

The hearings focused on two of the many IG recommendations: (1) NHTSA should have an independent assessment to ensure that the new DIMS functions properly, especially considering the amount of data NHTSA will receive and have to screen as part of the early warning reporting rule,<sup>226</sup> and (2) NHTSA should establish a peer review panel to ensure a degree of consistency in the defect investigation decision making process.<sup>227</sup>

First, in response to the IG's criticism of ODI's defective database, Dr. Runge admitted that ODI's "outdated information storage and management system" is incapable of "handl[ing] the large volume of information that will be submitted under the early warning rule<sup>228</sup>"; therefore, NHTSA contracted with Volpe to create a new "state-of-the-art data warehouse."<sup>229</sup> Dr. Runge expressed confidence that NHTSA would have this system running, under budget, by the end of 2002.<sup>230</sup> Kenneth Mead appeared unimpressed and continued to press for an independent third

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221. *Id.*

222. *See supra* notes 96-175 and accompanying text.

223. Specifically, the House Committee on Energy and Commerce as well as the Senate Committee on Commerce, Science, and Transportation. TREAD, § 15(b).

224. *Hearing, supra* note 2, at 12 (referring to TREAD Act, Section 15).

225. *Id.* at 12.

226. *See supra* notes 149-158 and accompanying text.

227. *See supra* notes 126-129 and accompanying text.

228. *Hearing, supra* note 2, at 14.

229. *Id.* at 12.

230. *Id.*

party with software expertise to oversee the development of the new DIMS.<sup>231</sup>

Second, commenting on the peer review panel utilized by NHTSA as a result of the IG and recommendation,<sup>232</sup> Mr. Mead noted that NHTSA “has increased the percent of investigations opened.”<sup>233</sup> However, Mr. Mead testified that the peer review panel is not an “end state” and recommended that NHTSA “ensure that (1) protocols for the panel process are written, (2) decisions are documented, and (3) the panel receives and reviews information when the defects analysis staff determine that an investigation should not be opened.”<sup>234</sup>

### 3. *Top Management Challenges*

In a memo dated December 5, 2003, to the Secretary of the DOT identifying the “10 top management challenges” in 2004 facing DOT, including NHTSA, the DOT Inspector General—consistent with its Audit Report (described above)—identified implementation of the TREAD Act.<sup>235</sup> Specifically, the IG noted that “NHTSA must fully implement its new safety defect information system, called the Advanced Retrieval (Tire, Equipment, Motor Vehicles) Information System, to receive and store early warning reporting information to be submitted by manufacturers.”<sup>236</sup> The memo encouraged the DOT Secretary to “ensure that [NHTSA’s] screeners and investigators are able to: (1) analyze, in a thorough and timely manner, the large volume of manufacturers’ information expected; and (2) appropriately use that information to determine when to open and how to prioritize vehicle defect investigations.”<sup>237</sup> Considering the scope and amount of information that NHTSA will receive—discussed in detail immediately below—the IG provided the Secretary with sage advice. Only time will tell how well NHTSA responds to the IG’s concerns.

### 4. *Postscript: The IG’s “Follow-Up Audit”*

On September 23, 2004, the IG released its “Follow-Up Audit of the Office of Defects Investigation.”<sup>238</sup> As its name implies, this

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231. *Id.* at 22.

232. *See supra* note 147 and accompanying text.

233. *Hearing, supra* note 2, at 24.

234. *Id.*

235. U.S. DEP’T OF TRANSP., TOP MANAGEMENT CHALLENGES 1, 2, 5 (2003), available at [http://www.oig.dot.gov/show\\_pdf.php?id=1217](http://www.oig.dot.gov/show_pdf.php?id=1217).

236. *Id.* at 5-6.

237. *Id.* at 6.

238. U.S. DEP’T OF TRANSP. OFFICE OF INSPECTOR GEN., FOLLOW-UP AUDIT OF THE OFFICE OF DEFECTS INVESTIGATION, (2004), available at [http://www.oig.dot.gov/show\\_pdf.php?id=1407](http://www.oig.dot.gov/show_pdf.php?id=1407) (Sept. 23, 2004).

report summarized the results of the IG's follow-up audit of ODI by evaluating NHTSA's progress since the IG's January 2002 report (discussed above).

The follow-up audit found that, although NHTSA has made "significant progress" in implementing the twenty-two administrative requirements of the TREAD Act,<sup>239</sup> its ability to reliably track defect trends is hindered because of a limited computer system to handle the massive amount of information.<sup>240</sup> According to the IG, the computer system (known as "ARTEMIS") "does not have the analytical capabilities originally envisioned to help analysts sort through the large volume of [early warning] information ... and point them towards potential safety defects."<sup>241</sup>

In addition, ARTEMIS "cannot perform more advanced trend analyses needed to find patterns and subtle relationships among the various types of [early warning] information to point analysts to potential defects warranting investigation."<sup>242</sup> For example, ARTEMIS cannot automatically notify an analyst if consumer complaints and warranty claims are increasing due to vehicle steering problems.<sup>243</sup>

The IG blames at least in part NHTSA management for these problems, specifically noting that NHTSA "has not identified all of the software needed to analyze the [early warning] information, outlined the associated costs, or developed a schedule for implementing these capabilities."<sup>244</sup> On the issue of cost, because NHTSA did not use "generally accepted cost estimating techniques," the initial cost estimate of ARTEMIS rose from \$5.35 million in June 2001 to \$9.4 million in March 2004—accompanied by a doubling in actual project completion time.<sup>245</sup>

Another area needing improvement is the peer review panel. Although the IG's recommendation to establish a peer review panel to review safety defect issues and determine whether and when to open an investigation, NHTSA has not "finalized screening procedures to ensure that analysts identify potential defects for the peer review panel's consideration because [NHTSA] has been waiting to begin receiving the [early warning] information before determining how best to revise" its internal

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239. To date, NHTSA has successfully implemented twenty of the twenty-two TREAD Act requirements, including thirteen of the fifteen required rulemakings. *Id.* at 4. Of the two outstanding rulemakings, one is currently being rewritten (tire pressure monitoring systems) and the other (certification labels) is not being pursued. *Id.*

240. *Id.* at 2-3.

241. *Id.* at 5.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.* at 11-12.

evaluation procedures.<sup>246</sup> As the IG points out, though, finalizing these procedures as quickly as possible is important “given the large volume of field reports” NHTSA is receiving each quarter (since June 2004).<sup>247</sup> Absent such procedures, analysts will have no way to thoroughly and reliably sift through early warning data, including other sources of information (such as technical bulletins), when identifying potential safety defects for peer review panel consideration.<sup>248</sup>

In order “[t]o move ahead with the use of [early warning] information for opening defect investigations,” the IG concluded with three recommendations for the NHTSA Administrator: (1) ensure an “adequately supported” cost estimate for operating and maintaining ARTEMIS; (2) revise the early warning data analysis plan “to better define the advanced capabilities needed” as well as identify software needed and establish a schedule with milestone dates to obtain all needed capabilities; and (3) “establish milestones for completing procedures to incorporate early warning information in the defects screening process and train defect analysts on the new procedures to provide reasonable assurance that decisions relating to the opening of safety defect investigations are based on thorough and consistent analyses of all available defects information.”<sup>249</sup>

## II. TREAD’S REPORTING RULES

Having closely examined post-TREAD events, from the IG’s audit to subsequent congressional hearings, this section turns to the actual requirements of the three-pronged reporting requirements: (1) foreign recalls and other safety campaigns; (2) “early warning;” and (3) reporting the sale or lease of defective or noncompliant tires.

### A. *Foreign Recalls and Safety Campaigns*

On October 11, 2002, exactly one year after publishing the Notice of Proposed Rulemaking (NPRM),<sup>250</sup> NHTSA published the final rule that implements the foreign safety recall and foreign safety campaign reporting requirements of the TREAD Act.<sup>251</sup>

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246. *Id.* at 6.

247. *Id.*

248. *Id.*

249. *Id.* at 6, 18.

250. Reporting of Information About Foreign Safety Recalls and Campaigns Related to Potential Defects, 66 Fed. Reg. 51,907 (proposed Oct. 11, 2001) (to be codified at 49 C.F.R. pt. 579) (Notice 1).

251. Reporting of Information About Foreign Safety Recalls and Campaigns Related to Potential Defects, 67 Fed. Reg. 63,295 (Oct. 11, 2002) (to be codified at 49 C.F.R. pt. 579). *See also* Nicholas J. Wittner, *NHTSA Issues Foreign Recall Reporting Final Rule Under TREAD Act*, LJM’S PRODUCT LIABILITY L.

As an initial matter, the report may be filed by: (1) the fabricating manufacturer; (2) the importer of the vehicle; (3) the brand name owner of the vehicle or item of equipment; or (4) a parent or subsidiary of such fabricator, importer, or brand name owner of the vehicle or item of equipment that is identical or substantially similar to that covered by the foreign recall or other safety campaign.<sup>252</sup> NHTSA specifically noted that “it would be a violation of law for a foreign fabricating manufacturer to designate its U.S. importer as its reporting entity, and then fail to assure that it is provided with the information” about relevant foreign recalls and campaigns.<sup>253</sup>

Covered entities must report (1) foreign safety recalls or (2) other foreign safety campaigns of identical or substantially similar motor vehicles (or identical or substantially similar vehicle equipment).

A foreign *safety recall* has four elements: (1) an *offer* by a manufacturer to owners of motor vehicles or equipment; (2) that is in a foreign country (i.e., outside the United States); (3) in order to provide remedial action to address a safety-related defect or a failure to comply with an applicable safety standard; (4) whether or not the manufacturer agrees to pay the full cost of the remedial action.<sup>254</sup> When all four elements are met, the manufacturer must report to NHTSA, *whether or not the problem would constitute a safety-related defect or noncompliance under U.S. law.*<sup>255</sup>

An “*other safety campaign*” differs from a foreign safety recall in that the former has no manufacturer “determination” and no offer of “remedy.” As defined in the final rule, therefore, an “other safety campaign” has three elements: (1) a manufacturer *communication* with owners or dealers; (2) with respect to *conditions* under which a vehicle or equipment item “should be operated, repaired, or replaced; that (3) *relate to safety.*”<sup>256</sup> The third element, as with the foreign safety recall definition, is quite broad. The preamble notes that “[p]recautionary advice” provided . . . on the conditions under which the vehicle is to be operated, repaired, or replaced may reflect the existence of a safety

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& STRATEGY, Nov. 2002, at 5 (discussing requirements of final rule and highlighting differences between the NPRM and the final rule).

252. Reporting of Information About Foreign Safety Recalls and Campaigns Related to Potential Defects, 67 Fed. Reg. at 63,297.

253. Reporting of Information and Documents About Potential Defects; Retention of Records that Could Indicate Defects, Notice of Proposed Rulemaking (NPRM), 66 Fed. Reg. 66,190, 66,194 (Dec. 21, 2001) (to be codified at 49 C.F.R. pts. 574, 576, 579) [hereinafter NPRM].

254. Reporting of Information About Foreign Safety Recalls, 67 Fed. Reg. at 63,298.

255. *Id.*

256. *Id.*

problem” and is, therefore, reportable.<sup>257</sup> Other covered actions could include extended warranty communications. However, ad hoc determinations are *not* roped into this definition. Other exclusions are promotional and marketing materials, customer satisfaction surveys, and operating instructions or owner’s manuals that accompany the vehicle at the time of first sale.<sup>258</sup>

The biggest difference between the final rule and NPRM is that NHTSA dispensed with the component-based approach and adopted the approach used in the early warning reporting, namely, a *vehicle-based* four-prong alternative test, under which a vehicle overseas is “substantially similar” to a U.S. vehicle if: (1) the vehicle is sold in Canada or certified to comply with Canadian Motor Vehicle Safety Standards (“CMVSS”); (2) it is a gray market vehicle (specifically, the vehicle must be “listed in the VSP or VSA columns of Appendix A to 593 of this subchapter”); (3) the vehicle is manufactured in the United States for sale abroad; or (4) the vehicle shares the same platform as a U.S. vehicle.<sup>259</sup>

The term “platform” is defined broadly. A platform is more than just the basic structure of a vehicle, including, but not limited to, the majority of the floor plan or undercarriage, and elements of the engine compartment. The term includes a structure that a manufacturer designates as a platform. A group of vehicles sharing a common structure or chassis is also considered to have a common platform, regardless of whether such vehicles are of the same type, make, or sold by the same manufacturer. “Examples of vehicles sharing a common platform are the Chrysler Group’s Plymouth, Dodge, and Chrysler minivans . . . [as well as the] Toyota Camry vehicles (including Toyota Camry and Avalon passenger cars, Toyota Sienna minivans, Toyota Highlander SUVs, Lexus ES 300 passenger cars, and Lexus RX 300 SUVs).”<sup>260</sup>

NHTSA followed the industry’s request for submitting a list each year of covered vehicles. Specifically, NHTSA proposed that manufacturers identify by November 1 (starting November 1, 2003) any vehicles they sell or intend to sell in foreign markets that the manufacturers believe are substantially similar to vehicles sold or planned to be offered for sale in the United States during the coming year. NHTSA later amended the due date to “not later than 30 days after January 28, 2003.”<sup>261</sup>

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257. *Id.* at 63,299.

258. *Id.*

259. *Id.* at 63,300.

260. Reporting of Information and Documents About Potential Defects Retention of Records that Could Indicate Defects, 67 Fed. Reg. 45,822, 45,843 (July 10, 2002) (to be codified at 49 C.F.R. pts. 573, 574, 576, 579) [hereinafter Final Rule].

261. Reporting of Information and Documents About Potential Defects Retention of Records that Could Indicate Defects, 68 Fed. Reg. at 4,112-13.

Recalls and other safety campaigns of original equipment components or systems (i.e., parts installed on the vehicle at the time of delivery to the dealer) are likely to be conducted by the vehicle manufacturer.<sup>262</sup> Suppliers need only report if they conduct a recall themselves or if they are ordered to conduct a recall.

Recalls and other safety campaigns of *replacement* equipment components or systems (i.e., everything other than “original equipment,” meaning tires, child restraints, headlights, brake fluids, etc.) are conducted by the suppliers themselves.<sup>263</sup>

Manufacturers need *not* report if one of the following three elements is met: (1) a § 573 report has been filed *and* the scope of the foreign recall or campaign is not broader than the scope of the recall campaign in the United States (“scope” means the subject matter of the recall and the time frame in which the recalled vehicles were manufactured (e.g., model years of the affected recall class)); (2) the component or system that gave rise to the foreign recall or other campaign does not perform the same function in any vehicles or equipment sold or offered for sale in the United States; or (3) the sole subject of the foreign recall or other campaign is a label affixed to a vehicle, item of equipment, or tire.<sup>264</sup>

In order to be certain that NHTSA is aware of all relevant overseas determinations and notifications, NHTSA required a one-time historical report. The report was due within thirty days of the effective date of the final rule (i.e., by December 11, 2002).<sup>265</sup> However, if a foreign recall or campaign had already been reported to NHTSA, it need not have been resubmitted if “the original report identified (1) the model(s) and model year(s) of the products that were the subject of the foreign recall or campaign”; (2) the “identical or substantially similar U.S. products”; and (3) the defect or other condition that led to the foreign “recall or campaign.”<sup>266</sup>

The reports must be filed within “five working days” after determining whether to conduct a foreign recall or foreign safety campaign.<sup>267</sup> The “five working days” period is determined by reference to the general business practice of the office in which such determination is made, and to the office reporting to NHTSA.<sup>268</sup>

To show how the five business day rule is flexible enough to

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262. Reporting of Information About Foreign Safety Recalls and Campaigns Related to Potential Defects, 67 Fed. Reg. at 63,301.

263. *Id.* at 63,301-02.

264. *Id.* at 63,306.

265. *Id.*

266. *Id.*

267. *Id.* at 63,303.

268. *Id.*

recognize the realities of global multinationals, NHTSA provided the following hypothetical:

The following hypothetical illustrates how working days are computed. It assumes that a vehicle manufacturer's world headquarters is in Germany, with subsidiaries in Asia and the United States. The Asian subsidiary receives a governmental notice on Thursday, September 1, that it must conduct a safety recall of certain vehicles. That day does not count in the computation of the relevant period, particularly in view of the fact that the notice might not be received until late in the day. On Friday, September 2, the subsidiary reviews the notice, and perhaps translates it into German (Day 1). The subsidiary observes a Saturday and Sunday weekend, and Monday is a national and corporate holiday. On Tuesday, September 6, the subsidiary faxes the original and the translation to Germany (Day 2). On Wednesday, September 7, the German headquarters confirms that the vehicles are substantially similar to those sold in the United States, and that the recall must be reported to NHTSA (Day 3). The headquarters office is closed on Thursday and Friday, as well as the weekend. On Monday, September 12, the headquarters office prepares the report and an English-language translation of the notice (Day 4). Headquarters faxes the report, notice, and translation to its U.S. subsidiary on Tuesday, September 13, but the subsidiary is closed that day. On Wednesday, September 14, the U.S. subsidiary would be required to submit the materials to NHTSA (the 5th working day).<sup>269</sup>

Each report must be dated and include the following information: (1) the manufacturer's name; (2) vehicles containing the defect and description of the basis for the recall or safety campaign; (3) total number of vehicles containing the defect or noncompliance; (4) description of the defect or noncompliance; (5) foreign country in which the recall or safety campaign is being conducted; (6) whether the foreign action is a recall or safety campaign; (7) whether the determination to conduct the recall or safety campaign was made by the manufacturer or by a foreign government; (8) description of the manufacturer's program for remedying the defect or noncompliance; (9) the date the determination to recall or conduct the action was made; (10) identification of all vehicles that the manufacturer sold or offered for sale in the United States that are identical or substantially similar to the vehicles covered by the foreign recall or campaign. If the determination was made by a foreign government, then the report must also include (11) a copy of the determination in the original language along with an English translation.<sup>270</sup>

The reporting of foreign recalls and foreign safety campaigns effectuates the purpose of "enhancing motor vehicle safety by

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269. *Id.* at 63,305.

