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On Proposed Motor Vehicle Safety Act of 2010
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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 watchdogged 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 football team to beat the Super Bowl champion New Orleans Saints. Ford's third quarter 2009 income was $35.5 billion compared to NHTSA's annual vehicle safety budget of less than $200 million. 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 owned by Honda, one of the companies it regulates. 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.

The history of NHTSA since its creation in 1970 has been one of an agency where Congress has to intervene as a major safety issue emerges that the agency is unable to resolve or lacks authority. Some examples of Congressional intervention are:

1970 Amendments, Pub Law No. 91-265 - Authorization of Vehicle Test Facility & Inclusion of Tires in Defect Notification

1974 Amendments, Pub Law No. 93-492 - Required Recall Repairs to Be Free, Doubled Civil Penalty, Mandated FMVSS 301 Fuel System Integrity Take Effect, Required 8 Schoolbus Safety Standards, Upgraded Defect Notices, Provided Right of Public to File Defect Petitions, Doubled Civil Penalty

1991 ISTEA, Pub Law No. 102-240, Required Full Front Seat Airbags, Revised Head Injury Rule

1998 TEA-21, Pub Law No. 105-178, Required Improved Airbag Rule

2000 TREAD Act, Pub Law No. 106-414, Required Revised Tire Safety Standard, Tire Pressure Monitoring, Early Warning Reporting System, Increased Civil Penalty to $15 Million

2002 Anton's Law, Pub Law No. 107-318, Required Booster Seat, Lap & Shoulder Belt Rules

2005 SAFETEA-LU, Pub Law No.109-59, Required Rollover Prevention, Side Impact, Roof Crush, Occupant Ejection, Power Window Switch Rulemakings, Crashworthiness Ratings & 15-Passenger Van Safety

2007 Cameron Gulbransen Act, Pub Law No. 110-189 - Required Backover, Power Window, Brake Shift Interlock Rules.

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 suffer brand damage while consumers lose their lives. It's a no-win situation.

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: Out-of-date and inadequate safety standards coupled with enforcement efforts playing catch up to an industry striving to run out the statute of limitations. 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, the 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 citizen right to petition and sue for unsupported denials of petitions and closing of defect investigations. 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 citizen 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 citizen suit 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.

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 recordkeeping 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.

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 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.

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. The summary reports are grouped

into 22 component categories so broad that 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? Each incident is reported only by state and date so that even given the make, model and year, it is impossible to correlate summary death and injury reports with public records.

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.

What we do know by comparing the summary EWR reports to the EWR inquiries is shocking. NHTSA received 301 summary EWR death and injury reports from Toyota on vehicle speed control, the EWR component category most closely associated with unintended acceleration. Yet NHTSA requested the original claim or notice document for only 15 of the 301 reports leaving 286 reports unrequested. At the same time that Toyota provided the 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. Chrysler has submitted 26 EWR 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 petitions when the agency was more open.

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 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.

Proposed Motor Vehicle Safety Act of 2010: The above analysis addresses Transparency and Accountability which is contained in Title III of the discussion draft. Accessibility of information and the right to seek judicial review are vital to ensuring that NHTSA carries out its enforcement obligations under the Safety Act. On a day-to-day basis, it is up to the public to watch what NHTSA does and hold it accountable. The provisions in Title III go a long way to making that

happen. Encouraging the public, mechanics, dealer and manufacturer personnel to report safety defects will provide valuable information. We recommend that whistleblower protection be added to this section.

The right to seek judicial review upon unlawful denial of a defect petition is an important check and balance which will be rarely used as shown by past experience but will provide an incentive to thorough analysis of consumer petitions rather than quick dismissal as was done with many of the Toyota SUA petitions.

One big abuse in defect investigations not addressed by Title III 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. 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.''*

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.

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(c) 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.

Title IV - 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.

Title II 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 agencies 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.

Title I 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.