

November 9, 2012

The Honorable David L. Strickland, Administrator
National Highway Traffic Safety Administration (NHTSA)
1200 New Jersey Avenue, SE
Washington, DC 20590

RE: Doc. No. NHTSA-2012-0068; Early Warning Reporting, Foreign Defect Reporting, and Motor Vehicle and Equipment Recall Regulations

Dear Administrator Strickland:

The Center for Auto Safety (CAS), Public Citizen, Trauma Foundation, Consumer Federation of America, and KidsAndCars.org appreciate the opportunity to comment on NHTSA's Notice of Proposed Rulemaking (NPRM) regarding Early Warning Reporting, Foreign Defect Reporting, and Motor Vehicle and Equipment Recall Regulations. The proposed rule addresses numerous issues in both early warning and recalls reporting, which are discussed individually below. CAS supports the agency's proposals put forth in the NPRM as regards standardization of submissions of recall information and public availability of this information. CAS has suggestions for many other areas of the NPRM which fall short of the statutory mandate in MAP-21 or fall short of protecting consumers from vehicle defects.

Technical Service Bulletin (TSB) Mandate in MAP-21

One mandate of MAP-21 NHTSA has failed to address in this rulemaking regards §31303, Public Availability of Communications to Dealers. CAS has always requested more timely and consistent public availability of all Technical Service Bulletins (TSBs) and other dealer communications submitted to the agency due to their great value in helping consumers keep their vehicles safe and reliable. Prior to 1981, NHTSA made all TSBs and other manufacturer communications to dealers publicly available. From 1981 until now, NHTSA has erected roadblock after roadblock to release of manufacturer communications required to be submitted to NHTSA under the National Traffic and Motor Vehicle Safety Act. But for once and all, MAP-21 requires that such communications be made publicly available.¹

¹ SEC. 31303. PUBLIC AVAILABILITY OF COMMUNICATIONS TO DEALERS.

(a) INTERNET ACCESSIBILITY.—Section 30166(f) of title 49, United States Code, is amended—

(1) by striking “A manufacturer shall give the Secretary of Transportation” and inserting the following:

“(1) IN GENERAL.—A manufacturer shall give the Secretary of Transportation, and the Secretary shall make available on a publicly accessible Internet website,”; and

(2) by adding at the end the following:

“(2) INDEX.—Communications required to be submitted to the Secretary under this subsection shall be accompanied by an index to each communication, that—

“(A) identifies the make, model, and model year of the affected vehicles;

“(B) includes a concise summary of the subject matter of the communication; and

“(C) shall be made available by the Secretary to the public on the Internet in a searchable format.”.

However, the NPRM simply fails to address this Congressional mandate whatsoever. Failure to post TSBs and other dealer communications can cost consumers thousands of dollars in repairs that could have been avoided or loss of life. In the case of the 2001-04 Ford Escape whose cruise control cable hung up and caused sudden acceleration, Ford sent out a dealer bulletin describing the defect, yet the bulletin was not sent to consumers or published as a TSB on NHTSA's TSB webpage. Only the most sophisticated and diligent of consumers could have found the bulletin in NHTSA's recall files.

All Vehicle Manufacturers Are Subject to MAP-21 Recall Information Mandate

Section 31301(a) of MPA-21 requires the Secretary make all motor vehicle and motor vehicle equipment recall information available to the public on the Internet for all motor vehicles.² The statute specifically requires that the information made available to the public “includes information about *each recall* that has not been completed for *each vehicle*.” Congress has determined that pertinent information regarding each vehicle that has been subject to a recall and has not been repaired must be provided to the public on the Internet. The clear result of this wording is that each and every manufacturer that is subject to the agency’s recall and recall notification authority that has issued a vehicle recall must be subject to the requirement to provide information searchable by the vehicle identification number for vehicles that have not yet been repaired under the recall. The words “about *each recall*”, and “for *each vehicle*”, are unlimited in scope and mean that each manufacturer recall and every vehicle subject to a recall must provide this information. In making all recalled vehicles subject to the information disclosure, section 31301(a) is directly requiring the vehicle manufacturer to supply the information for its recalled vehicles to the agency. As a result, every vehicle manufacturer is, of necessity, subject to this consumer information requirement.

NHTSA was soundly rejected in the Courts in the 1970's when it tried to exempt small volume vehicle manufacturers above 500 vehicles from meeting FMVSS deadline. In

² SEC. 31301. PUBLIC AVAILABILITY OF RECALL INFORMATION.

