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On S. 3302, The Motor Vehicle Safety Act of 2010
Before the Senate Commerce, Science & Transportation Committee
May 19, 2010

Mr. Chairman, members of the Subcommittee, thank you for the opportunity to testify on the proposed Motor Vehicle Safety Act of 2010. I am Clarence Ditlow, Executive Director of the Center for Auto Safety (CAS) which was founded by Consumers Union and Ralph Nader in 1970 to be a voice for consumers on auto safety.

The Center has watch dogged the National Highway Traffic Safety Administration (NHTSA) and the auto industry for 40 years. The National Highway Traffic Safety Administration is a wonderful agency with a vital mission but it is woefully underfunded, understaffed and outgunned by the industry it regulates. To expect today's NHTSA to adequately regulate the trillion dollar auto industry is like asking a high school basketball team to beat the LA Lakers. Ford's third quarter 2009 income was $35.5 billion compared to NHTSA's annual vehicle safety budget of less than $200 million.

Independent Test Facility: Unlike such other public health and safety agencies as FDA's Center for Biologics Evaluation and Research, NHTSA doesn't even have its own research facility. Instead it must rent space at the Transportation Research Center (TRC) owned by Honda which is a test facility used primarily by auto companies who like to rub shoulders with NHTSA. Lacking state of the art facilities at TRC, NHTSA produced a test report in EMI induced sudden unintended acceleration (SUA) that had no recorded test data or procedures. The first NHTSA Administrator, Dr. William Haddon, long sought a test and research facility owned by NHTSA as priority because it would give the agency the ability to do its own research to discover emerging problems and to support its investigations and compliance testing. It's time to make Dr. Haddon's dream come true and raise NHTSA's research capability to that of other regulatory agencies by creating an independent test facility combined with the Center for Vehicle Electronics and Emerging Technologies created under § 101 of S.3302.

We deeply appreciate the effort that went into drafting the proposed Motor Vehicle Safety Act of 2010. Consumers and auto companies alike will benefit from fundamental reforms to the National Traffic and Motor Vehicle Safety Act. All too often auto companies with their focus on short-term profits and sales have failed to incorporate advanced safety features and recall vehicles with known defects. They prefer instead to meet the minimum safety standards issued by NHTSA and take the chance that a strapped regulatory agency will not order a recall. When exposed by crashes spotlighted in the news and by such emerging technologies as cell phone calls or videotapes, auto companies lose billions in sales and brand damage while consumers lose their lives. It's a no-win situation for both.

Whether it's the Chevrolet Corvair in the 1960's, the Ford Pinto and the Firestone 500 tire in the 1970's, the Audi 5000, Chrysler minivan tail gate and GM pickups with side saddle gas tanks in the 1980's, the Ford Explorer and Firestone Wilderness & ATX tires in the 1990's, and Toyota

sudden acceleration in the 2000's, there's a common thread: Non-existent or out-of-date and inadequate safety standards coupled with enforcement efforts playing catch up to an industry striving to avoid recalls. If the industry wins the bet and the agency never catches up, individual companies can save hundreds of millions of dollars in avoided recalls as Toyota bragged about in sudden acceleration. If they lose and contain the loss at NHTSA, the worst case scenario is a fine of $16.4 million. If the defect goes public, the cost to the auto companies is far greater in lost sales and reputation. But as history has shown, only one or two defects go public every decade. What goes unsaid is that the innocent bystanders, consumers, pay with their lives.

What can be done about this: First and foremost we have to go back to the basics of the original safety legislation in the 1960's and 1970's which envisioned adequate funding for enforcement and safety research including the agency's own research and testing facility instead of a leased facility owned by a regulated manufacturer. The original legislation included a strong check and balance in the form of a transparent regulatory mechanism and a public right to petition and sue for unsupported denials of petitions and closing of defect investigations.

Judicial Review: One of the leading enforcement cases brought by NHTSA, *U.S. v General Motors Corp.*, 518 F.2d 420 (DC Cir 1975), (Kelsey Hayes Wheels) would have never had happened but for a mandamus challenge brought by Ralph Nader over the closing of a defect investigation with the small recall of 50,000 GM pickups with camper bodies on which the wheels failed. The investigation began based on a request from Mr. Nader to open an investigation. Id. at 435. The recall of the camper body pickups was a compromise settlement by the agency. Id. at 436. Mr. Nader challenged the settlement in U.S. District Court and obtained an order reopening the investigation. Id. at 437. Upon reopening the investigation upon the order in *Nader v. Volpe,* Civ. No. 960-70 (D.D.C., filed Mar. 31, 1970), NHTSA sought and obtained the recall of all 200,000 GM pickups with Kelsey Hayes Wheels.