270. *Id.*

specifying information, including data, that may indicate the existence of a potential safety-related defect or a noncompliance with an FMVSS before the manufacturer or NHTSA has decided that a defect or noncompliance exists.” These new reporting obligations emerged out of NHTSA’s desire to avoid another Ford-Firestone situation. Specifically, Ford never informed NHTSA—nor was Ford required to notify NHTSA under pre-TREAD law—of safety campaigns conducted in the Persian Gulf, Malaysia, Thailand, and Venezuela.

### *B. Early Warning Reporting*

The heart of TREAD’s three-pronged reporting requirements is the “early warning” reporting. The TREAD Act amended the Vehicle Safety Act to direct DOT (i.e., NHTSA) to complete a rulemaking no later than June 30, 2002, to establish early warning reporting requirements for vehicle and vehicle equipment manufacturers to include information on: (1) defects; (2) injury, death, or property claims; (3) customer satisfactions campaigns, consumer advisories, recalls, or other relevant activities; and (4) incidents in the United States where a manufacturer receives actual notice alleging its vehicle or equipment caused fatalities or serious injuries, or in a foreign country, where the allegedly defective vehicle or equipment is identical or substantially similar to that sold in the United States.<sup>271</sup> Congress also included requirements for manufacturers to report, periodically or upon request by NHTSA, information that the manufacturer has in its possession that would help identify defects in motor vehicle and motor vehicle equipment safety in the United States.<sup>272</sup>

Congress further provided that NHTSA could include other reporting requirements that the “NHTSA determines are necessary to identify defects related to vehicle and equipment safety in the United States.”<sup>273</sup> Before requiring any new reporting obligations, however, “NHTSA must specify in its final rule how it will review and utilize such reports to help identify defects related to motor vehicle safety, what systems and processes it will employ or establish to review and utilize such information, and the manner and form in which manufacturers are required to report.”<sup>274</sup> Even supporters of the bill agreed that NHTSA does not

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271. TREAD, § 3(b). This requirement arose out of an en bloc amendment offered by Representative Cliff Stearns (R-FL) and passed on a voice vote during the House Subcommittee on Telecommunications, Trade, and Consumer Protection markup. Michael Steel, *Panel Adds Teeth to TREAD Safety Bill*, NAT’L J. NEWS SERV., Sept. 27, 2000.

272. TREAD, § 3(b). See also H.R. REP. NO. 106-954, at 13 (summarizing the reporting requirements).

273. H.R. REP. NO. 106-954, at 13.

274. *Id.* at 13-14. Strikingly, no such limiting language appeared either in

have a “fishing license.”<sup>275</sup>

### 1. ANPRM

On January 22, 2001, NHTSA published the Advance Notice of Proposed Rulemaking (“ANPRM”) for early warning.<sup>276</sup> The ANPRM sought public input “on ways that the [NHTSA] may implement the ‘early warning reporting requirements’” of TREAD.<sup>277</sup> A major focus of the NHTSA was to solicit comments as to what type of information manufacturers should report. For example, for warranty claims data, NHTSA sought comment on how to standardize the information and how to avoid requiring excessive warranty claims.<sup>278</sup> NHTSA also had to determine how to handle claims involving serious injuries or death, which opened a host of definitional issues in how to define “serious injury.”<sup>279</sup> Other issues surrounded what constituted the requirements for submitting field reports, consumer complaints, customer satisfaction campaigns, design changes to parts, remedy failures, fuel leaks, and rollovers.<sup>280</sup>

### 2. NPRM

Upon review of the comments to the ANPRM, on December 21, 2001, NHTSA published the Notice of Proposed Rulemaking on Early Warning.<sup>281</sup>

*Reporting Groups.* The NPRM proposed dividing manufacturers into two groups with different reporting responsibilities. The first group consisted of larger manufacturers of motor vehicles (more than 500 per year), and all manufacturers of child restraint systems and tires. The second group consisted of all other manufacturers of motor vehicles and motor vehicle equipment (i.e., vehicle manufacturers that produced fewer than 500 vehicles annually, as well as manufacturers of original motor vehicle equipment and manufacturers of replacement motor

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the Senate version or in the Senate report accompanying the bill. S. REP. NO. 106-3059 (2000); S. REP. NO. 106-423, at 7.

275. Quote taken from Rep. Cliff Stearns (R-FL), who offered the “early warning” amendment to the TREAD Act. See Steel, *supra* note 271.

276. ANPRM, *supra* note 10. See Nicholas J. Wittner, *The “Reporting Rulemaking”: Early Warning or Information Overload?*, LJM’S PRODUCT LIABILITY L. & STRATEGY, Nov. 2001, at 4 (providing an excellent discussion of the ANPRM).

277. ANPRM, 66 Fed. Reg. at 6,532.

278. *Id.* at 6,537.

279. *Id.* at 6,538.

280. *Id.* at 6,538-39.

281. NPRM, 66 Fed. Reg. at 66,190. See generally Nicholas J. Wittner, *Foreign Recalls and Other Safety Campaigns – a Sweeping New NPRM*, LJM’S PRODUCT LIABILITY L. & STRATEGY, Dec. 2001, at 6 (explaining the contents of the NPRM).

vehicle equipment other than child restraints and tires).<sup>282</sup>

As proposed, manufacturers would have had to report on a quarterly basis ("30 days after the end of each calendar quarter") the following information<sup>283</sup> electronically, in specified Excel-type formats.<sup>284</sup>

*Product Information.* Because NHTSA decided *against* establishing any thresholds, it proposed requiring manufacturers to report production numbers of each model and model year *and nine years prior to the year of the reporting period* (including models no longer in production).<sup>285</sup> The production numbers allow NHTSA to "normalize the number of claims, complaints, etc. per unit of production." For all models with more than one type of fuel system, the information would be reported separately for gasoline powered vehicles and non-gasoline powered vehicles. For medium-heavy vehicles, a further sub-categorization is envisaged by service brake system (e.g., hydraulic, air). NHTSA has designated twenty-two reporting categories: (1) steering; (2) suspension; (3) service brakes; (4) parking brakes; (5) engine speed control (including throttle and cruise control); (6) air bags; (7) seat belts; (8) integrated child restraint systems; (9) latches (doors, hoods, hatches); (10) tires; (11) fuel system integrity; (12) power train; (13) electrical system; (14) engine and engine cooling system; (15) structure (other than latches); (16) visual systems; (17) seats; (18) lighting; (19) wheels; (20) climate control system (including defroster); (21) trailer hitches and related attachments; and (22) fires.<sup>286</sup>

*Incidents Involving Death.* Under the NPRM, NHTSA proposed that manufacturers report each incident involving a death that occurred in the United States, which is identified in either (1) a claim or (2) a notice that alleges or proves that the death was caused by a possible defect in the manufacturer's product (e.g., a police report).<sup>287</sup> A "claim"—unlike "notice"—need not allege or describe a defect; rather, a claim need only indicate an occurrence of death and that the manufacturer's product is responsible for that death.

In addition, manufacturers would report each death that occurred in a *foreign country*, which is identified in a claim involving a product that is "identical or substantially similar" (as explained above) to a product that manufacturers have offered for sale in the United States.<sup>288</sup> The term "substantially similar" is

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282. NPRM, 66 Fed. Reg. at 66,192-93.

283. Final Rule, 67 Fed. Reg. at 45,864.

284. NPRM, 66 Fed. Reg. at 66,212.

285. Final Rule, 67 Fed. Reg. at 45,878.

286. *Id.* at 45,879.

287. NPRM, 66 Fed. Reg. at 66,222.

288. *Id.*

met if one of the five following tests is satisfied: (1) vehicle is sold in Canada or certified to comply with CMVSS; (2) gray market; (3) vehicle is manufactured in the United States for sale abroad; (4) vehicle is a “counterpart”; or (5) vehicle shares a common platform.<sup>289</sup>

Reports would indicate which one of the twenty-two reporting categories is involved. If none is involved, then the report would indicate “other.”

*Incidents Involving Injuries.* NHTSA proposed that manufacturers report each incident that occurred in the United States in which a person was injured that is identified in either a (1) claim against the manufacturer or (2) notice that alleges or proves that the injury was caused by a possible defect. A “claim”—unlike “notice”—need *not* allege or describe a defect; rather, a claim need only indicate an occurrence of injury and that the manufacturer’s product is responsible for that injury.<sup>290</sup> Reports would indicate which one of the twenty-two reporting categories is involved. If none is involved, then the report would indicate “other.”

*Property Damage Claims.* NHTSA proposed that manufacturers report the number of claims for \$1,000 or more in property damage in the United States that are related to alleged problems with the twenty-two reporting categories (including fires).<sup>291</sup>

*Consumer Complaints.* NHTSA proposed that manufacturers report the number of consumer complaints in the United States that are related to problems with specified components and systems. Indeed, manufacturers would be required to review, maintain, and compile consumer complaints made “in any form, including those made by telephone to customer relations representatives (employees or contractors) and those made to dealers that are transmitted to [the manufacturer], as well as written communications directly to [the manufacturer].”<sup>292</sup> Manufacturers would report the aggregate number of complaints received about the twenty-two reporting categories (including fires).

*Warranty Claims Information.* NHTSA proposed that manufacturers report the number of warranty claims (including unverified claims) in the United States relating to problems with specified components and systems. As proposed, “warranty claims” included the “number of repairs and/or replacements free of charge under warranties, as well as those under formal or informal

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289. *Id.* at 66,199-200.

290. *Id.* at 66,198.

291. *Id.* at 66,201.

292. *Id.* at 66,203.

extended warranties and good will.”<sup>293</sup> Good will includes “voluntary Buy-Backs and Lemon Law Buy-Backs.”<sup>294</sup> As with property damage and consumer complaints, manufacturers would “have to maintain warranty claims, group the numbers of claims by [the twenty-two] reporting categories, and report them.”<sup>295</sup>

*Field Reports.* NHTSA proposed that manufacturers report the total number of field reports in the United States from employees and dealers, and from fleets, that are related to problems with specified components and systems and potential defects.<sup>296</sup> In addition, manufacturers would submit *hard copies* of reports received from employees and fleets, but manufacturers would not need to provide copies of reports received from dealers.<sup>297</sup> As with property damage, consumer complaints, and warranty claims, manufacturers would indicate which one of the twenty-two reporting categories is involved.

*Expanded Recordkeeping Requirements.* Although manufacturers were not required to submit actual documents constituting claims and notices involving deaths or injuries, property damage claims, warranty claims, consumer complaints, or dealer reports, NHTSA did propose that manufacturers retain each such claim, report, etc. for a period of “five calendar years from the date manufacturers acquire it.”<sup>298</sup> However, manufacturers would not have to retain it after the calendar year is, or becomes, *ten years* greater than the model year of the affected vehicle.<sup>299</sup> For example, if on July 1, 2002, manufacturers received two consumer complaints of 1996 and 1999 model year vehicles, then manufacturers would have to retain the complaint of the model year 1999 vehicle until July 1, 2007. Manufacturers would only have to keep the complaint of the model year 1996 vehicle until the beginning of the 2006 model year, even though fewer than five years had passed.<sup>300</sup>

*Expanded § 573.8 Reporting.* The TREAD Act’s early warning requirements of reporting “customer satisfaction campaigns,

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293. *Id.* at 66,204. For more information on warranty claims generally in the automobile industry, see Ed Garsten, *U.S. Auto Warranty Costs Soar*, DET. NEWS, Sept, 14, 2004, at 1A (placing the annual warranty cost to automakers at \$12 billion, which translates into one to three percent off revenues, according to AMR Research cited by Garsten). According to Garsten, warranty costs are rising because: (1) manufacturers have shortened or rushed product development cycles thereby hurting quality; (2) vehicles are becoming more complex because they are relying more on computers and software; and (3) “an overall push to lower costs that can adversely affect quality.” *Id.*

294. *Id.*

295. NPRM, 66 Fed. Reg. at 66,205.

296. *Id.* at 66,205-06.

297. *Id.* at 66,206.

298. *Id.* at 66,212.

299. *Id.* at 66,212.

300. *Id.*

consumer advisories, recalls, or other activity involving the repair or replacement of vehicles<sup>301</sup> has been incorporated into the § 573.8 report. Specifically, NHTSA would essentially expand the § 573.8 duties to include all technical bulletins, etc. involving any system or component of the vehicle, whether or not a “defect” existed. (The current wording of § 573.8 requires an initial determination of “defect.”) In addition, § 573.8 would be moved to a new § 579.5. Finally, NHTSA would require a cover letter for each monthly submission of documents. The cover letter would identify each communication in the submission by name or subject matter and date.

*Historical Report.* To “seed” the NHTSA database with historical data, NHTSA proposed that manufacturers submit a one-time retroactive report by April 30, 2003.<sup>302</sup> The retroactive report would provide information on the numbers of (1) property damage claims, (2) consumer complaints, (3) warranty claims, and (4) field reports.<sup>303</sup> The applicable time period and scope for these numbers is each calendar quarter “from January 1, 2000 through December 31, 2002, for each model and model year vehicle manufactured in model years 1994 through 2003.”<sup>304</sup> Each report would identify the alleged system or component related to the claim, incident, etc., as would the reports for the current reporting period. Overseas data is *not* required in the retroactive report.<sup>305</sup> Accordingly, overseas claims for death need not be reported.

### 3. *Final Rule*

On July 10, 2002, NHTSA published the final rule on early warning reporting.<sup>306</sup> Since then, NHTSA has amended (as of this writing) the final rule six times<sup>307</sup> and issued a series of legal

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301. *Id.* at 66,214.

302. *Id.* at 66,210.

303. NPRM, 66 Fed. Reg. at 66,211.

304. *Id.*

305. *Id.* at 66,211.

306. Final Rule, 67 Fed. Reg. at 45,822.

307. The five amendments are: (1) Reporting of Information and Documents About Potential Defects; Defect and Noncompliance Reports, 68 Fed. Reg. 18,136 (Apr. 15, 2003) (Notice 4); (2) Reporting of Information and Documents About Potential Defects; Defect and Noncompliance Reports, 68 Fed. Reg. 20,225 (Apr. 24, 2003) (Notice 5); (3) Reporting of Information and Documents About Potential Defects, 68 Fed. Reg. 35,132 (June 11, 2003) (Notice 5); (4) Reporting of Information and Documents About Potential Defects, 68 Fed. Reg. 35,145 (June 11, 2003) (Notice 6); (5) Reporting of Information and Documents About Potential Defects, 68 Fed. Reg. 64,568 (Nov. 14, 2003) (Notice 7); and (6) Reporting of Information and Documents About Potential Defects, 69 Fed. Reg. 57,867 (Sept. 28, 2004) (Notice 12). *See also* Reporting of Information and Documents About Potential Defects, 69 Fed. Reg. 3,292 (Jan. 23, 2004) (Notice 8) (rejecting petitions for reconsideration that sought to raise reporting thresholds from 500).

interpretations. The amendments are discussed within the analysis of the final rule (immediately below); the interpretations are discussed in the section immediately following the analysis of the final rule.

*Covered “Manufacturers.”* The majority of the early warning reporting requirements applies to larger manufacturers of motor vehicles, and all makers of child restraints and tires. The rule defines “manufacturer” as “a person manufacturing or assembling motor vehicles or motor vehicle equipment, or importing motor vehicles or motor vehicle equipment for resale . . . [and] includes any parent corporation [of the manufacturer], any subsidiary or affiliate, and any subsidiary or affiliate of a parent corporation [of the manufacturer] of such a person.”<sup>308</sup> This expansive definition implements NHTSA’s perception of congressional intent to apply the TREAD Act in an extraterritorial manner (i.e., to companies and activities outside the United States that have an effect in the United States).<sup>309</sup>

*Bifurcated Reporting.* The final rule splits manufacturers into two reporting groups, each with different reporting responsibilities. The first group (Group 1) consists of (1) vehicle manufacturers that produce or import more than 500 vehicles per year (i.e., large volume manufacturers),<sup>310</sup> (2) child restraint manufacturers, and (3) tire manufacturers. The second group (Group 2) consists of (1) all other vehicle manufacturers (i.e., small volume manufacturers) and (2) manufacturers of original and replacement equipment (i.e., parts suppliers) *other than* child restraints or tires.<sup>311</sup> This Article focuses on the requirements for large volume vehicle manufacturers (Group 1).<sup>312</sup>

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308. 49 C.F.R. § 579.27(b). NHTSA defined “affiliate” to mean “in the context of an affiliate of or person affiliated with a specified person, a person that directly, or indirectly through one or more intermediates, controls or is controlled by, or is under common control with, the person specified. The term person usually is a corporation.” *Id.* § 579.4(b). In adopting this definition, NHTSA referred to the SEC definition. *See* Final Rule, 67 Fed. Reg. at 45,830 (citing Securities and Exchange Commission Regulation 17 C.F.R. § 230.405 (2004)). *See also* 17 C.F.R. § 240.10b-18(a)(1).