(a) VEHICLE RECALL INFORMATION.—Not later than 1 year after the date of enactment of this Act, the Secretary shall require that motor vehicle safety recall information—

(1) be available to the public on the Internet;

(2) be searchable by vehicle make and model and vehicle identification number;

(3) be in a format that preserves consumer privacy; and

(4) includes information about each recall that has not been completed for each vehicle.

(b) RULEMAKING.—The Secretary may initiate a rulemaking proceeding to require each manufacturer to provide the information described in subsection (a), with respect to that manufacturer’s motor vehicles, on a publicly accessible Internet website. Any rules promulgated under this subsection—

(1) shall limit the information that must be made available under this section to include only those recalls issued not more than 15 years prior to the date of enactment of this Act;

(2) may require information under paragraph (1) to be provided to a dealer or an owner of a vehicle at no charge; and (3) shall permit a manufacturer a reasonable period of time after receiving information from a dealer with respect to a vehicle to update the information about the vehicle on the publicly accessible Internet website.

(c) PROMOTION OF PUBLIC AWARENESS.—The Secretary, in consultation with the heads of other relevant agencies, shall promote consumer awareness of the information made available to the public pursuant to this section.

rejecting NHTSA's stretch of the Safety Act, the District Court pointed out: "In this case, the Government argues that an administrative agency has not only express authority but also implied authority to carry out the import of its statute. Since there is no express authority in the Act to extend time to a single manufacturer, they argue that this extension can be implied." The Court firmly rejected this position in *Nader v. Volpe*, 320 FSupp 266 DDC (1970).

Since MAP-21 requires information for each and every vehicle recall to be posted on a website, NHTSA cannot arbitrarily create an exemption for manufacturers who produce 25,000 or fewer light vehicle each year. Indeed, smaller volume manufacturers may be more prone to defects and recalls than larger manufacturers as CAS demonstrated in its April 4, 1977 report to NHTSA on 27 defects in various British Leyland cars that ultimately resulted in over a dozen recalls. The CAS report relied on a foreign auto industry insider report given to NHTSA that concluded: "Some of the importers due to their small volume are totally ignoring safety and emission laws in the USA. The Federal agencies at this time have lost control of the importers with regard to safety and consumer complaints in the imports automobile industry."

This rulemaking adds new component categories for fuel systems in order to better track emerging fuels and fuel technologies. Some of these technologies are more likely to be brought out by smaller companies like Tesla and Fisker in the electric vehicle market. NHTSA's proposal to exempt small companies from the VIN recall identification system is inconsistent with its position that it needs to be able to better monitor these technologies.

New Component Reporting Categories

The proposed rule requires Light Vehicle manufacturers to categorize the Fuel/Propulsion System type for nine different fuel/propulsion systems, and adds four new Light Vehicle and one new Medium-Heavy vehicle component reporting categories. These new categories apply to very specific components. For Light Vehicles, the added components are Electronic Stability Control (ESC), Forward Collision Avoidance, Lane Departure Prevention, and Backover Prevention. For Medium-Heavy Vehicles, Stability Control/Roll Stability Control has been added as a component category.

However, the proposed rule does not propose any clarification or expansion of current component categories that have proven to be far too general to warn the agency of potential defects. Under the proposed rule, airbags remains a general category, and early warning reports will still not distinguish between non-deployment, inadvertent deployment, aggressivity, and other airbag defects. Indeed, EWR does not even distinguish between types of airbags such as front, side torso, side curtain and knee. NHTSA's NCAP website lists five different types of side airbags. Whether side airbags are roll sensing is extremely important as side airbags need to stay inflated longer in rolls than in side impacts.

Airbags are the most reported component in EWR. The top 23 light duty vehicle manufacturers reported 50,037 death and injury claims through the second quarter of 2012 with 24,870 of these claims reporting airbags. Without more specificity in EWR reports, it is impossible for the agency to accurately assess defect trends in this area without breaking the category down into more accurately defined subcategories. Similar problems exist in the seatbelt category and others. In creating new categories such as ESC, NHTSA needs to

establish which categories have too many claims such as airbags do to defy defect analysis and add new categories to break them down into smaller segments that can be analyzed.

Elimination of Quarterly Recall Completion Reports

The proposed rule eliminates the requirement for manufacturers to file quarterly reports on recall campaign progress and completion rates. The proposed rule states, “Given that the larger volume manufacturers and those small volume manufacturers that opt in to the VIN look-up service will be providing daily information from which the agency can determine completion information, the purpose of those quarterly reports would be obsolete as to those manufacturers’ recalls.” In fact, the purpose of these quarterly reports, which date all the way back to the first recalls in 1966, would in no way be obsolete; they are the only public record of the percentage of recalls completed for each recall. If the final rule eliminates the requirement for quarterly recall completion reports, it must also provide a public search function within the VIN look-up service that allows the public to view the recall completion rate on a quarterly or monthly basis.