The 1974 Vehicle Safety Amendments codified the public right to petition for a defect investigation seeking a recall just as Ralph Nader had done in the Kelsey Hayes Wheels case. The judicial right to challenge denials continued until the decision in *Center for Auto Safety v. Dole,* 846 F.2d 1532 (DC Cir 1988) holding that NHTSA's decisions to deny defect petitions are judicially unreviewable because there is no "law to apply." Id. at 1535. During the 15-year period in which the right to seek judicial review of the denial of a defect petition was unquestioned, this was the only litigated case. During the eight year period prior to 1974 when there was judicial review of such requests to open investigations as Mr. Nader's in the Kelsey Hayes Wheels case, only the Kelsey Hayes case was litigated. So, in the entire 23-year history of the right to judicial review to challenge denials of defect petitions and requests to open investigations, there were only two litigated challenges. This is scarcely a burden on agency resources but rather a very valuable check and balance against unsupported agency defect actions.

Public Investigations and Information: In the early days of the agency from 1966 through the early 1980's, defect investigations and defect information were an open book at NHTSA. There were public lists of all investigations. Investigatory files were open as provided by the Freedom of Information Act. Warranty information, lawsuits, claims, field reports and complaints submitted by manufacturers in investigations were routinely available. Consumers and safety groups could go to

NHTSA's Technical Reference Division and obtain copies of any consumer complaint, Technical Service Bulletin (TSB) or other dealer communication filed with the agency under what is now 49 USC § 30166. Safety groups could monitor investigations and rebut manufacturer arguments. Records of meetings with manufacturers during investigations were routinely kept. This transparency resulted in investigations that resolved defect issues and resulted in single recalls. Investigations did not linger for years and result in multiple sequential recalls. Such was the case with Ford Cruise Control Deactivation Switch fires which took 11 years from the date of the initial investigation and 6 recalls before all 16 million Fords with defective switches were recalled.

Beginning in the mid-1980's and culminating after Early Warning Reporting was established, NHTSA gradually closed the door on public defect investigations and defect information. When the agency went from a paper record keeping system to an electronic and internet system for defect investigations and defect information, consumers and safety groups got the short end of the deal. Dealer communications including Technical Service Bulletins (TSBs) which used to be in public files are no longer readily available, if available at all. The agency now places only sketchy and inaccurate summaries of a small fraction of all dealer communications and TSBs on its website.

Electronic Investigation Files Unavailable at NHTSA: NHTSA today requires manufacturers to submit most information in defect investigations in electronic format. Instead of placing the information on the Internet or in public files at the Technical Reference Division (now Technical Information Services), the agency sends the defect records to the National Crash Analysis Center (NCAC) in Ashburn VA which has no public facility for reading files as did Technical Reference. Instead one must pay $80 per CD for investigatory files with there being multiple CDS per investigation. The cost of obtaining information on the Toyota sudden unintended acceleration (SUA) investigations in the 2000's is nearly $1,000 – if one can find the information. For most consumers and consumer groups, what was once readily available is practically unavailable today. This thick pile is just an index to all the electronic investigatory files only available from NCAC. Soon all detailed investigatory file manufacturer submissions will be in electronic format and unavailable from NHTSA. Since there's no confidential materials in the electronic files at NCAC, NHTSA should send them to its already existing investigations website instead.

EWR Data Too Broad & Not Public: When the TREAD Act was passed in 2000, Congress required NHTSA to set up an Early Warning Reporting System (EWR) that required manufacturers to submit information on deaths, injuries, warranty claims, complaints and field reports. From the consumer and safety group perspective, EWR made a bad situation worse. Until Public Citizen filed a FOIA lawsuit, no information obtained under EWR was public. Now the agency releases the summary information on death and injury reports but it is so vague as to be useless.

EWR submissions by manufacturers and NHTSA summary reports on passenger vehicles are grouped into 20 component categories so broad one doesn't know what the report is. E.g., one category covers the fuel system – is this the fuel filler neck, the fuel rail, the fuel injection, the throttle body, the evaporative canister, the fuel tank, the electronic control unit that controls fuel metering or what? The categories are listed below.

steering system	suspension system	service brake system	parking brake
engine & engine cooling system	fuel system	power train	electrical system
exterior lighting	visibility	air bags	seat belts
structure	latch	vehicle speed control	tires
wheels	seats	fire	rollover

In the recent case of the Toyota 4Runner steering rod relay recall, 05V-389, for which NHTSA has opened a timeliness investigation on May 10, 2009, Toyota coded a clear steering rod relay fracture that led to a rollover crash with 3 injuries as rollover and power train but not steering. In a September 2004 Audit of EWR, the DOT Inspector General found that EWR can't identify steering defects & NHTSA Administrator Runge agreed to that finding. defects. In contrast to the 22 specific components categories for passenger cars and trucks under EWR, consumer complaints from VOQ's can go into 1200 different categories (that's too many but 22 is too few). (Attached is the consumer complaint list for VOQ's.)