309. Final Rule, 67 Fed. Reg. at 45,825. Congress intended that manufacturers, including multinational companies, “adopt practices to ensure that all relevant information on matters for which reports are required is made available to that corporation’s designated reporting entity”. *Id.* The reporting entity is usually the U.S. importer, distributor, or manufacturer. *Id.* at 45,827.

310. 49 C.F.R. §§ 579.21-579.26.

311. 49 C.F.R. § 579.27.

312. *See* Eric Rubel & Matthew Eisenstein, *The TREAD Act and NHTSA’s Implementing Regulations: What Motor Vehicle Equipment Manufacturers Need to Know*, PRODUCT SAFETY & LIABILITY REP., Feb. 10, 2003, at 131 (providing an excellent discussion of the reporting obligations of Group 2 manufacturers). In determining whether it will hit the 500 vehicles in a given year, manufacturers should make “good faith estimates of their expected

NHTSA has already issued several interpretations on the issue of how to handle various brands or divisions within a group company (e.g., whether a small volume brand (less than 500) that is “affiliated” with a large volume company must report as Group 1 or Group 2). On this issue NHTSA has ruled that the parent company must “aggregate” for purposes of production counts of the divisions, parent, subsidiaries, and affiliates.<sup>313</sup> Hence, the small volume brand would have the Group 1 reporting responsibility, which is far more comprehensive (as described below). NHTSA did rule, however, that the “parent may report collectively” for all the brands, affiliates, etc., so long as “all vehicles are covered by the reporting.”<sup>314</sup>

*Product Information.* Group 1 vehicle manufacturers must submit product information that states: (1) manufacturer’s name; (2) quarterly reporting period; (3) make; (4) model; (5) model year; (6) type; (7) platform; and (8) production (stated as either the cumulative production of the current model year to the end of the reporting period, or the total model year production for each model year for which production has ceased).

*Report Format.* The report must be organized such that incidents are reported alphabetically by make, within each make alphabetically by model, and within each model chronologically by model year. Reports must indicate which one of the twenty-two reporting categories is involved. If none is involved, then the report would indicate either (98) or (99) (see immediately below). NHTSA has designated twenty-two reporting categories: (The

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annual production” of a category of vehicle, and they estimate that they will exceed 500, then they should begin the comprehensive reporting in the quarter in which the estimate is made, rather than the quarter in which production actually reaches or exceeds 500. Memorandum from Jacqueline Glassman, Chief Counsel, NHTSA (Dec. 12, 2003) (found under link entitled “Anonymous”), <http://www-odi.nhtsa.dot.gov/ewr/ewr.cfm?ewrdocs=interpretations>.

313. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Jason J. Cavallo, Halcore Group, Inc. (July 21, 2003), <http://www.nhtsa.dot.gov/cars/rules/interps/files/cavallo.ztv.html>; Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Robert S. Strassburger, Alliance of Automobile Manufacturers, Inc. (Nov. 4, 2003), [http://www.nhtsa.dot.gov/cars/rules/interps/files/alliance\(9-2-03\).ajd.html](http://www.nhtsa.dot.gov/cars/rules/interps/files/alliance(9-2-03).ajd.html); Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Lance Tunick, Vehicle Services Consulting, Inc. (Oct. 14, 2003), <http://www.nhtsa.dot.gov/cars/rules/interps/files/tunick2.ztv.html>; Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Rod Nash, Collins Industries, Inc. (Aug. 20, 2003), <http://www.nhtsa.dot.gov/cars/rules/interps/files/nash.ztv.html>. The NHTSA maintains an online database of its Interpretations at <http://www.nhtsa.dot.gov/cars/rules/interps/>.

314. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Jason J. Cavallo, Halcore Group, Inc. (July 21, 2003), <http://www.nhtsa.dot.gov/cars/rules/interps/files/cavallo.ztv.html>.

somewhat awkward numbering follows NHTSA's numbering) (01) steering system; (02) suspension system; (03) service brake system; (05) parking brake; (06) engine and engine cooling system; (07) fuel system; (10) power train; (11) electrical system; (12) exterior lighting; (13) visibility; (14) air bags; (15) seat belts; (16) structure; (17) latch; (18) vehicle speed control; (19) tires; (20) wheels; (22) seats; (23) fire; (24) rollover; (98) where a system or component not covered by categories (01) through (22) is not specified in the claim or notice; and (99) where no system or component of the vehicle is specified in the claim or notice. NHTSA removed the obligation proposed in the NPRM to report on trailer hitches and climate control systems (including defrosters).

Information must be submitted separately with respect to each make, model, and model year of vehicles manufactured during the quarterly reporting period *and nine model years prior to the earliest model year in the reporting period*, including models no longer in production. Reports must be submitted electronically, in specified formats.

*Incidents Involving Death or Injury.* For all vehicles less than ten calendar years old at the beginning of the reporting period, manufacturers must report each "incident" involving a death or injury that occurred in the United States, which is identified in either a (1) claim or (2) notice that alleges or proves that the death or injury was caused by a possible defect in the manufacturer's product. NHTSA defines a "claim" as a request or demand for relief and does not require the filing of a lawsuit.<sup>315</sup> Accordingly, a letter to a vehicle manufacturer that identifies the vehicle with minimal specificity and sought compensation for a fatality or

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315. Terminology, 49 C.F.R. § 579.4(c). The final rule defines "claim" as follows:

Claim means a written request or written demand for relief, including money or other compensation, assumption of expenditures, or equitable relief, related to a motor vehicle crash, accident, the failure of a component or system of a vehicle or an item of motor vehicle equipment, or a fire originating in or from a motor vehicle or a substance that leaked from a motor vehicle. Claim includes, but is not limited to, a demand in the absence of a lawsuit, a complaint initiating a lawsuit, an assertion or notice of litigation, a settlement, covenant not to sue or release of liability in the absence of a written demand, and a subrogation request. A claim exists regardless of any denial or refusal to pay it, and regardless of whether it has been settled or resolved in the manufacturer's favor. The existence of a claim may not be conditioned on the receipt of anything beyond the document(s) stating a claim. Claim does not include demands related to asbestos exposure, to emissions of volatile organic compounds from vehicle interiors, or to end-of-life disposal of vehicles, parts or components of vehicles, equipment, or parts or components of equipment.

*Id.*

injury constitutes a reportable “claim.” A “notice” includes a document, *other* than a media article (such as newspaper articles, publicly available Internet bulletin board postings, or other materials in the public domain) that does not include a demand for relief, and that the manufacturer receives from a person other than NHTSA.<sup>316</sup> A “claim”—unlike “notice”—need *not* allege or describe a defect; rather, a claim need only indicate an occurrence of death or injury and that the manufacturer’s product is responsible for that death.

In addition, manufacturers must report each death that occurred in a *foreign country*, which is identified in a claim involving either their product or a product that is “identical or substantially similar” to a product that the manufacturers have offered for sale in the United States. The term “substantially similar” is met if one of the four following tests is satisfied: (1) vehicle is sold in Canada or certified to comply with CMVSS; (2) gray market (specifically, the vehicle must be listed in the VSP or VSA columns of Appendix A to part 593); (3) vehicle is manufactured in the United States for sale abroad; or (4) vehicle shares the same platform. Recognizing the difficulties in establishing a reliable definition, NHTSA removed the proposed alternative test of “counterpart.”

If an incident involves more than one code, then each code must be reported separately in the report with a limit of five codes to be included. Manufacturers must also identify each separate incident with a unique, consecutive number. This will allow both ODI and the manufacturer to readily identify and refer to a specific incident.

If the vehicle manufacturer does not know the vehicle identification number (“VIN”) of the vehicle when the incident is first reported, then the manufacturer must provide an update for the calendar quarter in which the incident was first reported. An update is also required if the manufacturer originally indicated a code (99) (i.e., system and component unidentified) and later became aware that one or more specified systems or components allegedly contributed to the incident. Updating is *not* required if (1) the manufacturer learns that additional systems or components contributed to the incident, so long as some identifying code (other than (99)) was originally reported or (2) the manufacturer learns that a previously injured person has later died.

*Property Damage Claims.* Manufacturers must report each property damage claim in the United States that is related to

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316. *Id.* The final rule defines “notice” as follows: “Notice means a document, other than a media article, that does not include a demand for relief, and that a manufacturer receives from a person other than NHTSA.” *Id.*

alleged problems within the twenty-two reporting categories (note that (98) and (99) do not apply). "Property damage claim" means a claim for property damage other than vehicle component malfunctions or warranty claims. NHTSA removed all monetary threshold references; the NPRM had proposed that only those property damage claims exceeding \$1,000 should be reported. Therefore, every property damage claim, regardless of amount claimed, must be reported.

*Warranty Claims Information.* Manufacturers must report the number of warranty claims in the United States relating to problems with the twenty-two specified components and systems. "Warranty claims" include the number of paid repairs and/or replacements free of charge under warranties, as well as those under formal or informal extended warranties and good will. Good will includes voluntary buy-backs and lemon law buy-backs. Unpaid warranty claims, claims that relate only to work performed under a recall campaign that has *either* been reported to NHTSA *or* conducted pursuant to emissions-related recalls under the Clean Air Act (later expanded to include any state emissions recall, such as one in California), and service contract work done by dealers *without backing by a manufacturer* are not reportable.

However, if a breach of warranty lawsuit is resolved with a monetary payment, it must be reported as a warranty claim in the quarter in which the payment is made. Whether this particular requirement effectuates the purpose of *early warning* is highly questionable. After all, a period of many months may pass by the time a breach of warranty lawsuit is filed, reviewed, and analyzed for settlement purposes. The benefit of early warning is thus illusory in the case of many settled breach of warranty claims.

In addition, the definition fails to exclude warranty claims paid under either service actions or customer satisfaction campaigns, both of which often generate thousands of warranty claims. However, the underlying problem is being addressed (through the service action), though NHTSA will not know that through the artificially-inflated raw warranty claims count. The same rationale excluding warranty work conducted under a formal recall should justify excluding warranty work conducted under *informal* recalls such as service actions or customer satisfaction campaigns. It is not as though manufacturers can "hide" these actions from NHTSA, because NHTSA will know about these actions as a result of the *monthly* reporting requirements, described below (in "*External communications and customer satisfaction campaigns*").

*Field Reports.* Though not specifically addressed in the TREAD Act, NHTSA sought comment in the ANPRM for "field reports." NHTSA has authority under TREAD to require field

reports.<sup>317</sup> The final rule requires manufacturers to report the total number of field reports in the United States from employees and dealers, and from fleets (including company-owned vehicles), that are related to problems with the twenty-two specified components and systems.<sup>318</sup> In addition, manufacturers must submit *hard copies* of reports received from employees and fleets if such reports contain “assessments,” but manufacturers do not need to provide copies of reports received from dealers. If employees or dealers have written more than one field report about a particular incident, *each (subsequent or additional) report* is reportable. Of all the required early warning data, field reports are probably the most accurate indicator of a safety-related defect trend. This was not lost on NHTSA, which stated in the final rule: “Documents in which a manufacturer’s representative or employee raises or analyzes a potential problem have often been valuable to ODI in identifying a defect.”<sup>319</sup>

*Consumer Complaints.* Manufacturers must report the number of consumer complaints in the United States that are related to problems with the twenty-two reporting categories. Consumer complaints include complaints made in any form, including those made by telephone to customer relations representatives (employees or contractors) and those made to dealers that are transmitted to the manufacturer, as well as written communications (including e-mail) sent to the consumer affairs department (including the president or CEO, if such letters are forwarded to the consumer affairs department in the usual course of business). Manufacturers must report the aggregate number of complaints received about the twenty-two reporting categories (including fires). Consumer complaints are arguably the least reliable indicator of safety-related defects because, as the

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317. See 49 U.S.C. § 30166(m)(3)(B) (allowing the Secretary to request other data (i.e., field reports) from manufacturers of motor vehicles).

318. 49 C.F.R. § 579.4(c). “Field report” is defined as follows:

Field report means a communication in writing, including communications in electronic form, from an employee or representative of a manufacturer of motor vehicles or motor vehicle equipment, a dealer or authorized service facility of such manufacturer, or an entity known to the manufacturer as owning or operating a fleet, to the manufacturer regarding the failure, malfunction, lack of durability, or other performance problem of a motor vehicle or motor vehicle equipment, or any part thereof, produced for sale by the manufacturer and transported beyond the control of the manufacturer, regardless of whether verified or assessed to be lacking in merit, but does not include any document covered by the attorney-client privilege or the work product exclusion.

*Id.* This Rule incorporates changes made through Response to Petition for Reconsideration, 69 Fed. Reg. 20,556 (Apr. 16, 2004) (to be codified at 49 C.F.R. pt. 579).

319. Reporting of Information and Documents About Potential Defects Retention of Records that Could Indicate Defects, 67 Fed. Reg. at 45,856.

D.C. federal district court found in a landmark auto safety case, "drivers can describe only what happened to them, which is an altogether insufficient basis upon which to make a judgment as to the technical adequacy" of a safety-related defect.<sup>320</sup> Nevertheless, NHTSA finds consumer complaint information valuable in identifying defect trends. In the preamble to the final rule, NHTSA commented:

As far as the agency is concerned, the utility of consumer complaints for early warning purposes is not diminished by the fact that they are based on the observations of vehicle users as opposed to persons with technical training or experience. Such observations are often what first alerts the agency to the possible existence of a safety-related defect, especially when warranty coverage is not or no longer available. As such, consumer complaints about safety-related systems and components constitute an essential part of the proposed early warning reporting system. If the agency were to overlook consumer complaints in anticipation of receiving a more technically developed analysis of a potential safety problem from a manufacturer, an entire mechanism for early warning would be eliminated.<sup>321</sup>

Finally, NHTSA limited the consumer complaint information to the United States only. However, it indicated that it might later expand the reporting requirement to include consumer complaints made outside the United States.<sup>322</sup>

As discussed above (in section I.C.2.b.), consumer complaints are the least helpful early warning data, especially considering how NHTSA has defined a reportable complaint. Not only must manufacturers report every complaint, even if the complaint does not relate to safety issues (e.g., complaints about door noise), but NHTSA did not adopt a safety-based approach to reporting complaints. The result of including non-safety items is that the consumer complaint information will be potentially misleading. In explaining why non-safety items must be reported, NHTSA stated it does not "believe [it] would be appropriate to simply require reporting of 'safety-related' problems, since manufacturers often have a much more narrow view of what constitutes a safety-related problem than we do."

*Expanded Recordkeeping Requirements.* Although manufacturers are not required to submit actual documents constituting claims and notices involving deaths or injuries, property damage claims, warranty claims, consumer complaints, or dealer reports, manufacturers must retain each such claim,

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320. *GM I*, 656 F. Supp. at 1577. See also McDonald, *Judicial Review*, *supra* note 100, at 1330-32 (discussing this case).

321. Reporting of Information and Documents About Potential Defects Retention of Records that Could Indicate Defects, 67 Fed. Reg. at 45,849.

322. *Id.* at 45,848-49.

report, etc. for a period of *five calendar years* from the date manufacturers acquire it. The NPRM had proposed ten years; however, NHTSA responded to the industry's concern that NHTSA had not estimated the burden and cost of storing the information for ten years as opposed to five.

*External Communications and "Customer Satisfaction Campaigns."* The TREAD Act's early warning requirements of reporting "customer satisfaction campaigns, consumer advisories, recalls, or other activity involving the repair or replacement" of vehicles has been incorporated into the § 573.8 report. Specifically, NHTSA has essentially expanded the § 573.8 duties to include *all* TSBs, bulletins, etc. involving any system or component of the vehicle, whether or not a "defect" existed. (The former wording of § 573.8 required an initial determination of "defect.") In addition, § 573.8 has been moved to a new section, § 579.5. Finally, NHTSA required – then later removed the requirement – that each submission be accompanied by a document identifying each communication in the submission by name or subject matter and date.

*Retroactive Report.* To "seed" the NHTSA database with historical data, NHTSA required that manufacturers submit a one-time retroactive report by September 30, 2003 (the NPRM had proposed April 30, 2003). This date was later changed to January 15, 2004. Manufacturers had to report (1) production data, (2) the number of warranty claims or adjustments, and (3) the number of field reports. A separate report was required for each calendar quarter during the three-year period from April 1, 2000 through March 31, 2003 (a total of twelve separate reports) for vehicles manufactured in model years 1994 through 2003. NHTSA removed the proposed requirement of also including consumer complaints and property damage claims. Submission of copies of field reports is not required under this one-time provision. Overseas data are also not required in the retroactive report. Accordingly, overseas claims for death need not be reported.

*Timing.* The first quarter for which reports were required was the *third calendar quarter* of 2003 (July 1 to September 30, 2003). As mentioned above, the due date for the historical report was January 15, 2004. Beginning in 2004, manufacturers had thirty days in which to actually file the reports after the close of the quarter. Experience with reporting soon revealed that thirty days would not be adequate for some manufacturers, so NHTSA amended the rule to extend the deadline to sixty days from the close of the quarter. Hard-copies of field reports are due at the end of the first quarter in 2004. Going forward, the hard-copies are due fifteen days after the other quarterly data (i.e., seventy-five days after close the reporting quarter).