Furthermore, the proposed rule leaves open the possibility that manufacturers would be able to provide the VIN look-up service through their own websites, while being exempt from the responsibility of providing the agency with quarterly reports. This possibility is wholly inconsistent with the intentions of MAP-21, and the agency must resolve this issue in the final rule. We strongly support eliminating the option for manufacturers to offer their own VIN look-up services.

Regional Recalls

The regional recall VIN lookup proposed by NHTSA simply doesn’t work. Cars move from one state to another. The proposal is fixed in time with the manufacturers being required to provide VIN lookup only for those vehicles currently registered, or originally sold or registered, in those geographic areas, usually a salt belt, hot weather or cold weather state, covered by the recall. What happens if the car moves from a non-covered state to a covered state after the manufacturer submits the information into the VIN lookup system? The proposal also does not cover fleet vehicles that are sold and registered in non-covered areas but whose use is confined to covered areas where differences in weather will contribute to identified safety defects. The only way to make VIN lookup work for regional recalls is to require the VIN lookup to include the VINs of all vehicles in all states and then create a category called outside the scope of recall where the recall replacement remedy doesn’t apply unless the vehicle moves into that state. This outside the scope recall is also necessary because NHTSA’s policy is that if a vehicle that is outside the scope has the failure specified in the recall, then the manufacturer is required to repair the vehicle for free.³

VIN Data on Recalls Filed Prior to MAP-21

The proposed rule only requires VIN data submission for recalls filed within two years prior to the enactment of MAP-21, while MAP-21 clearly contemplates a more far-reaching database stretching back to no more than FIFTEEN years prior to its enactment. NHTSA’s interpretation that a two year time frame is within the agency’s discretion is simply not

³ See NHTSA Associate Administrator K. Weinstein letter to manufacturers, September 4, 1998 at: <http://www.autosafety.org/sites/default/files/GEOpolicy.pdf>

consistent with MAP-21, nor is it sufficient to inform and protect owners of vehicles that have been recalled as recently as June of 2010. There are countless examples of vehicle owners who have suffered the consequences of defects without being properly notified.⁴ MAP-21 and the VIN data system would be the most reliable way for these consumers to acquire accurate knowledge of whether or not their vehicle has been recalled and whether or not the recall has been performed. To exclude thirteen years of recalls will adversely impact safety and is contrary to the statute.

Interim notices as Integral Part of 49 CFR 577.5

While we agree with NHTSA's desire to have manufacturers provide preliminary communication to vehicle owners in recalls where the development of a remedy or parts takes longer than 60 days, we disagree with the method by which the agency is proposing to accomplish this. By making such notices integral to Part 577.5, the agency is purporting that such notices are issued pursuant to 49 USC 30118 & 30119. To the contrary, we believe such notices are inconsistent with 30118 and 30119.

Section 30119 specifically states that notifications issued by manufacturers under 30118 must contain the measures to be taken to obtain a remedy of the defect or noncompliance, a statement that the manufacturer will remedy the defect or noncompliance without charge under 30120, and the earliest date the remedy is available. Interim notices without that specified information are not 30118 notices.⁵

There are also practical reasons for not making such preliminary communications 30118 notices to owners. The agency is proposing to make 30118 notices and their envelopes more attention-grabbing, yet the interim notices that would be issued in the new formats contrast sharply with the recall notices that vehicles owners have been receiving for decades by not offering them an available remedy and instead telling them to wait for another notice. We are concerned that putting such notices in the attention-grabbing formats will have the effect of diminishing the effectiveness of future recall notices received by such owners.

Our position does not preclude the manufacturer communicating important information to owners when a 30118 notice to owners is delayed due to remedy/parts issues. We note that General Motors issued such communication in the Chevrolet Cobalt power steering recall. Those letters were not 30118 notices but, nevertheless, communicated important preliminary information to owners on the recall and their vehicle. While the format and wording could be tinkered with, we believe this type of notice appropriate and consistent with the Safety Act.

Sincerely,

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⁴ <http://www.edmunds.com/car-safety/recalled-but-unrepaired-cars-are-a-safety-risk-to-consumers.html>

⁵ The current proposal is different than the notices with interim remedy measures issued in such recalls as the Toyota pedal entrapment recalls and the Ford cruise control fires recalls. The interim notices in those recalls contained interim remedies and were, therefore, consistent with 30118 and 30119.

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