For the past seven months, the Center for Auto Safety has been filing FOIA after FOIA to open up the secret workings of the EWR system. Our first FOIA for lists of all EWR inquiries and files resulted in NHTSA asking us to pay $55,000 in advance for the information. After six months of negotiations, NHTSA gave us a list of death and injury inquiries made to manufacturers. What NHTSA didn't give us and what we still don't know are (1) what the agency did with the records obtained under the inquiries - i.e., did they open and close an internal investigation or evaluation without making it public, (2) was there any follow up with the manufacturer and (3) the actual death records themselves.

NHTSA Fails To Request Most Death & Injury Reports: What we do know by comparing the summary EWR reports to the EWR inquiries is shocking. NHTSA doesn't even request specific death and injury records from the summaries submitted by auto companies in the broad EWR reporting categories where there are know major defects. Here are three examples:

Toyota SUA – most likely component vehicle speed control with fuel system, power train and electrical other possibilities. 301 reported incidents of death & injury – only 16 records requested leaving 286 unrequested.

Jeep Grand Cherokee Fuel Fed Fires - most likely components are fire-related and fuel system. 26 reports of fire related deaths & injuries – no records requested

1990-95 Toyota 4Runner & 1993-98 T100 steering – most likely components steering, suspension, rollover. 5 reports of steering related deaths & injuries, no records requested.

During the same time that Toyota provided the 301 summary EWR speed control death and injury reports, the agency had multiple defect investigations and petitions pending to which the reports were relevant but apparently ignored. The Center for Auto Safety has a defect petition pending since last October on fuel fed fires in 1993-04 Jeep Grand Cherokees which have had 279 deaths in fuel fed fire crashes with over 70 deaths clearly due to fire. Under EWR, Chrysler has submitted 26 summary reports of fire related deaths and injuries. Our EWR FOIA showed that NHTSA has not requested the underlying death and injury report for any of the 26 EWR summary

reports. The public record of our defect petition does not show any communication between the agency and Chrysler, something that used to be made public on an ongoing basis in past defect petition when the agency was more open.

For the Toyota 4Runner, NHTSA did not have an open investigation when Toyota announced Recall 05V-389 based on reports in Japan a year earlier with a claim that there were no cases in the US which could have been disproved then by asking for the death and injury reports behind Toyota's EWR summary reporting but NHTSA failed to ask. A complicating factor is EWR reporting requirements only go back 9 model years from the reporting quarter so almost all 4Runners were not subject to reporting when EWR started in 3rd Quarter of 2003. The reporting requirement should be extended to the average 12 year life of a vehicle.

Defect Death Reports Should be Mandated & Public: Unless a defect investigation in the form of a Preliminary Evaluation or an Engineering Analysis is opened, the public does not have any access to NHTSA's analysis of EWR data. One thing is clear - NHTSA has made hundreds of information inquiries on deaths under EWR which are not made public. We have gotten access to only one EWR inquiry so far – Ford Explorer rollover deaths labeled as DI06-Explorer. The records which consist of non-confidential claims records, police reports, lawsuits, and newspaper articles cover over 300 deaths through 2005. But despite the 300 deaths, there is no indication of what NHTSA did. This is all the more of a mystery because the total Explorer rollover deaths after the TREAD Act took effect are more than before the TREAD Act became law. The agency just doesn't like the public to see what it's doing behind closed doors.

Death reports based on an allegation of a defect are the most significant records covered by EWR today. The number of death reports is low. The documents consist of public records so there is no issue of confidentiality. The vast majority of recalls do not involve deaths. Where there are defects involving deaths, there is normally a recall. Death reports should be treated just like field reports – the actual document that the manufacturer receives of a death claim or notice that alleges or proves the death was caused by a possible defect should be required & made public. Otherwise NHTSA can sit on the summary numbers and never request the actual claim or notice information received by manufacturer as it did with Toyota SUA and Jeep Grand Cherokee fires. In addition to death reports, EWR should be expanded to include lawsuit complaints which are one of the most detailed sources of information available on safety defects.