*Miscellaneous Provisions.* Each manufacturer must designate

two employees to serve as contact points for NHTSA. These employees should have a working fluency with the information technology issues surrounding the reporting of TREAD.

NHTSA will commence an initial review of the early warning rule within two years after the initial reports are received (i.e., the summer of 2005). Where necessary, it will make changes. Subsequently, NHTSA will review its defect information-gathering procedures at least once every five years.

The TREAD Act also requires all manufacturers to provide information within the scope of the early warning provision when NHTSA requests it. Under this new authority, the information need only relate to preliminary investigative activities and need only be of such a nature that it may assist NHTSA in the identification of safety-related defects. On this basis, NHTSA has already requested additional information from manufacturers if the information in the early warning reports suggests that there may be a possible problem. These "Death & Injury Inquiries" (following up on reported incidents of claims and notices of deaths and injuries) and "Aggregate Inquiries" (following up on other TREAD data such as warranty claims, etc.) do *not appear*, however, to be formal investigations, such as Preliminary Evaluations and Engineering Analyses now conducted by ODI. Because these Inquiries are *not* investigations, they are *not* exempt from requirements of the Paperwork Reduction Act, which requires NHTSA (and any other Federal agency) to obtain approval from the Office of Management and Budget (OMB) before imposing any new information demands from the private sector.<sup>323</sup> In issuing the Inquiries, NHTSA will need to carefully balance the authority provided to it under TREAD against the requirements of OMB.

*Cost-Benefit.* Along with the final rule, NHTSA published a "Final Regulatory Evaluation" (FRE).<sup>324</sup> Although a thorough cost-benefit analysis of TREAD's early warning requirements is beyond the scope of this article, a brief summary of NHTSA's findings reveals that, based largely on input from industry, NHTSA estimated the start-up costs of compliance in the first year of the final rule to be \$70 million with recurring annual costs of \$1.72 million,<sup>325</sup> though others have estimated a cost closer to \$2 billion.<sup>326</sup> First year costs were estimated to be between \$68

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323. 44 U.S.C. §§ 3501–3521.

324. U.S. Dep't of Transp. Office of Regulatory Analysis, Final Regulation Evaluation: TREAD Act Early Warning Reporting System Part 579 (July 10, 2002), available at [http://dmses.dot.gov/docimages/pdf82/178899\\_web.pdf](http://dmses.dot.gov/docimages/pdf82/178899_web.pdf).

325. *Id.* at ii.

326. See Nick Bunkley, "Early Warning" System Costly, DET. NEWS, Sept. 1, 2004, at 1C (citing "industry experts" as estimating the cost of early warning compliance to be \$2 billion).

million and \$87 million.<sup>327</sup> The costs are largely offset by the benefits, which NHTSA identified as (1) investigations opened sooner than before, which means that defective vehicles and equipment are “taken off the roads sooner, and fewer injuries and fatalities, and less property damage will occur, though NHTSA was unable to quantify these benefits”<sup>328</sup> and (2) a cost savings to manufacturers of \$9 million annually by stopping production of defective vehicles sooner as a result of recall actions that are conducted sooner than before.<sup>329</sup>

*Confidentiality.* As part of a separate rulemaking, NHTSA addressed what early warning information would be entitled to “confidential treatment” under the Freedom of Information Act (FOIA)<sup>330</sup> and what would be publicly accessible.<sup>331</sup> The confidentiality final rule creates a series of class determinations. NHTSA has determined that the following TREAD information will *not* be entitled to protection from public release: (1) production data on light vehicles; (2) claims of death and injuries (including overseas claims); (3) notices of deaths and injuries (alleging a defect);<sup>332</sup> and (4) property damage claims. The following early warning information was granted “class protection” from public release and therefore has “confidential” status: (1) reports and data relating to warranty claims information; (2) reports and data relating to field reports, including dealer field reports and hard-copy field reports; and (3) reports and data relating to consumer

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327. *Id.*

328. *Id.* at i-ii. NHTSA expects that investigations will be opened twelve months sooner than usual (on average, it takes thirty-six to forty-five months from the time the first consumer complains to a dealer before there is a NHTSA-influenced recall). *Id.* at ii.

329. *Id.* at ii. NHTSA bases this savings estimate on “having the average recall (manufacturer voluntary recall and NHTSA-influenced) occur three months earlier for a subset of vehicles [that] are still in production when the recall occurs and for which some recalled vehicle are three or more years old, and assuming an average recall costs \$100 per vehicle.” *Id.*

330. FOIA exempts “confidential business information” from disclosure. *Chrysler Corp. v. Brown*, 441 U.S. 281, 293-94 (1979).

331. Confidential Business Information, 68 Fed. Reg. 44,209, 44,216 (July 28, 2003) (to be codified at 49 C.F.R. pt. 512).

332. Responding to the industry’s concern of protecting the privacy of customers, which could be violated by publishing the complete Vehicle Identification Number (“VIN”) of the vehicle involved in a death or injury incident, NHTSA later amended the rule to disclose only eleven of the seventeen VIN characters, holding the last six characters confidential. Confidential Business Information, 69 Fed. Reg. 21,409, 21,416 (Apr. 21, 2004) (to be codified at 49 C.F.R. pt. 512). By conducting a search on several websites that offered to provide personal information on individuals based only on input of full VIN data, NHTSA was able to determine the name, address, date of birth, and lien information of the vehicle owner. *Id.* Considering the ease of obtaining such sensitive information, NHTSA decided to amend the rule of disclosing the complete VIN. *Id.*

complaints. Other information entitled to “class protection” includes production numbers for child restraint systems, tires, and vehicles “other than light vehicles.” Currently, NHTSA is not releasing any data, however, pending the outcome of a lawsuit filed against it by Public Citizen.<sup>333</sup> The lawsuit seeks to force NHTSA to release all the early warning information to the public.<sup>334</sup> The Rubber Manufacturers Association, a group that represents tire manufacturers such as Bridgestone, Goodyear, and Continental, has intervened in this lawsuit and filed claims against NHTSA, asserting that that NHTSA should be precluded from disclosing *any* of the early warning data.<sup>335</sup>

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333. See Complaint, Public Citizen, Inc. v. Mineta, No. 1:04-CV-00463-RJL (D.D.C.) (filed Mar. 22, 2004) (on file with author). See also Jeffrey McCracken, *U.S. Keeping Crash Data Secret; Officials Backtrack on Safety Disclosure Amid Suit by Tire Makers*, DET. FREE PRESS, Sept. 24, 2004, at 1A.

334. *Id.*

335. *Id.*

TABULAR COMPARISON OF ANPRM, NPRM, AND FINAL  
RULE<sup>336</sup>

3-YEAR HISTORICAL REPORT    ||    ONGOING (QUARTERLY) REPORT<sup>337</sup>

	NPRM	FINAL RULE		ANPRM	NPRM	FINAL RULE
Production data	X	X			X	X
Warranty claims	X	X		X	X	X
Consumer complaints	X			X	X	X
Employee & fleet field reports	X	X		X	X	X
Dealer field reports	X	X		X	X	X
Internal investigations				X		
Design changes to parts				X		

336. See Nicholas J. Wittner, *The "Early Warning Reporting" NPRM: Heading in the Right Direction*, LJM'S PRODUCT LIABILITY L. & STRATEGY, Mar. 2002, at 6 (discussing differences between ANPRM and NPRM); Nicholas J. Wittner, *TREAD's Final Rule: End of the Road?*, LJM'S PRODUCT LIABILITY L. & STRATEGY, Aug. 2002 (discussing differences between NPRM and Final Rule).

337. The ANPRM only solicited comments, and did not propose affirmative obligations. Standards Enforcement and Defect Investigation, Defect and Noncompliance Reports, Record Retention; Advance Notice of Proposed Rulemaking (ANPRM), 66 Fed. Reg. 6,532 (Jan. 22, 2001). In addition, the ANPRM did not solicit comments on historic reporting. *Id.* The obligation to provide historical data emerged upon publication of the NPRM. NPRM, 66 Fed. Reg. at 66,190.

Remedy failures				X		
Fuel leaks, fires, & rollovers	X	X		X	X	X
Property damage claims	X			X	X (only if > \$1,000 threshold)	X (no \$ threshold)
Claims / notice for deaths & injury				X ("serious" injuries)	X (all injuries)	X (all injuries)
Overseas claims of death				X	X	X
Customer satisfaction campaigns				X	X	X
Expanded record retention				X	X (10 years)	X (5 years)

#### 4. Interpretations of Final Rule

From time to time, NHTSA's Chief Counsel issues interpretive rules. An interpretive rule is a rule that "describes, clarifies, and reminds the public of a statutory or regulatory standard or a pre-existing rule."<sup>338</sup> An interpretive rule differs

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338. See ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW § 4.2.3, at 82 n.16 (2d ed. 2001) (citing four cases from the United States Court of Appeals for the District of Columbia Circuit: *Chemical Waste Management, Inc. v. United States EPA*, 873 F.2d 1477, 1482 (D.C. Cir. 1989); *British Caledonian Airways, Ltd. v. CAB*, 584 F.2d 982, 989-90 (D.C. Cir. 1978); *Chamber of Commerce v. OSHA*, 636 F.2d 464, 469 (D.C. Cir. 1980) and *Guardian Federal Savings and Loan Ass'n v. Federal Savings & Loan Insurance Corp.*, 589 F.2d 658, 664 (D.C. Cir. 1978). *Chemical Waste Management* maintains that case law has "emphasized the distinction between rules which create new legal obligations and those which simply restate or clarify existing statutes or regulations." *Id.* In addition, *Chamber of Commerce* held that interpretive rules "only provide a clarification of statutory language . . . the interpreting agency only 'reminds affected parties of existing duties.'" *Id.* Finally, *Guardian Federal Savings and Loan Ass'n* explained that "an interpretive rule is merely a clarification or explanation of

from a legislative rule (such as the “Final Rule On Early Warning”) in that the interpretive rule “is not intended to alter legal rights, but to state the agency’s view of what existing law already requires.”<sup>339</sup>

The Chief Counsel issues her interpretative rules (more commonly known simply as “interpretations”) in letter form by responding to questions from the motor vehicle industry and the public. Her interpretations represent the definitive view of NHTSA on the questions addressed and may be relied upon by the regulated industry and members of the public.<sup>340</sup> NHTSA has always made its interpretations open to the public in its technical reference library in Washington.<sup>341</sup> With the invention of the World Wide Web, the interpretations are now available on NHTSA’s website.<sup>342</sup>

To date, NHTSA has issued forty interpretations of the early warning final rule,<sup>343</sup> which is extraordinary both in number and in time (rarely has NHTSA issued so many interpretations so quickly after publication of a final rule).<sup>344</sup> The following table summarizes each interpretation and provides cross-references to interpretations that address the identical or substantially similar issues. The table includes all interpretations relevant to vehicle and equipment manufacturers but does not include interpretations to other industries affected by the early warning rules of the TREAD Act (e.g., child restraint manufacturers).

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an existing statute or rule.” *Id.* For additional background on interpretative rules, see Kevin M. McDonald, *Are Agency Advisory Opinions Worth Anything More than the Government Paper They’re Printed on?*, 37 TEXAS TECH. L. REV. (forthcoming Nov. 2004).

339. ERNEST GELLHORN & RONALD M. LEVIN, ADMINISTRATIVE LAW AND PROCESS 305 (4th ed. 1997).

340. To access a searchable database of NHTSA’s interpretations, see <http://www.nhtsa.dot.gov/cars/rules/interps/welcome.html> (last visited Sept. 2, 2004). However, in a recent case before the Sixth Circuit Court of Appeals, NHTSA contradicted a statement on its website, disclaiming that its interpretive letters are the “definitive view of the agency” and making “clear that the letters are simply advisory opinions about a set of facts presented to the Chief Counsel.” *Air Brake Systems, Inc. v. Mineta*, 357 F.3d 632, 646 (6th Cir. 2004).

341. *Id.*

342. *Id.*

343. This count includes only those interpretations relevant to vehicle manufacturers and does not include, for example, interpretations to other industries affected by the early warning rules of the TREAD Act (e.g., child restraint manufacturers). See also *supra* note 312 and accompanying text.

344. For a list of the interpretations by the NHTSA Office of Defects Investigation on Early Warning Reporting, see <http://www-odi.nhtsa.dot.gov/ewr/ewr.cfm?ewrdocs=interpretations> (last updated Dec. 12, 2003). For a searchable database of NHTSA’s Interpretation Files, see <http://www.nhtsa.dot.gov/cars/rules/interps/> (last visited Sept. 3, 2004).

Addressee	Date	Significance of Interpretative Rule
KME Fire Apparatus <sup>345</sup>	Mar. 26, 2004	<p>- A claim or notice of death or injury is reportable even if the underlying alleged defect does not directly involve operation of the vehicle itself. Example: A manufacturer of fire fighting vehicles must report a claim for injury or death where, e.g., the fire pump (used to discharge water through a hose) allegedly failed, causing the death of a person in a building or car fire. This would be categorized as "99." Rationale: NHTSA has "consistently interpreted the requirement for manufacturers to report a claim or notice of a death incident ... regardless of the manufacturer's view of the underlying facts" (see also Interpretations to Miller, Johnson, Snell &amp; Cumiskey dated August 8, 2003 (deaths reportable even if manufacturer's vehicle or equipment did not initiate sequence of events leading to death); Halcore Group dated July 21, 2003 (reportable even if not within defined component categories); and NTEA dated May 14, 2003 (even if claim arose out of aftermarket part)).</p>

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345. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Steven M. Cormier, Esq., KME Fire Apparatus (Mar. 26, 2004), available at <http://www.nhtsa.dot.gov/cars/rules/interps/files/Cormier.ajd.html>.

Baker Daniels <sup>346</sup>	Feb. 2, 2004	- Communications between manufacturers and multiple recipients within the same corporate family (e.g., subsidiaries) are not “ <i>external communications</i> ” and therefore need not be submitted under 49 C.F.R. § 579.5 (customer satisfaction campaigns, etc.) “because [the documents] are not sent to more than one manufacturer, distributor, dealer, lessor, lessee, owner or purchaser.” In this case, the entire corporate family is “considered the same manufacturer for the purposes of 49 CFR 579.”
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346. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Melissa M. Hinds, Esq., Baker Daniels (Feb. 2, 2004), available at <http://www.nhtsa.dot.gov/cars/rules/interps/files/BakerDaniels.ajd.html>.

<p>Japan Auto Parts Industries Association<sup>347</sup></p>	<p>Dec. 8, 2003</p>	<p>- A <i>part supplier</i> need not report a <i>recall campaign</i> conducted by a vehicle manufacturer that does not sell motor vehicles in the United States. <i>Rationale:</i> The vehicle manufacturer, not the supplier, determined that a defect existed (49 C.F.R. § 579.11). In addition, “since a foreign government did not require [the supplier] to conduct a safety-related recall, [the supplier] is not obligated to report the recall.” 49 C.F.R. § 579.12.”</p> <p>- A <i>part supplier</i> need not report <i>claims of death</i> received by a vehicle manufacturer that does not sell vehicles in the United States. <i>Rationale:</i> The claim was made against and received by the vehicle manufacturer, not the parts supplier. 49 C.F.R. § 579.27(b).</p>
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347. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Keiko Utsunomiya, Japan Auto Parts Industries Association (Dec. 8, 2003), available at <http://www.nhtsa.dot.gov/cars/rules/interps/files/JAPIA.ajd.html>.

Anonymous – Memo of Chief Counsel <sup>348</sup>	Dec. 3, 2003	- In determining whether a manufacturer will hit the <i>500 annual production threshold</i> , the manufacturer is required to make “good faith estimates.” <i>See also</i> Interpretation to Vehicle Services Consulting, Inc., July 24, 2003. For <i>future</i> production numbers, approximation is allowed when determining whether the 500 threshold is met. For <i>production-to-date</i> numbers, manufacturers may “approximate production information in those situations where it is not possible . . . to quantify the number of vehicles, tires, or child restraint systems.” NHTSA anticipates “that such approximation of past production to be few and far between” because production records are “usually kept in ordinary course of business.”
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348. Memorandum from Jacqueline Glassman, Chief Counsel, NHTSA (Dec. 3, 2003), available at <http://www.nhtsa.dot.gov/cars/rules/interps/files/ODI.approximationofproduction.html>.

<p>Toyo Tire Corporation<sup>349</sup></p>	<p>Nov. 19, 2003</p>	<p>- The <i>EWB Compendium</i> is not an interpretation of § 579 or the terms of that section, “but merely is intended to assist manufacturers in submitting information.” Any interpretive questions “should be sent to the Office of Chief Counsel.”</p> <p>- [Tires only] <i>Tire manufacturers</i> do not have to report <i>warranty adjustments</i> that do not mention involve the component categories in 49 C.F.R. § 579.26(c). (This Interpretation also affirms the Response to RMA’s Petition dated Aug. 26, 2002, 68 Fed. Reg. 35,132, 35137 (6/11/03)). For example, claims for “early ride” complaints (with no failure condition other than failing to meet subjective expectancy for comfort or warranted mileage projections) or merely “cosmetic” claims “that did not concern a failure” are not reportable.</p> <p>- [Tires only] For determining the <i>15,000 tire threshold</i> (in which case only incidents of death and injury are reportable), the standard is <i>groups of tires with the same SKUs</i>. Thus, if a tire line has SKUs, and if fewer than 15,000 tires with a given SKU are produced (or expected to be produced) in a given year, then only those incidents (resulting in death and injury) are reportable.</p> <p>- [Tires only] If a tire is manufactured outside the United States, the Tire Information Number (“TIN”) need not include the plant name. Manufacturers may provide country of origin. <i>See also</i> Interpretation to RMA, Oct. 10, 2003 at 3.</p> <p>- [Tires only] <i>Warranty claims / adjustments</i> need not be reported if they are denied “in its entirety.” The tire manufacturer need only report warranty</p>
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349. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Harold van der Meijden, Toyo Tire (USA) Corporation (Nov. 19, 2003), available at <http://www.nhtsa.dot.gov/cars/rules/interps/files/toyo.ajd.html>.

		<p>adjustments when it paid or provided other reimbursement to a consumer pursuant to a warranty program offered by a manufacturer or goodwill. 49 C.F.R. § 579.4, as amended at 68 Fed. Reg. 35,132, 35,142.</p> <p>- [Tires only] A tire manufacturer need <i>not</i> file a report for a claim or notice of death and injury when “the claim alleges one or more deaths in a foreign country involving a tire that is <i>not</i> identical or substantially similar to one offered for sale in the U.S.” This corrects an error in the Compendium (Version 1.0).</p> <p>- [Tires only] For the historical report, tire manufacturers should include the total annual production of tires produced from the beginning of each calendar year included in the report until the close of the quarter that is the subject of the report.</p>
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Oshkosh Truck Corporation <sup>350</sup>	Nov. 6, 2003	<p>- Trucks built exclusively for <i>military use</i> with no civilian counterparts (designed &amp; manufactured exclusively for military) are <i>not</i> subject to EWR. <i>See also</i> Interpretation to Stewart &amp; Stevenson, May 21, 2003.</p> <p>- <i>Airport Rescue and Firefighting</i> (“ARFF”) trucks and snow removal trucks <i>used exclusively for off-road service</i> (e.g., at airports to remove snow or fight fires) are <i>not</i> subject to EWR. <i>See also</i> Interpretation to Grubb, June 12, 1995 (excluding vehicles designed and sold solely for off-road use, such as runway vehicle, from Vehicle Safety Act’s <i>definition of motor vehicle</i>). However, snow removal trucks conducting <i>on-road work</i> are subject to EWR.</p> <p>- Trucks designed for and used in on-road civilian market, such as <i>concrete placement trucks</i>, fall under EWR “because they are civilian and engaged in on-road work.”</p> <p>- The “determinant between <i>full and limited reporting</i> (i.e., as <i>small volume manufacturer . . .</i>) is the total aggregate production for each reporting category of vehicle defined by EWR.” <i>See also</i> Interpretation to Collins Industries, Aug. 20, 2003.</p>
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350. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to W. Thatcher Peterson, Oshkosh Truck Corporation (Nov. 6, 2003), available at <http://www.nhtsa.dot.gov/cars/rules/interps/files/Oshkosh.html>.

Association of International Automobile Manufacturers, Inc. ("AIAM") <sup>351</sup>	Nov. 6, 2003	<ul style="list-style-type: none"><li>- The "bubble" portions on consumer surveys ("requesting scaled, qualitative evaluations or product performance" do <i>not</i> constitute reportable <i>consumer complaints</i> because "it [is] unclear as to when or if a low rating rises to the level of a 'complaint.'"</li> <li>- Comments written by consumers in the space designated for comment as well as any pages attached by the consumer must be reviewed to determine whether they are <i>consumer complaints</i>.</li> <li>- Notes written in the non-designated area (e.g., marginal notes written in spaces on machine read bubble forms that aren't designated for recording comments) need <i>not</i> be reviewed as containing <i>consumer complaints</i>.</li></ul>
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351. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Association of International Automobile Manufacturers, Inc. (Nov. 6, 2003), available at <http://www.nhtsa.dot.gov/cars/rules/interps/files/AIAM.ekmy.html>.

<p>Alliance of Automobile Manufacturers<sup>352</sup></p>	<p>Nov. 4, 2003</p>	<p>- "For the purposes of determining whether the <i>production of vehicles</i> meets or exceeds the <i>500 vehicles per year</i> threshold in Section 579.21 <i>et. seq.</i>, the <i>production of the divisions, parent, subsidiaries and affiliates must be aggregated.</i>" Aggregate reporting is "appropriate in order to capture all vehicles manufactured by an entity with affiliates or subsidiaries." <i>See also</i> Interpretations to Vehicle Services, Oct. 14, 2003; Collins Industries, Inc., Aug, 20, 2003; Halcore Group, July 21, 2003.)</p> <p>- Statements made at the public hearings concerned "technical issues." The Chief Counsel is the only NHTSA official with authority to issue <i>interpretations</i> of agency regulations (citing 49 C.F.R. § 501.8(d)(4)).</p> <p>- The interpretation on <i>FMVSS No. 208 phase-in</i> was limited only to No. 208; the "concerns underlying that interpretation" aren't the same as for early warning.</p>
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352. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Robert S. Strassburger, Alliance of Automobile Manufacturers, Inc. (Nov. 4, 2003), available at [http://www.nhtsa.dot.gov/cars/rules/interps/files/alliance\(9-2-03\).ajd.html](http://www.nhtsa.dot.gov/cars/rules/interps/files/alliance(9-2-03).ajd.html).

Alliance of Automobile Manufacturers	Nov. 4, 2003	<p>- EWR does <i>not</i> require reporting injuries from incidents occurring outside the United States. In their reports on foreign incidents, manufacturers do not need to state the number of injuries (i.e., just enter a "0").</p> <p>- With respect to the United States, only those injuries that are <i>themselves</i> the subject of a claim or notice (alleging defect) must be reported.</p>
TurtleTOP <sup>353</sup>	Nov. 3, 2003	<p>- This decision was limited to TurtleTOP's reporting responsibilities—for vans less than 500 units per year, it must still report claims and notices of fatalities in United States.</p>

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353. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Janet L. Kircher-Dudley, TurtleTOP (Nov. 3, 2003), available at <http://www.nhtsa.dot.gov/cars/rules/interps/files/TurtleTop.html>.

Featherlite, Inc. <sup>354</sup>	Oct. 30, 2003	- Regarding <i>trailer manufacturers</i> , an injury to a horse (which is tangible property) is not a reportable <i>property damage claim</i> unless “one or more specified vehicle components or systems has been identified as giving rise to the incident or damage, or there was a fire” (citing the preamble to 67 Fed. Reg. 45,822, 45,846).
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354. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Norman L. Helmke, Featherlite, Inc. (Oct. 30, 2003), available at [http://www.nhtsa.dot.gov/cars/rules/interps/files/featherlite\(9-15-03\).mtg.html](http://www.nhtsa.dot.gov/cars/rules/interps/files/featherlite(9-15-03).mtg.html).

Recreational Vehicle Industry Association (RVIA) / Monaco Coach Company <sup>355</sup>	Oct. 22, 2003	- "Pre-Delivery Inspection (PDI) forms, Dealer Acceptance forms (DAF), and other pre-retail documents 'related to . . . vehicles which are still in the <i>direct control</i> of the manufacturer or dealer'" are <i>not field reports</i> . <i>Rationale:</i> Although vehicles in the possession of dealers are considered "beyond the direct control of the manufacturer" for purposes of recall, "NHTSA does not consider documents prepared by dealers that address particular vehicle [ <i>sic</i> ] prior to their first retail sale to be <i>field reports</i> " for early warning reporting.
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355. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Lawrence F. Hennenberger, Esq., Arent Fox Kintner Plotkin & Kahn, PLLC (Oct. 22, 2003), available at <http://www.nhtsa.dot.gov/cars/rules/interps/files/RVIA-MonacoCoach.ekmy.html>.

<p>Vehicle Services Consulting, Inc.<sup>356</sup></p>	<p>Oct. 14, 2003</p>	<p>- [Confirming the Interpretation to <i>Halcore</i>, July 21, 2003]. “[W]here individual small volume manufacturers are held by a single parent corporation, EWR reports could be filed by <i>either the parent corporation or each of the vehicle-manufacturing subsidiaries</i>, but in either event, the production of all related vehicle manufacturers <i>must be aggregated</i> to determine whether the threshold was met.” <i>See also</i> Interpretation to Alliance, Nov. 4, 2003; Collins Industries, Inc., Aug, 20, 2003; Halcore Group, July 21, 2003.</p> <p>- Small volume manufacturers should make a good faith estimate of its expected annual production of a category of vehicle, and if it is estimated to exceed 500, then it “should begin comprehensive reporting in the quarter in which the estimate is made rather than the quarter in which production actually reaches or exceeds 500.”</p>
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356. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Lance Tunick, Vehicle Services Consulting (Oct. 14, 2003), *available at* <http://www.nhtsa.dot.gov/cars/rules/interps/files/tunick2.ztv.html>.

<p>Rubber Manufacturers Association ("RMA")<sup>357</sup></p>	<p>Oct. 10, 2003</p>	<ul style="list-style-type: none"> <li>- Manufacturers that identify "significant errors" in their reports should contact ODI on a "case-by-case basis." However, the same <i>template</i> that is used for the original report should be used for <i>updated reports</i> (Version 1, Version 2, etc.).</li> <li>- [Tires only] The four calendar years prior to the earliest calendar year in the reporting period will be the four calendar years before the calendar year of the report.</li> <li>- [Tires only] NHTSA will use RMA's definition of "tire type code."</li> <li>- [Tires only] Country of origin and date of importation can, in some cases, satisfy the regulation for identifying "plant of manufacturer." <i>See also</i> Interpretation to Toyo Tire, Nov. 19, 2003, at 3.</li> <li>- [Tires only] <i>Warranty production and tire production</i> are <i>cumulative</i> for the reporting period. For example, a tire manufacturer's report for the third quarter of a calendar year would contain the total warranty count and production count for a tire line for the first three quarters. This is unlike numbers of <i>property damage claims and warranty adjustments</i> under § 579.26(c) (reporting <i>quarterly</i> not <i>cumulatively</i>).</li> <li>- [Tires only] No reporting is needed if the system or component involved is not specified in the codes. If a manufacturer is unsure if a group of tires is used as "original equipment" it shall state "U" in the reporting field (citing 69 Fed. Reg. 35,144).</li> </ul>
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357. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Ann Wilson, Rubber Manufacturers Association (Oct. 10, 2003), *available at* <http://www.nhtsa.dot.gov/cars/rules/interps/files/rmaltrjul25.ztv.html>.

Collins Industries, Inc. <sup>358</sup>	Oct. 10, 2003	- Collins and its subsidiaries must report according to the <i>aggregate production</i> of each vehicle category. “[F]or example, if the spotter trucks are medium-heavy vehicles, and Collins and/or its subsidiaries also manufacture medium-heavy vehicles, the <i>production volumes of all these companies’ vehicles must be aggregated</i> to determine how to report.” See also Interpretations to Alliance, Nov. 4, 2003; Vehicle Services, Oct. 14, 2003; Collins Industries, Inc., Aug. 20, 2003; Halcore Group, July 21, 2003.)
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358. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Rod Nash, Collins Industries, Inc. (Oct. 10, 2003), available at <http://www.nhtsa.dot.gov/cars/rules/interps/files/nash2.ajd.html>.

<p>Motor &amp; Equipment Manuf. Assoc. ("MEMA")<sup>359</sup></p>	<p>Oct. 9, 2003</p>	<p>- Regarding the reporting of § 579.27(c) – “in the event an equipment manufacturer reports an <i>incident involving a death</i>, it should also provide in its report the number of injuries, if any, if the incident occurred in the United States.” (NOTE: This interpretation is modified and clarified by the Alliance interpretation from November 4, 2003.)</p>
<p>Alliance of Automobile Manufacturers<sup>360</sup></p>	<p>Sept. 4, 2003</p>	<p>- <i>Updating information on fatalities or injuries</i> need only occur “for a period of <i>five years</i> from the quarter in which the fatality or injury was initially submitted to NHTSA.” (NOTE: Resubmission of the entire workbook is necessary.)</p>

359. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Lawrence F. Henneberger, Esq. & Christopher H. Grigorian, Esq., Arent Fox Kintner Plotkin & Kahn, PLLC (Oct. 9, 2003), *available at* <http://www.nhtsa.dot.gov/cars/rules/interps/files/mema.ztv.html>.

360. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Robert Strassburger, Alliance of Automobile Manufacturers (Sept. 4, 2003), *available at* <http://www.nhtsa.dot.gov/cars/rules/interps/files/alliancerecords.ztv.html>.

National Truck Equipment Association (NTEA) <sup>361</sup>	Sept. 4, 2003	<p>- Complete reporting for medium-heavy vehicles and buses is not needed if the aggregate number of vehicles was fewer than 500 “in the year of the reporting period and in each of the two calendar years preceding the reporting period.” (This change is now consistent with requirements for light vehicles.)</p> <p>- “Although manufacturers reporting under Section 579.27 [fewer than 500 vehicles] need <i>not</i> report incidents involving only injuries, they are required to <i>report the number of injuries</i> of which they are aware that occurred in incidents involving one or more deaths that are identified in claims or notices received by the manufacturer.”</p> <p>- The definition of <i>platform</i> can mean that vehicles with “different structures on common chassis” have the same platform. This does <i>not</i> mean that “vehicles that have <i>common structures added by a final stage manufacturer</i> on different chassis also . . . have the same platform.”</p> <p>- “<i>Final stage manufacturers</i> need only identify those models/vehicles that share a chassis.”</p> <p>- <i>Platform designations</i> are “determined the same way for alterers as for final stage manufacturers.”</p>
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361. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Michael Kastner, National Truck Equipment Association (Sept. 4, 2003), available at <http://www.nhtsa.dot.gov/cars/rules/interps/files/ntea3.ztv.html>.

Truck Manufacturers Association <sup>362</sup>	Aug. 22, 2003	- <i>Chassis-cab incomplete vehicles</i> are subject only to the <i>limited</i> EWR reporting under § 579.27 <i>even if</i> these manufacturers receive “warranty claims, field reports, consumer complaints, etc.” that are not even received by the final stage manufacturer. <i>Rationale:</i> “[F]or many years, NHTSA has considered <i>incomplete chassis</i> to be <i>items of original equipment.</i> ” (Noting, however, that incomplete vehicle manufacturers are subject to NHTSA’s defect and noncompliance reporting under 49 C.F.R. § 573). ( <i>See also</i> Interpretation to Spartan Motors, April 11, 2003.)
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362. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Robert M. Clarke, Truck Manufacturers Association (Aug. 22, 2003), *available at* <http://www.nhtsa.dot.gov/cars/rules/interps/files/clarke.ztv.html>.

Collins Industries, Inc. <sup>363</sup>	Aug. 20, 2003	<p>- Under EWR, the definition of <i>manufacturer</i> under 49 C.F.R. § 579.4(c) “includes parents, subsidiaries, and affiliates. For purposes of determining if the <i>production of vehicles</i> meets or exceeds 500 vehicles per year, the production of the divisions, parent, subsidiaries, and affiliates must be <i>aggregated</i>.” (See also Interpretations to Alliance, Nov. 4, 2003; Vehicle Services, Oct. 14, 2003; Halcore Group, July 21, 2003.)</p> <p>- “The determinant between <i>full and limited</i> (i.e., small volume manufacturer under § 579.27) reporting is the total annual <i>aggregate production for each type of vehicle</i> defined by EWR . . . If the aggregate number of <i>either light vehicles or medium-heavy vehicles and buses</i> is less than 500,” then only the limited information must be reported. If the aggregate production of subsidiaries exceeds 500 or more for a vehicle type, then full reporting is necessary. In addition, if there is anticipation that total production “will exceed 500 before end of a calendar year,” then quarterly reporting is required reports, even if the current production was below 500 in each of the prior two calendar years. See also Interpretation to Oshkosh Truck, Nov. 6, 2003.</p>
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363. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Rod Nash, Collins Industries, Inc. (Aug. 20, 2003), available at <http://www.nhtsa.dot.gov/cars/rules/interps/files/nash.ztv.html>.

<p>Miller, Johnson, Snell &amp; Cummiskey, P.L.C.<sup>364</sup></p>	<p>Aug. 8, 2003</p>	<ul style="list-style-type: none"> <li>- If a <i>supplier (original equipment manufacturer)</i> does not receive a claim or notice of death in any quarterly reporting period, it is not required to report that fact to NHTSA.</li>   <li>- <i>Regardless of proximate cause</i>, if a document received by an original equipment manufacturer (“OEM”) meets the definition of “claim” or “notice” and identifies the OEM’s equipment with “minimal specificity,” then the OEM must report to NHTSA as proscribed in § 579.27. (<i>See also</i> Interpretation to KME Fire Apparatus, Mar. 26, 2004.)</li>   <li>- The word <i>equipment</i> comprises both the completed “item of motor vehicle equipment” and “each individual component that comprises the item.” “Equipment incorporating . . . fasteners would be substantially similar for EWR” (e.g., if commonality present) “unless the claim [or notice] specifically identified a non-common component as the source of the failure.”</li>   <li>- “<i>Sold or offered for sale</i>” does NOT include vehicles merely imported by Registered Importers (e.g., Smart cars).</li>   <li>- NHTSA need not be informed if there are no <i>customer satisfaction campaigns</i> in the previous month.</li> </ul>
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364. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Barry C. Kane, Esq., Miller, Johnson, Snell & Cummiskey, P.L.C. (Aug. 8, 2003), available at <http://www.nhtsa.dot.gov/cars/rules/interps/files/kane.ztv.html>.