Private Meetings: One big abuse in defect investigations not addressed by S.3302 is the meeting between manufacturers and NHTSA for which there is no record other than a list of attendees. These meeting often occur at the conclusion of an investigation where the important decisions are made and are attended by former NHTSA employees representing the manufacturer. They frequently include presentation of documents by either NHTSA or the manufacturer on why there should or should not be a recall. In the case of the Toyota Sienna SUA investigation, EA08-014, that led to the Safety Improvement Campaign 09V-023 (i.e., less than a Safety Recall), a meeting attended by former NHTSA Chief Counsel Erika Jones, Chris Tinto and Chris Santucci (former NHTSA staff) has only the list of attendees & nothing else.

The single best example of a NHTSA private meeting occurred in the Chrysler minivan liftgate investigation. In September 1993 a young girl in Virginia was killed when the rear liftgate latch failed on her family's Dodge Caravan, the liftgate opened and she was ejected from the rear. NHTSA opened a Preliminary Evaluation which got upgraded to a Engineering Analysis in January 1994. By October 1994 30 children had died, and many more had been permanently injured due to the minivan liftgate latch and seat system safety defects, which were well-known inside Chrysler. Paul Sheridan, the head of Chrysler's Minivan Safety Leadership Team had already made several major presentations to upper Chrysler management recommending that the minivan be recalled and the safety defects be repaired at no charge to minivan families. On November 17, 1994, NHTSA held a private meeting with Chrysler at which NHTSA showed Chrysler its low speed crash tests showing the tailgate popping open and child dummies flying out. NHTSA told Chrysler "The latch failure is a safety defect that involves children." Yet at that meeting NHTSA agreed not only to drop its request for a safety recall but also to deny any FOIA requests for the crash tests predicting it would be months before the tests could be pried loose. Yet there is nothing in the public investigatory about the agreement. Instead it was revealed in the attached internal Chrysler memo produced in discovery in a lawsuit and released from protective order when the case went to trial. These meetings are not about data submissions by manufacturers. They are about secret deals to close investigations without recalls that ultimately result in deaths and injuries to consumers.

To correct this, we recommend adding a section "o" to 30166 reading:
(o) Records of Meetings in Investigations. – If a manufacturer meets with representatives of the Secretary of Transportation during or in the course of an investigation, the Secretary shall keep public minutes of the meetings including records of any presentations or evidence presented by either the Secretary or the manufacturer. Any information provided to the Secretary pursuant to this subsection shall be disclosed publicly unless exempt from disclosure under section 552(b) of title 5.''

Whistleblower Protection: The Chrysler minivan investigation demonstrates the strong need to provide whistleblower protections for employees working in the auto and related industries who blow the whistle to NHTSA. Paul Sheridan who is here today tried to get Chrysler to recall the minivans and fix not only the liftgate latch but also the seat back structure. Chrysler responded by disbanding Sheridan's Safety Leadership Team. At this point Sheridan announced his intention to report his safety defect concerns, to NHTSA. Alarmed by Mr. Sheridan's intention, Chrysler waited until the Christmas holidays to raid Mr. Sheridan's office files, fired him without notice and obtained an ex parte "muzzle order" which threatened him with arrest if he disclosed what he knew about Chrysler safety defects. Undaunted Mr. Sheridan provided his sworn testimony to NHTSA. In an effort to intimidate him Chrysler then amended their Michigan lawsuit against him, alleging "damages" totaling $82,000,000. This amount stands as an all-time record claimed against a former employee. Chrysler unilaterally dropped its lawsuit in exchange for the court dismissing Mr. Sheridan's state whistleblower claims but needless to say Mr. Sheridan suffered untold sums in legal expenses and personal trauma.

Recall Database: NHTSA itself should be required to maintain a database of recall information by VIN – what is more important than a list of vehicles subject to a recall by VIN is

a list of vehicles by VIN that have not yet been repaired under a recall. Some manufacturers already give that information to companies like Carfax where inputting a VIN to be checked will turn up outstanding recalls. As the federal agency to go to on vehicle safety, NHTSA should get that information from manufacturers. In the 1980's the Federal Trade Commission required some manufacturers to publish free indexes of TSBs and were allowed to charge a nominal fee for posting and handling for providing individual TSBs. Section 302© of the discussion draft is silent as to whether manufacturers can charge for access to TSBs. Some companies already charge for such access with Toyota having a $400 annual fee. This section should be modified to require the dealer communications be free for a specific vehicle upon the consumer entering the VIN.