<p>Vehicle Services Consulting, Inc.<sup>365</sup></p>	<p>July 24, 2003</p>	<p>- In any calendar year in which a manufacturer produces <i>500 or more light vehicles</i> for sale in the United States, the manufacturer must report under § 579.21, regardless of how many vehicles it produced in prior calendar years. (<i>See also</i> “Anonymous” Interpretation, Dec. 3, 2003.)</p> <p>- Any manufacturer that reports under § 579.27 (“because at least two years have passed without it producing 500 or more vehicles”) need not submit the comprehensive information of § 579.21, “regardless of the number of vehicles it produced during the preceding nine model years.” <i>See also</i> “Anonymous” Memo, Dec. 3, 2003.</p>
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365. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Lance Tunick, Vehicle Services Consulting, Inc. (July 24, 2003), *available at* <http://www.nhtsa.dot.gov/cars/rules/interps/files/tunick.ztv.html>.

Active Web Services <sup>366</sup>	July 21, 2003	- Aggregate payments made to dealers “without reference to any specific claim(s)” and that does not identify and/or “report the system or component upon which the claim is based” are <i>not</i> reportable <i>warranty claims</i> .
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366. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Dan DeDecker, Active Web Services, L.L.C. (July 21, 2003), *available at* <http://www-odi.nhtsa.dot.gov/ewr/interpretations/activewebservices2.pdf>.

Halcore Group, Inc. <sup>367</sup>	July 21, 2003	<p>- Definition of <i>manufacturer</i> requires the parent to aggregate (for purposes of production counts) the divisions, parent, subsidiaries, and affiliates. However, § 579.3(b) allows the parent to “report collectively or the incorporated entities to report separately,” so long as all vehicles are covered by the reporting. <i>See also</i> Interpretation to Alliance, Nov. 4, 2003; Vehicle Services, Oct. 14, 2003; and Collins Industries, Inc., Aug, 20, 2003).</p> <p>- <i>Final stage manufacturers</i> do not have to report <i>warranty claims</i> that they do not process (e.g., that are sent to and processed by the chassis manufacturer).</p> <p>- If an end user contacts a <i>final stage manufacturer</i> about a chassis issue and it advises to contact local chassis manufacturer, this is a reportable <i>consumer complaint</i>.</p> <p>- <i>Interior cabinetry</i> is not covered by any category.</p> <p>- <i>Interior lighting</i> is covered by the <i>electrical</i> category.</p>
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367. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Jason J. Cavallo, Halcore Group, Inc. (July 21, 2003), available at <http://www-odi.nhtsa.dot.gov/ewr/interpretations/HalcoreGroupInc.pdf>.

Butzel Long <sup>368</sup>	July 2, 2003	<ul style="list-style-type: none"> <li>- Reports of light vehicle manufacturers involving <i>integrated child seat systems</i> must be reported as <i>seats</i> (Code 22).</li> <li>- Seat manufacturers (as OEMs) must "report to NHTSA any claims or notices involving death relating to its product."</li> </ul>
Stewart & Stevenson Services, Inc. <sup>369</sup>	May 21, 2003	<ul style="list-style-type: none"> <li>- Reports under EWR rules are not required for <i>military personnel carriers</i>. However, reports are "required for pickup trucks, vans, and sedans that have civilian counterparts."</li> </ul>

368. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Daniel P. Malone, Butzel Long (July 2, 2003), available at <http://www-odi.nhtsa.dot.gov/ewr/interpretations/ButzelLong.pdf>.

369. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Richard C. Kroger, Stewart & Stevenson Services, Inc. (May 21, 2003), available at <http://www-odi.nhtsa.dot.gov/ewr/interpretations/stewartstevenson.pdf>.

Southeast Toyota Distributors <sup>370</sup>	May 16, 2003	- There is no independent reporting obligation under EWR for <i>distributors and dealers</i> who only add accessory equipment to a vehicle before its first sale, such as “audio systems, tires, wheels, cruise control, trailer hitches, luggage racks, running boards, spoilers, truck bed liners, and convenience equipment,” to report information to NHTSA, because the manufacturer is responsible for reporting information it receives from distributors and dealers, such as field reports.
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370. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to L. Taylor Ward, III, Esq., Southeast Toyota Distributors, L.L.C. (May 16, 2003), available at <http://www-odi.nhtsa.dot.gov/ewr/interpretations/southeasttoyota.pdf>.

National Truck Equipment Association (NTEA) <sup>371</sup>	May 14, 2003	<p>- “[L]ight vehicle manufacturers may choose to include information about their <i>incomplete chassis</i> along with their other vehicles for which they report under Section 579.21.” Indeed, “type” includes “incomplete vehicle” as a category of “light vehicle.”</p> <p>- <i>Foreign defect reporting</i> and the annual list of substantially similar vehicles will be submitted in the future through a NHTSA template on its website.</p> <p>- The <i>definition of “latch”</i> does <i>not</i> include “locking/latching mechanisms that are located internally to a vehicle, such as on the inside of a second unit body of a truck or the interior of a trailer . . . .’Latch’ relates only to a vehicle’s exterior doors.”</p>
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371. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Michael Kastner, National Truck Equipment Association (May 14, 2003), available at <http://www-odi.nhtsa.dot.gov/ewr/interpretations/NTEA2.pdf>.

Ford Motor Co. <sup>372</sup>	May 14, 2003	<p>- Information received by <i>subsidiaries</i> such as Hertz is not reportable. This includes claims for death, injury, or property damage, or consumer complaints received only by Hertz (on Ford vehicles or other vehicles). <i>Rationale</i>: “[N]o other vehicle manufacturer would have a similar data source,” and the results would skew data. However, field reports and warranty claims (because in Ford system) come in.</p> <p>- A <i>Third-party extended warranty</i> that is purchased from a Ford dealer “in connection with sale or lease of a motor vehicle” is a reportable warranty claim.</p>
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372. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to James P. Vondale, Ford Motor Co., (May 14, 2003) (on file with author).

Active Web Services <sup>373</sup>	May 1, 2003	- <i>Historical warranty information</i> need not be reported if not already in an electronically-stored format. However, future reports must be provided in electronic format even if the manufacturer keeps only paper records.
Sundown Trailers <sup>374</sup>	Apr. 30, 2003	- Regarding the <i>submission of hard-copy field reports</i> , "such documents may be submitted in paper form." NHTSA plans on "establishing a naming convention for field reports which will be set forth . . . on the [ODI] . . . website."

373. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Dan DeDecker, Project Manager, Active Web Services, L.L.C. (May 1, 2003), available at <http://www-odi.nhtsa.dot.gov/ewr/interpretations/activewebservices.pdf>.

374. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Vic R. Cook, Sundown Trailers (Apr. 30, 2003), available at <http://www-odi.nhtsa.dot.gov/ewr/interpretations/sun%20down%20trailer.pdf>.

Waste Equipment Technology Association. <sup>375</sup>	Apr. 29, 2003	- Where a vehicle is manufactured in <i>two or more stages</i> , the manufacturer that certifies the completed vehicle is the one who must report as a vehicle manufacturer for early warning. However, note the Interpretation to NTEA, May 14, 2003.
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375. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Gary Satterfield, Vice President, Waste Equipment Technology Association (Apr. 29, 2003), *available at* <http://www-odi.nhtsa.dot.gov/ewr/interpretations/WETA.pdf>.

Coachmen Industries <sup>376</sup>	Apr. 29, 2003	- <i>"Prior approval" documents</i> sent from dealers to manufacturer for purposes of pre-approving a warranty repair are not reportable dealer field reports because the document "simply identifies the problem as a foundation for a warranty claim, and the action item sought is simply a warranty authorization" and if "the manufacturer approves the authorization, the incident will be" captured in the warranty claim count. Note, however, that if the document contains an "assessment of a performance problem to the manufacturer and was not oriented primarily toward warranty approval, it would be considered to be a field report."
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376. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Kathy L. Samovitz, Associate Counsel, Coachmen Industries, Inc. (Apr. 29, 2003), available at <http://www-odi.nhtsa.dot.gov/ewr/interpretations/CoachMan.pdf>.

Memo: National Association of Trailer Manufacturers (NATM) <sup>377</sup>	Apr. 24, 2003	- TREAD prohibits NHTSA from requiring manufacturers to maintain or submit <i>info or records not in their possession</i> . Thus, "if a manufacturer does not record, transcribe, retain, or otherwise collect consumer complaints, contacts, conversations, letters, and similar conversations, then there is no obligation to begin so under early warning regulation."
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377. Memorandum of Jonathan D. White, Defects Assessment Division, ODI, NHTSA, (Apr. 24, 2003) (on file with author).

Haldeman & Associates (on behalf of Etnyre) <sup>378</sup>	Apr. 11, 2003	<p>- <i>Vehicles rebadged</i> (or branded) with one name but manufactured by another name must be reported to NHTSA by the <i>manufacturer</i>, and not the “brander.”</p> <p>However, § 579.3 allows the brander to assume the reporting obligation. If the brander does not report, then “the fabricating manufacturer must count the rebadged trailers in the aggregate of its own production.” If the brander “chooses to report,” the fabricator should not include the branded in its part of the production. The choice should be consistent and not “revised from year to year or within a given year.”</p>
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378. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Michael J. Hedeem, Esq., Haldeman & Associates (Apr. 11, 2003), available at <http://www-odi.nhtsa.dot.gov/ewr/interpretations/etnyre.pdf>.

National Truck Equipment Association (NTEA) <sup>379</sup>	Apr. 11, 2003	- "The only early warning reporting requirements of Part 579 that apply to <i>manufacturers of original equipment</i> (other than tires) are the limited reporting requirements of 49 CFR 579.27." NTEA members who are solely manufacturers of original equipment have very limited reporting responsibilities.
Spartan Motors Chassis <sup>380</sup>	Apr. 11, 2003	- <i>Incomplete vehicle manufacturers</i> are not "manufacturers of 'motor vehicles' for purposes of" early warning. Incomplete manufacturers do not have "full reporting responsibilities" under early warning. <i>See also</i> Interpretation to TMA, Aug, 22, 2003.

379. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Michael E. Kastner, Director of Government Relations, National Truck Equipment Association (Apr. 11, 2003), available at <http://www-odi.nhtsa.dot.gov/ewr/interpretations/NTEA.pdf>.

380. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Kimberly Boucher, Compliance Administrator, Spartan Motors Chassis, Inc. (Apr. 11, 2003), available at <http://www-odi.nhtsa.dot.gov/ewr/interpretations/Spartan.pdf>.

Knapheide Manufacturing Co. <sup>381</sup>	Apr. 11, 2003	- Regarding " <i>structure</i> ," "[g]enerally, accessories that are installed inside of a service body . . . have little potential for creating a safety-defect. We therefore do not expect warranty claims" on accessories such as "welders, generators, invertors, etc.," all of which "do not change the shape or size of the body." <i>Note</i> : This is inconsistent with the final rule.
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381. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to John D. Evans, Vice President of Engineering, The Knapheide Manufacturing Company (Apr. 11, 2003), available at <http://www-odi.nhtsa.dot.gov/ewr/interpretations/Kanapheide.pdf>.

Alliance of Automobile Manufacturers <sup>382</sup>	Apr. 11, 2003	<p>- <i>10 calendar years</i>: A “claim involving a fatality or injury occurring in a foreign vehicle need not be reported if no sales of a substantially similar vehicle have occurred in the United States for more than ten years before the beginning of the reporting period. On the other hand, in a situation in which a fatality or injury occurs in a foreign vehicle that is more than ten years old and a substantially similar U.S. vehicle has been sold within a ten-year period before the reporting period,” then a reportable “claim” has happened.</p> <p>- <i>For foreign defect reporting</i>, no report is required consistent with amended § 579.11(d)(2) “if a component or system is present on a substantially similar U.S. vehicle but does not perform the same function as on a foreign vehicle.” No report is needed if the system or component “leading to the foreign recall or other campaign is not installed at all on the substantially similar U.S. vehicle.”</p>
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382. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Robert S. Strassburger, Vice President of Vehicle Safety and Harmonization, Alliance of Automobile Manufacturers, Inc. (Apr. 11, 2003), available at <http://www-odi.nhtsa.dot.gov/ewr/interpretations/alliance2.pdf>.

Alliance of Automobile Manufacturers <sup>383</sup>	Mar. 25, 2003	<p>- Reporting is to be based on the <i>face of the claim or complaint</i>, and not on any assessment or filter.</p> <p>- <i>Marketing survey information:</i> Information collected directly from consumers, either directly or through a contractor is the source of consumer complaints, “regardless of whether primary purpose . . . is marketing.” <i>Rationale:</i> Consumers expect that the complaint will reach the manufacturer. Thus, third-party submissions are not reportable, but proprietary are reportable.</p> <p>- <i>Dealer repair work orders</i> are not reportable field reports.</p> <p>- <i>Inspection reports “conducted to determine eligibility for insurance and/or extended warranty coverage”</i> are not reportable field reports because they are “not prepared in response to an assertion that a specific problem exists in a particular vehicle, which is the normal genesis of field reports.”</p>
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### C. Reporting on Sale or Lease of Defective or Noncompliant Tire

Under pre-TREAD law, governed by 49 U.S.C. § 30120(i), when a vehicle or equipment manufacturer notified a dealer (including a retailer) that a new vehicle or part either did not comply with a safety standard or contained a safety-related defect, then the dealer was prohibited from selling or leasing the defective

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383. Letter from Jacqueline Glassman, Chief Counsel, NHTSA, to Robert Strassburger, Vice President of Vehicle Safety and Harmonization, Alliance of Automotive Manufacturers, Inc. (Mar. 25, 2003), available at <http://www-odi.nhtsa.dot.gov/ewr/interpretations/alliance.pdf>.

or noncompliant vehicle or part.<sup>384</sup> However, prior to passage of the TREAD Act, this prohibition did not apply to the sale or lease of *used* vehicles or equipment. During the Ford-Firestone congressional hearings, media reports indicated that some people were selling defective Firestone ATX and Wilderness tires that consumers had *returned* to dealers for replacement tires under the safety recall.<sup>385</sup> To prevent these sales from happening in the future, Congress imposed both a new ban on such sales as well as a new reporting requirement that applies to *tires* only (not other parts), failure of which triggers the enhanced civil penalties and newly added criminal penalties.<sup>386</sup>

Under this new reporting requirement (the third of the three-pronged reporting rules), the TREAD Act directs DOT (i.e., NHTSA) to issue a final rule within ninety days of enactment (i.e., February 1, 2001) requiring any person who knowingly and willfully sells or leases a defective or noncompliant tire with actual knowledge that the tire manufacturer has notified dealers of the defect, to report such sale or lease to DOT (i.e., NHTSA). On December 26, 2000, NHTSA issued an interim final rule implementing this TREAD requirement.<sup>387</sup> On July 23, 2001 (more than four months after envisaged in TREAD), NHTSA issued its final rule (effective August 22, 2001), which did not differ materially from the interim final rule.<sup>388</sup> The final rule requires (1) any person who (2) knowingly and willfully (3) sells or leases for use on a motor vehicle (4) a new or used tire that is either defective or not in compliance with applicable safety standards with (5) actual knowledge that the manufacturer of such tire has notified its dealers of such defect (6) to report that sale or lease to NHTSA within five working days of the sale or lease.<sup>389</sup> Only elements (1) and (5) require further discussion.

Regarding the first element (scope of applicable "persons"), NHTSA expects this rule to "generally apply to tire retailers, including individuals."<sup>390</sup> Accordingly, car dealers, lessors, and

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384. Motor Vehicle Safety; Reporting the Sale or Lease of Defective or Non-compliant Tires, 65 Fed. Reg. 81,409, 81,410 (Dec. 26, 2000) (to be codified at 49 C.F.R. pt. 573).

385. *Id.*

386. 49 U.S.C. § 30166.

387. Motor Vehicle Safety; Reporting the Sale or Lease of Defective or Non-compliant Tires, 65 Fed. Reg. at 81,410.

388. Motor Vehicle Safety; Reporting the Sale or Lease of Defective or Non-compliant Tires, 66 Fed. Reg. 38,159 (July 23, 2001) (to be codified at 49 C.F.R. pt. 573).

389. Motor Vehicle Safety; Reporting the Sale or Lease of Defective or Non-compliant Tires, 66 Fed. Reg. at 38,160. Regarding the sixth (last) element, NHTSA chose five working days so as to be consistent with 49 C.F.R. § 573.5, which requires defect and noncompliance reports to be submitted within a five-day time frame. *Id.*

390. Motor Vehicle Safety; Reporting the Sale or Lease of Defective or Non-

rental companies are not subject to the reporting requirements of this rule, except with respect to tires that they may sell or lease *separately* from the vehicle.<sup>391</sup> The principle of respondeat superior applies to this rule, however, such that employers, principals, and other persons who are legally responsible for the actions of their employees or agents must report any covered sales or leases of their employees or agents.<sup>392</sup> For example, if an employee of a tire retailer sells or leases a tire that is either defective or fails to comply with an applicable safety standard, then both the employee and the tire retailer would have to report the sale within five working days to NHTSA, and both would be accountable if the sale was not reported.<sup>393</sup> However, only one report per covered sale or lease is required, such that either an employee or the employer need file a report under the rule.<sup>394</sup>

Regarding the fifth element (“actual knowledge”), the House Commerce Committee made clear in its report accompanying TREAD that the phrase “knowingly and willfully” is meant to “represent the common and traditional meaning of those words involving actual knowledge and will action, as opposed to including any facet of reckless disregard.”<sup>395</sup> As implemented by NHTSA in the final rule, a covered person “must have actual knowledge that the manufacturer of the tire at issue had notified its dealers of the defect or noncompliance.”<sup>396</sup> However, a covered person need *not* have received notification directly from the manufacturer; rather, a person’s “actual knowledge that the notification was made to dealers would be sufficient to invoke the reporting requirement” of the rule.<sup>397</sup>

Failure to report a sale or lease of a defective or noncompliant tire will trigger the civil penalty (\$5,000 per violation and \$16.05 million for a related series of violations) and criminal penalty provisions added by TREAD (fines, or imprisonment up to fifteen years or both).<sup>398</sup> The reporting obligation drops if the defect or

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compliant Tires, 65 Fed. Reg. at 81,411.

391. Motor Vehicle Safety; Reporting the Sale or Lease of Defective or Non-compliant Tires, 66 Fed. Reg. at 38,160.

392. *Id.* However, only one report per covered sale or lease is required, such that either an employee or her employer could file a report pursuant to the new rule. *Id.*

393. *Id.* See also Motor Vehicle Safety; Reporting the Sale or Lease of Defective or Non-compliant Tires, 65 Fed. Reg. at 81,411 (adding that only one report for covered sale or lease is required, allowing either the employee or the retailer to file a report).

394. Motor Vehicle Safety; Reporting the Sale or Lease of Defective or Non-compliant Tires, 66 Fed. Reg. at 38,160.

395. H.R. REP. NO. 106-954, at 14.

396. Motor Vehicle Safety; Reporting the Sale or Lease of Defective or Non-compliant Tires, 66 Fed. Reg. at 38,160.

397. *Id.*

398. 49 U.S.C. §§ 30165(a), 30166, 30170. On June 14, 2004, to comply with

noncompliance is remedied before the sale or lease, or if the recall order is restrained or set aside in a civil action.<sup>399</sup>

It is unclear why Congress would not take the logical step of extending the reporting obligation to sales and leases of *all* defective or noncompliant parts and vehicles. If the intent of the reporting obligation is to ensure that consumers are protected from purchasing or leasing defective or noncompliant auto parts, then Congress has missed the mark by limiting this obligation to tires only. Extending the reporting obligation to defective and noncompliant parts and vehicles would also be consistent with the Vehicle Safety Act, which prohibits the manufacture, sale, and importing of noncompliant vehicles and equipment.<sup>400</sup> How *effective* this law will be, in terms of numbers of people actually reporting their underlying illegal sale or lease, is an entirely different question. In this regard, even NHTSA sees a certain absurdity. According to Kenneth Weinstein, NHTSA's Administrator for Safety Assurance, "[t]he TREAD Act makes it illegal to sell recalled products, and if you do, you have to report it to us . . . [t]his law was written by a lot of different people at a lot of different times."<sup>401</sup>

### III. INCREASED PENALTIES

#### A. Civil Penalties

Two weeks after enactment of the TREAD Act, NHTSA published a final rule implementing TREAD's amendments to the Vehicle Safety Act's civil penalties.<sup>402</sup> Under these amendments, the civil penalty for a single violation of the Vehicle Safety Act is increased from \$1,100 to \$5,000, and the maximum civil penalty for a related series of violations is increased from \$925,000 to

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federal law (requiring adjustments for inflation), NHTSA raised the civil penalty to \$16,050,000 for a related series of violations. See Civil Penalties, 69 Fed. Reg. 32,963 (June 14, 2004).

399. 49 U.S.C. § 30166.

400. 49 U.S.C. § 30112. Interestingly, the Act does not prohibit the manufacture, sale, or importing of *defective* vehicles. Rather, in cases of vehicles containing safety-related defects, the Act provides for civil damages when a manufacturer fails to satisfy the notification and remedy duty. See, e.g., 49 U.S.C. § 30121(b) (imposing civil penalties for failing to notify owners and purchasers under 49 U.S.C. § 30119(c) and (d)).

401. Miles Moore, *TREAD Act Reality: NHTSA's Powers Now Greatly Expanded*, TIRE BUS., Apr. 1, 2002, at 9. Note that Mr. Weinstein overstated the actual reporting requirements of TREAD. He should have replaced "products" in the above quotation with "tires."

402. Civil Penalties; Registered Importers of Vehicles Not Originally Manufactured to Conform to the Federal Motor Vehicle Safety Standards, 65 Fed. Reg. 68,108, 68,110 (Nov. 14, 2000) (to be codified at 49 C.F.R. pts. 578, 592).

\$16,050,000.<sup>403</sup> (Note that a separate violation occurs for every motor vehicle or item of equipment *and* for each failure or refusal to allow or perform an act required under applicable sections of the Act.<sup>404</sup>) These amendments are self-executing, which means that NHTSA was not required to undertake a rulemaking to implement the increased civil penalties. Nevertheless, NHTSA published a final rule in order to properly effectuate the statutory amendments with conforming amendments to the Code of Federal Regulations.<sup>405</sup>

The TREAD Act takes a two-prong approach to amending the civil penalty provisions<sup>406</sup> of the Vehicle Safety Act. First, the TREAD Act increases the maximum penalty from \$1,100 to \$5,000 for each violation of the Vehicle Safety Act (e.g., failing to recall a noncompliant vehicle) and from \$925,000 to \$15,000,000 (later raised to \$16,050,000) for a related series of violations, effective as of the date of enactment (November 1, 2000).<sup>407</sup>

Second, the TREAD Act amends the civil penalty provisions of the Vehicle Safety Act<sup>408</sup> to provide that any person who violates the Inspections, Investigations, and Records provisions<sup>409</sup> of the Vehicle Safety Act (or any regulations issued thereunder) is liable to pay the U.S. government a civil penalty “for failing or refusing to allow or perform an act required under that section or regulation.”<sup>410</sup>

As envisaged under the first prong, the maximum penalty for such a violation is \$5,000 per violation per day.<sup>411</sup> Also, as envisaged under the first prong, the maximum penalty for a related series of daily violations is \$16,050,000 (effective beginning on October 28, 2004).<sup>412</sup> Finally, again as envisaged under the first-prong, these penalties apply as of the date of the TREAD Act’s enactment (i.e., November 1, 2000) to obligations existing under the previous Inspections, Investigations, and Records

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403. 49 U.S.C. § 30165.

404. *Id.*

405. Civil Penalties; Registered Importers of Vehicles Not Originally Manufactured to Conform to the Federal Motor Vehicle Safety Standards, 65 Fed. Reg. at 68,109.

406. 49 U.S.C. § 30165.

407. *Id.*

408. *Id.*

409. *Id.* § 30166.

410. *Id.* 30165.

411. *Id.*

412. *Id.* See also Civil Penalties, 69 Fed. Reg. 57,864; 57,865 (Sept. 28, 2004) (to be codified at 49 C.F.R. pt. 578.6 (increasing the maximum civil penalty for related series of motor vehicle safety violations from \$15,000,000 to \$16,050,000 but keeping maximum civil penalty for a single violation at \$5,000 “because the inflation-adjusted figures are not yet at a level to be increased” under Federal law).

provisions that were unchanged by TREAD.<sup>413</sup> These penalties also apply to violations of the following three new sections added by TREAD: (1) Reporting of Defects in Motor Vehicles and Products in Foreign Countries;<sup>414</sup> (2) Early Warning Reporting Requirements;<sup>415</sup> and (3) Prohibition on the Sale or Lease of Defective or Noncompliant Tires.<sup>416</sup>

Why Congress chose the two-prong approach is unclear. Up until passage of the TREAD Act, the civil penalty provisions of the Vehicle Safety Act authorized the same penalties for *any* violation of the Act and did not distinguish between certain provisions of the Act.<sup>417</sup> Perhaps Congress meant to highlight the importance of the new sections<sup>418</sup> by adding a separate reference in the civil penalty provision. Whatever the reason, the excess verbiage in the Code as well as in the regulations resulting from the corresponding amendments is unneeded and was clearly avoidable if Congress would have simply followed the pre-TREAD format.

### B. Criminal Penalties

The TREAD Act amended for the first time the Vehicle Safety Act to include *criminal* penalties where: (1) a person or corporation<sup>419</sup> (2) violates 18 U.S.C. § 1001 (i.e., material misrepresentation or concealment to the Federal government)<sup>420</sup>

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413. Civil Penalties; Registered Importers of Vehicles Not Originally Manufactured to Conform to the Federal Motor Vehicle Safety Standards, 65 Fed. Reg. at 68,109. In short, these obligations include recordkeeping requirements and providing dealer and consumer communications to NHTSA. See, e.g., 49 U.S.C. § 30166(e)-(f).

414. 49 U.S.C. § 30166.

415. *Id.*

416. *Id.*

417. See 49 U.S.C. § 30165(a) (1994) (prior to the TREAD Act amendments).

418. The three new sections added by TREAD to 49 U.S.C. § 31066 are (1) Reporting on Defects in Foreign Countries; (2) Early Warning Reporting; and (3) Ban on the Sale or Lease of Defective or Non-compliant Tires. TREAD § 3.

419. Corporate criminal liability can extend to manufacturers on the basis of intentionally misleading statements made by the appointed agent acting within the scope of his or her employment, because corporate guilt may be premised solely upon the acts of its agents. See, e.g., *United States v. Steiner Plastics Mfg. Co.*, 231 F.2d 149 (2nd Cir. 1956), (finding that a jury may find a corporation guilty, but not the president guilty as an individual, because corporate guilt may be premised upon acts of its agents other than the president); *United States v. Automated Med. Labs., Inc.*, 770 F.2d 399, 407 n.5 (4th Cir. 1985) (holding that a corporation may be convicted of making and using false documents in a matter within the jurisdiction of a federal agency on the basis of action taken by an agent of the corporation acting within scope of employment when the action is taken at least in part to benefit the corporation). The court also found no requirement that any officer or director knowingly and willfully participate in or authorize the unauthorized practice. *Id.*

420. 18 U.S.C. § 1001 makes it a crime to (1) knowingly and willfully (2) falsify, conceal, cover up, or make any materially false, fictitious, or fraudulent

with respect to the reporting requirements of § 30166<sup>421</sup> (3) with the intent of misleading NHTSA (4) regarding safety-related defects in motor vehicles or motor vehicle equipment<sup>422</sup> that (5) have caused death or serious bodily injury.<sup>423</sup> All five elements must be present for criminal liability to arise, which takes the form of a fine under title 18 (up to \$250,000 for individuals<sup>424</sup> and \$500,000 for corporations<sup>425</sup>), or imprisonment up to fifteen years, or both.<sup>426</sup> Similar to the civil penalty provisions, these criminal penalty provisions are self-executing (i.e., NHTSA did not need to issue a separate implementing rulemaking).

The second of the above five elements presents the most difficult issues. First, no one knows for sure when a violation of 18 U.S.C. § 1001 occurs. Yet, this element presupposes the existence of such a violation. NHTSA itself refused to offer any guidance as to when a “violation” of 18 U.S.C. § 1001 occurs, claiming (correctly so) in the final rule that clarity can be offered only by the judiciary and, further, that TREAD limited NHTSA’s criminal rulemaking power to provide only for safe harbor (discussed below).<sup>427</sup> NHTSA’s deference to the judiciary, however, offers little assistance to those who must comply with TREAD (and, therefore, with 18 U.S.C. § 1001).

At the outset, case law is split on the issue of whether criminal liability should be imposed where the false statements

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statement or representation (3) in any matter within the jurisdiction of the executive, legislative, or judicial branch of the United States. 18 U.S.C. § 1001.

421. Note that other reporting requirements emerge out of 49 U.S.C. § 30166 and are also covered by the newly added criminal penalty provisions, namely, defect and noncompliance reports as well as reporting on dealer and customer communications. 49 U.S.C. § 30166(e)-(f).

422. This Article will not explore the numerous difficulties inherent in determining the existence of a “safety-related defect.” Basically, neither NHTSA nor the courts have developed a sound definition of “safety-related defect.” Rather, a “safety-related defect” is determined on a case-by-case basis after extensive fact-finding and often only after extensive engineering and legal analysis. Therefore, I leave to a separate time the task of providing a sound definition of a “safety-related defect.”

423. 49 U.S.C. § 30170. The fifth element is defined via reference to 18 U.S.C. § 1365(h)(3) (“Tampering with Consumer Products”). *Id.* That section defines “death or serious bodily injury to an individual” as a bodily injury which involves: (1) a substantial risk of death; (2) extreme physical pain; (3) protracted and obvious disfigurement; or (4) protracted loss or impairment of the function of a bodily member, organ, or mental faculty. 18 U.S.C. § 1365.

424. 18 U.S.C. § 3571(b). *See also* H.R. REP. NO. 106-954, at 14-15.

425. 18 U.S.C. § 3571(c). *See also* H.R. REP. NO. 106-954, at 14-15.

426. 49 U.S.C. § 30170 (emphasis added).

427. Motor Vehicle Safety: Criminal Penalty Safe Harbor Provision, 66 Fed. Reg. 38,380, 38,381-82 (July 24, 2001) (to be codified at 49 C.F.R. pt. 578). The latter argument offered by NHTSA is the more persuasive than the former.

are made by a person not under oath and not under a duty to speak.<sup>428</sup> Although some cases require an oath or a duty to speak as a prerequisite to violate 18 U.S.C. § 1001, a significant number of cases as well as the Department of Justice (“DOJ”) require neither an oath nor a duty to speak to find criminal liability.<sup>429</sup> Therefore, a cautious interpretation may cover *not only* anyone speaking to NHTSA on behalf of the manufacturer (under oath or not), whether speaking orally or in writing, *but also* anyone who fails to speak to NHTSA with the intent of concealing or covering up a “material fact.”<sup>430</sup>

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428. See *United States v. Levin*, 133 F. Supp. 88, 91 (D. Colo. 1953) (holding that 18 U.S.C. § 1001 should not be construed to extend to cases where false statements are made by a person not under oath and not under a duty to speak, but should be limited in its application to persons under legal obligation to speak or give information to representatives of U.S. agencies or departments that have authority to finally dispose of matter being investigated, and to cases where keeping of records or filing of documents are required or permitted by law). *But see United States v. Isaacs*, 493 F.2d 1124, 1157-58 (7th Cir. 1974) (holding that oral, conversational responses given in an interview with IRS agents, even if not given under oath, are nevertheless sufficient to support a charge of false statements to IRS agents in violation of 18 U.S.C. § 1001).

429. U.S. DEPARTMENT OF JUSTICE, 9 UNITED STATES ATTORNEY MANUAL 902, available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00902.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00902.htm) (last visited Sept. 13, 2004) (providing the 1996 Amendments to 18 U.S.C. § 1001). See *United States v. Pereira*, 463 F. Supp. 481, 485 (E.D.N.Y. 1978) (affirming imposition of criminal liability even absent an oath or a duty to speak). In keeping with its liberal interpretation of the terms in 18 U.S.C. § 1001, the Second Circuit has applied the term “statement” to statements not required by law, not under oath, and not in writing. *Id.* at 487. See also *United States v. Van Valkenberg*, 157 F. Supp. 599, 601 (D. Alaska 1958) (rejecting *United States v. Levin* and finding that “there is no necessity under 18 U.S.C. § 1001 that the ‘statements or representations’ be made while under a legal obligation to speak”); *United States v. Massey*, 550 F.2d 300, 305 (5th Cir. 1977) (holding that 18 U.S.C. § 1001 applies to both oral and written statements and unsworn as well as sworn statements); *United States v. Des Jardins*, 772 F.2d 578, 580 (9th Cir. 1985) (holding that 18 U.S.C. § 1001 is not overly broad because it punishes unsworn oral statements); *United States v. Dumas*, 288 F. 247, 248 (E.D.N.Y. 1923) (holding that false statements need not be made under oath to violate 18 U.S.C. § 1001). See also H.R. REP. NO. 104-680, at 8 (1996) (stating that “[O]ther than establishing materiality as an element of all three offenses, the Committee does not view the offenses defined in paragraphs (1), (2), and (3) as changing already existing case law as it relates to the elements of the offenses”) *Id.* However, certain limitations do exist concerning statements within the jurisdiction of the judicial and legislative branches. False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 2(c), 110 Stat. 3459 (1996).

430. See, e.g., *Massey*, 550 F.2d at 305 (holding that 18 U.S.C. § 1001 applies to both oral and written statements); *Pereira*, 463 F. Supp. at 487 (finding the defendant’s negative response to a Customs agent’s inquiry as to whether he had anything to declare was a “statement” within the scope of 18 U.S.C. § 1001); *United States v. Clifford*, 409 F. Supp. 1070, 1074 (E.D.N.Y. 1976)

In addition, the scope of personal criminal liability reaches individuals who have “aided and abetted” the lying or misleading of NHTSA.<sup>431</sup> Accordingly, if someone from a manufacturer, together with the appointed agent of that manufacturer, was shown to have engaged in a scheme to defraud NHTSA, it is unclear whether the non-agent individual could also be held personally criminally liable under either the aiding and abetting approach favored by the DOJ and a number of courts, which would extend liability in this case based on the concealment of a material fact, whether or not that person had an independent duty to speak to NHTSA.