Funding: The Center for Auto Safety supports increased funding for NHTSA of $500 million per year. If appropriations in this amount are not available, then we support the user fee as the way to get funding for NHTSA to levels more adequate to its mission. In the short term, NHTSA should be given funding to purchase its own research and test facility as Congress intended to do more than 40 years ago in the 1970 Vehicle Safety Amendments. One particular area that is underfunded that could expose defects like Toyota SUA earlier is the National Analysis Sampling System (NASS). The current budget is just over $15 million and investigates only 4,000 crashes per year. This compares with a budget of around $10 million per year in the early 1980s providing about 10,000 cases. The original design would have produced nearly 19,000 cases per year which, at current costs, would require a budget of around $60 million.

Had NASS been operating at its original design size, the agency could have spotted the problem with Firestone tires on Ford Explorers much earlier. The savings in life and limb from that discovery, even a few months earlier, alone would have been sufficient to cover the extra cost of NASS at its full design size. Explorers were introduced in 1990 and the defective Firestone tires were on some of the earliest models. If the excessive Explorer rollovers resulting from failures of Firestone tires could have been spotted by the mid-1990s, it could have saved hundreds of lives and at least one billion dollars for Ford & Firestone.

Enhanced Safety Authority: The Center for Auto Safety fully supports increasing the civil penalty to $25,000 per violation and lifting the cap on civil penalty to match other enforcement agencies such as the Environmental Protection Agency which also regulates the motor vehicle industry. We also support the imminent hazard provision which is present in other regulatory agency such as the Food and Drug Administration. Missing from the discussion draft is criminal penalties which are common in other statutes for knowing and willful violations of the Act.

Vehicle Electronics and Safety Standards: The Center for Auto Safety fully supports the provisions in Title I. We recommend that the Event Data Recorder (EDR) provision be changed to require both rulemakings to be completed in three years and to give manufacturers that presently do not have an EDR that meets the requirements in the present voluntary standard the option of going to the advanced EDR a year earlier than required and

skip the minimal EDR. All of the rulemakings required by Title I would benefit from deadlines for issuing proposed rules as well as final rules.

Conclusion: This legislation provides a unique opportunity to not only reduce the unacceptable toll of death and injuries on the nation's roads but also provide stability to the auto industry which suffers from lack of public confidence and sales when preventable defects such as Toyota sudden unintended acceleration occur. The federal government through the National Highway Traffic Safety Administration should lead the way to vehicle safety and not clean up afterwards.

MINIVAN LATCH ISSUE

Proposed Agreement with NHTSA

1. **Crash Test Video and the Public Record:**

   - NHTSA has agreed that they will deny all FOIA requests to place their investigative files, including the crash test video, on the public record and that the Department of Justice will defend any lawsuits seeking to compel production under FOIA.

   - We would agree with NHTSA that their engineering analysis will remain open while we conduct the service campaign to provide them additional bases to argue that release of the materials would interfere with their investigation.

   - The Department of Justice says there is less than a 50/50 chance of keeping the video off the record for the full duration of the investigation, i.e. the campaign, if there is a court ruling. Given the possibility that a lawsuit could be filed at any time, they anticipate that the legal process would take at least four months, regardless of the outcome.

2. **Service Action Only - No Recall:** NHTSA has agreed that a Chrysler service campaign would fully satisfy all of their concerns and they would give full public support to such an effort. The critical elements that differentiate the service campaign from a recall (mostly reflected in the two attached letters) are as follows:

   - no admission of defect or safety problem;

   - stated purpose of the campaign - to ensure peace of mind in light of media coverage;

   - campaign does not count as a NHTSA action - not included in NHTSA recall numbers, no Part 573 or Part 577 letters;

   - statements to owners, the public and NHTSA assert that no defect has been found; and

   - NHTSA acknowledges that replacement latch is not a 100% solution.

3. Chrysler Announcement: Chrysler controls publication of its action with the following provisions:

- Chrysler goes first with its own statement and reads approved NHTSA statement supporting Chrysler's action;

- Chrysler characterizes campaign as done solely to ensure the peace of mind of its owners, i.e. "your concern is our concern";

- Letter from Martinez to Chrysler and NHTSA press statement praise Chrysler action as fully satisfying all of NHTSA's concerns and state that Chrysler is a safety leader;

- NHTSA officials acknowledge publicly that there has been no finding of defect and that there will be none; and

- NHTSA officials acknowledge that owners should not be concerned over the delayed implementation of the action and that they can best protect themselves by keeping seat belts buckled at all times.

4. Additional Provisions: The following points have been requested by NHTSA and appear to be reasonable:

- The letter to owners makes reference to the NHTSA hot line phone number;

- Latch replacement will be offered as part of any routine minivan servicing (once replacement latches are available);

- Chrysler will submit six quarterly reports on the progress of the campaign (helps to support defense of FOIA requests); and

- NHTSA can make reference to the service campaign in response to owner inquiries.