Second, although the individual or manufacturer must have *actual knowledge* that the statement is false at the time the statement is made (or concealed), the individual or manufacturer does not have to know that lying to the government is a crime or even that the matter being lied about is “within the jurisdiction” of a government agency.<sup>432</sup> Regarding the actual knowledge component, however, the legislative history of TREAD is clear (even if the case law is not) that the knowingly and willful requirement of 18 U.S.C. § 1001 could or should not be construed to include reckless disregard.<sup>433</sup>

Third, TREAD provides that the DOJ may bring a criminal

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(holding that 18 U.S.C. § 1001 may be applied to oral unsworn statements and the defendant need not have initiated the investigation).

431. See *Driver v. United States*, 199 F.2d 860, 862 (5th Cir. 1952) (holding that a person who permitted another to make out and file a false income tax return in order to obtain a refund of fictitious overpayment of income taxes could be convicted as an aider and abettor under 18 U.S.C. § 1001); *United States v. Greenberg*, 268 F.2d 120, 122 (2d Cir. 1959) (finding that the United States could properly prosecute the defendant under 18 U.S.C. § 1001 for having aided and abetted in preparation of false payroll records to the U.S. Navy); *United States v. Cure*, 804 F.2d 625, 629 (11th Cir. 1986) (finding that a person with no duty to file Currency Transaction Reports (“CTRs”) can be prosecuted under 18 U.S.C. § 1001 on account of aiding and abetting a financial institution’s failure to file CTRs).

432. *United States v. Yermian*, 468 U.S. 63, 69 (1984).

433. H.R. REP. NO. 106-954, at 15. See also McDonald, *Don’t TREAD on Me*, *supra* note 4, at 1200 n.164. Congress’s intent here seems to contradict case law. See, e.g., *United States v. Evans*, 559 F.2d 244, 246 (5th Cir. 1977) (finding that a person who makes a false statement with reckless disregard of truthfulness of the statement is deemed to have knowledge of this statement and its truthfulness or lack thereof); *United States v. Schaffer*, 600 F.2d 1120, 1121 (5th Cir. 1979) (finding “reckless indifference” may be equated with “knowingly and willfully”); *United States v. Gottlieb*, 493 F.2d 987, 994 (2d Cir. 1974) (holding that a false statement regarding membership in the Army National Guard made with “reckless disregard” of its truth or falsity would support a conviction under 18 U.S.C. § 1001); *United States v. Clearfield*, 358 F. Supp. 564, 574 (E.D. Pa. 1973) (holding that knowledge of actual falsity is not required under 18 U.S.C. § 1001; rather, conviction can be based on a finding that the defendant acted with reckless disregard of whether a statement was true and with a conscious purpose to avoid learning the truth).

action, or initiate grand jury proceedings, for a violation of the new criminal provisions “only at the request of the Secretary of Transportation.”<sup>434</sup> Critics charge that this hampers the DOJ’s independence; however, this condition is probably an appropriate check on the DOJ. In addition, DOT has more intimate background knowledge and is likely in a better position than DOJ to initially determinate whether criminal action is warranted. Most agencies lack the statutory authority to litigate on their behalf. As envisaged under TREAD for DOT, these agencies must obtain representation from the DOJ, and the DOJ’s refusal to litigate a particular agency decision may mean that the agency’s decision has no real effect.<sup>435</sup> Finally, although DOT must request action, DOJ will ultimately determine whether to proceed to litigation. To the extent the President can control litigation through the DOJ, this is an appropriate tool of executive oversight and may resolve differences between the President and the DOT. (Of course, differences between the DOJ and the President could exist, too.)

To summarize, it is unclear whether personal criminal liability reaches *not only* the manufacturer and individual(s) appointed as the manufacturer’s agent for NHTSA matters *but also* (potentially) any individual(s) who fails to speak to NHTSA (e.g., by falsifying, concealing, or covering up a material fact<sup>436</sup> with actual knowledge that the statement is false or concealed) *as well as* anyone found to have aided and abetted in intentionally misleading NHTSA, *regardless of where the false statements were made* (i.e., foreign manufacturer’s representatives could, therefore, be covered).

Confused manufacturers may take some comfort in statements by NHTSA officials that the criminal provisions will be invoked rarely<sup>437</sup> as well as from the TREAD “safe harbor” provision that offers protection from criminal prosecution where a person corrects any improper reports or failures to report within a “reasonable time.”<sup>438</sup> What constitutes a “reasonable time” was left by Congress for NHTSA to define through a separate rulemaking, which NHTSA was to complete within ninety days of enactment of TREAD (i.e., January 29, 2001).<sup>439</sup> After first suggesting twenty-

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434. 49 U.S.C. § 30170.

435. *But see* Fed. Election Comm’n v. NRA Political Victory Fund, 513 U.S. 88, 90 (1994) (dismissing the case because the DOJ did not authorize the appeal).

436. 18 U.S.C. § 1001(a)(1).

437. *See* Miles Moore, *TREAD Act Reality: NHTSA’s Powers Now Greatly Expanded*, TIRE BUS., Apr. 1, 2002, at 9 (quoting Kenneth Weinstein, NHTSA’s Administrator for Safety Assurance).

438. 49 U.S.C. § 30170.

439. *Id.* Within 90 days of the TREAD Act’s enactment, “the Secretary [i.e., NHTSA] shall establish by regulation what constitutes a reasonable time for

one days in an interim final rule as the “reasonable time period,”<sup>440</sup> NHTSA finally decided upon thirty days in the final rule, which was published on July 23, 2001, nearly six months later than envisaged under TREAD.<sup>441</sup> In first suggesting twenty-one days, NHTSA considered the following factors: (1) NHTSA’s mission under the Vehicle Safety Act “to collect complete and accurate information in order to decide whether to open investigations of potential defects, to conduct those investigations efficiently and expeditiously, and to assure appropriate oversight of ongoing recalls;” (2) “real world” considerations (i.e., to encourage the use of the safe harbor provision, the time period must be long enough for the provision to be usable in real world situations); and (3) comparable safe harbor rules and policies used by other federal agencies, such as EPA, IRS, and FAA.<sup>442</sup>

However, comments submitted by the Motor and Equipment Manufacturers Association (“MEMA”) and the Original Equipment Suppliers Association (“OESA”) on the twenty-one-day period caused NHTSA to reconsider. MEMA and OESA argued that, because of the “wide disparities in size, sophistication and legal support among motor vehicle and vehicle parts manufacturers,” a smaller industry company would need more than twenty-one days to consult with legal counsel about the implications of submitting the corrected information and admitting a felony violation.<sup>443</sup> Although not persuaded by MEMA and OESA’s reasoning, NHTSA nevertheless extended the time period to thirty calendar days. According to NHTSA, although “21 days ordinarily would be a sufficient time for violators to correct their improper actions, [NHTSA was] willing to make reasonable accommodations in light of concerns of small businesses.”<sup>444</sup> The thirty-day period will run from the date of the improper report to NHTSA or the date of the failure to report to NHTSA.<sup>445</sup> Finally, the safe harbor is

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[the safe harbor provision] and what manner of correction is sufficient for purposes [of the safe harbor].” *Id.* Nevertheless, the House Commerce Committee expected NHTSA to define a “reasonable time” as “some point after the person is aware that a defect or noncompliance related to the falsified or concealed information exists and that the defect or noncompliance has caused serious bodily injury.” H.R. REP. NO. 106-954, at 15.

440. Motor Vehicle Safety; Criminal Penalty Safe Harbor Provision, 65 Fed. Reg. 81,414, 81,415 (Dec. 26, 2000) (to be codified at 49 C.F.R. pt. 578).

441. Motor Vehicle Safety; Criminal Penalty Safe Harbor Provision, 66 Fed. Reg. 38,380, 38,382 (July 24, 2001) (to be codified at 49 C.F.R. pt. 578).

442. Motor Vehicle Safety; Criminal Penalty Safe Harbor Provision, 65 Fed. Reg. at 81,415.

443. Motor Vehicle Safety; Criminal Penalty Safe Harbor Provision, 66 Fed. Reg. at 38,382.

444. *Id.*

445. *Id.* In order for the correction to be timely, it must be received by NHTSA on or before the (30th) calendar day, not merely mailed or otherwise sent before that day. Motor Vehicle Safety; Criminal Penalty Safe Harbor

apparently intended to apply only to the newly added criminal provisions (not the civil penalty provisions).<sup>446</sup>

In addition to correcting the information within the 30-day time period, to qualify for the safe harbor protection, the person (1) must have lacked knowledge at the time of the violation that the violation would result in an accident causing death or serious bodily injury<sup>447</sup> and (2) correct the improper reports or failure to report in the “correct” format. The lack of knowledge element is consistent with the underlying criminal penalty provisions, which require a violation of 18 U.S.C. § 1001, which in turn (as discussed above) presupposes a “knowing and willful” misrepresentation.<sup>448</sup> The “correct” format must accomplish the following: (a) specifically identify all items of information and documents that were improper or not provided to NHTSA and is related to a submission under 49 U.S.C. § 30166, or a regulation, requirement, or order issued there under; and (b) correct all reporting errors, including providing NHTSA with all missing or corrected information.<sup>449</sup> For a corporation, the correction must be signed by an authorized person (usually the individual officer or employee who submitted the information or who should have provided missing information, or someone in the company with authority to make such a submission).<sup>450</sup>

Finally, the safe harbor applies only to criminal liability related the reporting obligations:<sup>451</sup> (1) Reporting on Defects in

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Provision, 65 Fed. Reg. at 81,416. The correction must: (1) identify with specificity all items of information and documents that were improper or were not provided and (2) correct all reporting improprieties and failures for which the protections of the safe harbor provision are sought, including providing NHTSA with all missing or corrected documents and information. *Id.* For a corporation to properly make a correction, the correction (letter) must be signed by an authorized person (ordinarily the individual officer or employee who submitted the information or who should have provided missing information, or someone in the company with authority to make such a submission). *Id.*

446. 146 CONG. REC. S10,273 (daily ed. Oct. 11, 2000) (statement of Sen. McCain). “In explaining the safe harbor provision under the enhanced penalty section, the intent of the House sponsors is not necessary because it is clear on the face of the language that it would not apply to an underlying violation of existing criminal law.” *Id.*

447. 49 U.S.C. § 30170..

448. *See supra* notes 428–431 and accompanying text; *see also* Motor Vehicle Safety; Criminal Penalty Safe Harbor Provision, 66 Fed. Reg. at 38,382.

449. Motor Vehicle Safety; Criminal Penalty Safe Harbor Provision, 65 Fed. Reg. at 81,416.

450. *Id.* If the person submitting the correction cannot submit the correct information, then he or she must provide a full detailed description of that information or of the content of those documents and the reason why he or she cannot provide them to NHTSA (e.g., the information or documents are not in his or her possession or control). *Id.*

451. Motor Vehicle Safety; Criminal Penalty Safe Harbor Provision, 66 Fed.

Foreign Countries; (2) Early Warning Reporting; (3) Ban on the Sale or Lease of Defective or Noncompliant Tires<sup>452</sup> as well as the previously existing reporting obligations.<sup>453</sup> Given the nature of tire retail outlet centers, which (in contrast to vehicle manufacturers) may be small businesses, one wonders whether they will have the legal resources to understand their reporting obligations and safe harbor provisions to correct failures to report covered sales or leases.

#### POSTSCRIPT AND PORTENTS

In August 2002, after Continental AG announced a recall of 595,000 tires installed on Ford Expeditions and Lincoln Navigators based on warranty claims and fatality accident information, at least one high-profile consumer advocacy group hailed the TREAD Act, and in particular the early warning reporting requirements, as the impetus for the recall decision.<sup>454</sup>

In late February 2004, NHTSA announced the first tire recall as a result of the TREAD Act's early warning rules. Ironically, the recall was conducted by Bridgestone/Firestone on 290,000 Firestone Steeltex Radial AT tires equipped on Ford Excursion sport utility vehicles.<sup>455</sup> NHTSA stated that the first data indicating a defect trend came in December 2003 as part of the

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Reg. at 38,381.

452. TREAD § 3(a)-(c).

453. See *supra* note 421.

454. See Bill Koenig, *Continental Recalls SUV Tires; Accident Involving Ford Expedition Triggers Precaution*, WASH. POST, Aug. 20, 2002, at E03 (quoting Clarence Ditlow, President of the Center for Auto Safety, as having said: "We're beginning to see the fruits of the TREAD Act and early-warning system") Continental described the problem to NHTSA as "even wear, vibration, or especially under the condition of overloading or under-inflation in high ambient temperature usage, separation between the belt edges potentially leading to tread detachment." *Id.* Perhaps Continental was motivated at least in part by a desire to avoid (or minimize) potential piggyback litigation. According to AMR Research (an independent research analyst firm), product liability claims are likely to *triple* as a result of the data required under TREAD. Ralph Kisiel, *Quick Fix: Nothing Hurts a New Vehicle's Image Like a Postlaunch Problem*, AUTOMOTIVE NEWS, Dec. 15, 2003, at 24. For more information on AMR Research, see <http://www.amrresearch.com/AboutUs>.

455. Danny Hakim, *Another Recall Involving Ford, Firestone Tires and S.U.V.'s*, N.Y. TIMES, Feb. 27, 2004, at C1; Greg Schneider, *Firestone Recalling 297,000 Steeltex Tires*, WASH. POST, Feb. 27, 2004, at E01. Some of the Steeltex tires were used as original equipment after Ford severed its ties with Firestone in 2001. Jeff Plungis, *Feds: Tire Warning is Working*, DET. NEWS, Feb. 27, 2004, at 1B. According to Firestone, the tires fail when the vehicle is overloaded or the tire is under-inflated. *Id.* Firestone said it would have conducted the recall even without NHTSA's review of the TREAD data. Miles Moore, *BFS Was Ready to Notify NHTSA of Steeltex Tires*, TIRE BUS., Mar. 15, 2004, at 3.

first quarterly TREAD report (covering the third quarter of 2003).<sup>456</sup> This data disclosed three accidents that led to five deaths and four other accidents that led to injuries.<sup>457</sup> Within two months, Bridgestone/Firestone announced the \$30 million voluntary recall.<sup>458</sup>

In March 2004, General Motors announced a recall of 3.66 million pickups and sport-utility vehicles to remedy defective tailgate cables, representing the company's biggest recall in twenty-three years.<sup>459</sup>

What these recalls have in common is that they all occurred in the wake of the TREAD Act's early warning rules. "The logic has changed since Firestone," says Rebecca Lindland, a forecaster for Global Insight, Inc, "[t]he last thing [auto companies] want in the media is evidence they knew something and didn't do anything."<sup>460</sup>

Complying with the TREAD Act's early warning reporting requirements continues to be one of the largest challenges facing automotive companies. The early warning rules are now set. NHTSA can now compare company versus company performance on warranty claims, consumer complaints, and field reports, to name just a few data sources.

With the largest computer database outside the U.S. military, NHTSA sits on a wealth of information. It remains to be seen if NHTSA can process this information—much of which is wholly inadequate to identify safety-related defect trends—in a reliable, meaningful, and consistent manner. The Inspector General's recent follow-up audit casts doubt on NHTSA's current ability to do so.

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456. Hakim, *supra* note 455; *See also* Denial of Motor Vehicle Recall Petition, 69 Fed. Reg. 58,221, 58,223 (Sept. 29, 2004) (in explaining the role of the TREAD Act's early warning data on this recall, NHTSA stated that it "began receiving [early warning] data from all major tire manufacturers in December of 2003. This includes data on production, [warranty claims], property damage claims, and death and injury claims and notices. Scrutiny of these data earlier this year contributed to the [Steeltex tire] recall.")

457. *See* Hakim, *supra* note 455.

458. *Id.* Amy Wilson, *Bridgestone Recalls Firestones on Excursions*, AUTOMOTIVE NEWS, March 1, 2004, at 46. On September 29, 2004, NHTSA denied two petitions submitted to NHTSA by the Law Offices of Lisoni & Lisoni of Pasadena, California that requested the agency open a defect investigation into *all* Firestone Steeltex tires manufactured since 1995 and into Steeltex tires installed on ambulances. *See* Denial of Motor Vehicle Recall Petition, 69 Fed. Reg. 58,221 (Sept. 29, 2004).

459. *See* Jeff Green, *GM Recall Biggest in 23 Years*, DET. FREE PRESS, Mar. 19, 2004, [http://www.freep.com/money/autonews/gm19\\_20040319.htm](http://www.freep.com/money/autonews/gm19_20040319.htm). The recall affects model years 2000 to 2004 Chevrolet Silverado pickups and GMC Sierra pickups built between October 1999 and October 2003, and some Chevrolet Avalanche sport-utility vehicles and Cadillac Escalade luxury sport-utility vehicles. *Id.*

460. *Id.*

To its credit, NHTSA has promised to review the early warning rule within two years after the initial reports are received—that is to say, the summer of 2005. By that time, NHTSA should know what sources are useful and not useful. Those that are not useful should be shut down so that NHTSA can stop chasing red herrings and use its resources more effectively, and manufacturers can return their resources devoted to red herrings back to shareholders, employees, and customers.

