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Re: Docket No. NHTSA-2001-8677; Notice 2

Comments of Consumers Union of US Inc.
to
National Highway Traffic Safety Administration
on
Reporting of Information and Documents about
Potential Defects Retention of Records that Could Indicate Defects
RIN 2127-AI25

Consumers Union (CU) welcomes the opportunity to comment on National Highway Traffic Safety Administration's (NHTSA) Notice of Proposed Rulemaking (NPRM) for early warning information on potential product defects. CU appreciates the agency's effort to refine and streamline the process of gathering early warning information, and we take notice of the important changes and improvements made in the NPRM since the publication of the Advanced Notice of Proposed Rulemaking (ANPRM) in January of 2001. If the data that are submitted pursuant to this regulation are properly organized and regularly reviewed by NHTSA analysts, we believe this will be an essential tool for protecting motorists and promoting automotive safety.

While we are optimistic about the usefulness of these data to warn of early safety problems and defects, we are mindful of the concerns expressed in the January 3, 2002

report of the Department of Transportation's Inspector General (the "IG" report) reviewing NHTSA's Office of Defect Investigations (ODI) systems and procedures. That report notes that this early warning rule developed pursuant to the Transportation Recall, Enhancement, Accountability, and Documentation Act (TREAD) of 2000 *is the heart the Act*, but cautions that there are a host of problems, from the IG's perspective, with NHTSA's current system for receiving information from the automotive industry and reviewing that information. The coding of entries, the need for common coding of complaints, injury and death information, and warranty claims will be a major and largely new challenges. Also, we expect that NHTSA will be collecting sales figures on tires, engines, transmissions, and drive trains (2 wheel vs. 4 wheel drive) in order to put into context the level of threat posed by a suspected defect or safety hazard. Unless ODI's procedures for reviewing and evaluating the huge new volume of data are addressed as outlined in the IG's recommendations, the effort to gather these early warning data under TREAD could be largely wasted.

Among our specific concerns are these:

- The IG's report detailed ODI's process, or even lack of process, for determining how an alleged defect is investigated or whether it is investigated at all. In some instances, when NHTSA received reports from consumers who took the time and effort to report deaths, injuries, or incidents with motor vehicles and motor vehicle equipment they believed had safety implications, those reports received no action. In other cases, with perhaps fewer complaints over a longer period of time, an investigation was opened. There was little consistency or rationale offered in determining which cases might generate an investigation and which would not. In order for the anticipated early warning information to be effective,

ODI needs a uniform, coherent process for determining which cases merit an investigation and a process to make sure the investigators actually conduct the investigations in serious cases.

- NHTSA officials told the IG that in cases where no investigation was opened, cases citing specific safety problems were kept open in the event that more complaints were reported. However, in 7 of 10 open cases in the IG's random sample, the number of complaints increased, in two cases significantly (in one case involving non-deployment of airbags, the number of complaints quadrupled), but ODI still did not open an investigation. Again, for early warning data to be useful, NHTSA needs to be evaluating new reports as they come in and acting on cases that represent a trend. Currently that appears not to happen in any systematic way.
- Beyond the increased data flow that should come in under TREAD, we support the IG's suggestion that NHTSA regularly and proactively solicit information from external sources. This means developing a system for routinely gathering information from insurance companies and plaintiffs' lawyers, both of whom are natural sources of information related to defects, and making that information part of any NHTSA investigation. In addition, CU knows from experience that motorists often call consumer groups to report safety concerns. The IG suggested that NHTSA seek information from safety and consumer organizations, using these groups as a source for gathering safety information. We support the IG's recommendation here as well.
- The IG found there to be insufficient staff with ODI to review the volume of complaints and, as a result, found that ODI overlooked critical sources of

information. This problem has been partially addressed by Congress, which provided funds to ODI to add staff. With increases in staff, ODI should use these additional resources to review previous reports (within a reasonable number of years) and correct improperly and inconsistently recorded defect data that the IG report uncovered in ODI's files. (Despite one NHTSA official's stated intention, as described in the IG report, not to do so.) These older statistics become part of the baseline data NHTSA needs to undertake a thorough investigation and compare them to new defect reports under the TREAD early warning provisions. As the NPRM notes, NHTSA intends to require auto manufacturers to submit statistics on property damage claims over \$1000, consumer complaints, warranty claims, and field reports received from January 2000 to December 31, 2002. This gives the agency information that will be critical in "seeding" [NHTSA's words] its database so as to better evaluate new safety concerns. But NHTSA needs to recover and improve on the accuracy of its own data by insuring that information already in the agency's files is complete and accurate. The IG found that such was not the case.

- ODI needs a uniform system for tracking complaints and potential trends. There should not be idiosyncratic filing systems as described in the IG report that depend upon the particular systems of each defect analyst. With potentially large volumes of early warning information coming into the agency, that information must be gathered and reviewed in a far more systematic and uniform manner, so it can be quantified and analyzed as a whole.
- The IG found inexplicable why two different cases involving deaths alleging an airbag safety problem and a child restraint, respectively, didn't prompt an

investigation, and found no written explanation of why an investigation was never opened. There seems currently to be no system of notifying senior staff when a decision NOT to open an investigation is made. Even in several cases where a defect analyst recommended opening an investigation, the IG found that the investigative staff neglected to do so without explanation. These cases run the gamut from non-deploying airbags to front suspension torsion bar breakage to exhaust system leakage. In summary, the IG concluded that ODI needs far better processes and procedures if it is to adequately evaluate the new early warning information and serve the needs of consumers in a timely manner.

To assist NHTSA in creating an oversight process for decisions related to opening investigations, the IG recommends that NHTSA set up a peer review panel to oversee decisions to take action in specific cases. CU believes there is certainly the need for oversight, and agrees that a peer review panel could serve that purpose well.

Whatever methods NHTSA chooses,¹ it must insure that early warning data will be systematically reviewed and analyzed in a timely fashion with checks and balances in place to oversee the results. In the aftermath of the passage of TREAD, the perception that NHTSA had failed to sufficiently anticipate the safety problems with Ford Explorers mounted with Firestone tires resonated with the Congress and the public. The public ultimately must be able to rely on NHTSA, with more resources and greatly enhanced access to information, to do a far better job detecting these “early warning” trends and acting decisively to enhance consumer safety.

¹We note with concern the IG’s findings that ODI’s new information management system, set to be operational by fall 2002, is “at risk because of poor project planning and management and urge NHTSA officials to give high priority to addressing these problems.” We sincerely hope that the NHTSA will work closely with computer systems analysts to insure that the new information management systems work effectively, and if the agency runs into problems, it will share those concerns with Congress. We also urge NHTSA to address the problems identified with the system in the IG report as a top priority.

Comments on the NPRM

- CU supports NHTSA's intent in the NPRM to require that motor vehicle and motor vehicle equipment manufacturers submit reports in the following areas: deaths, injuries, property damage, consumer complaints², warranty claims information, and field reports³. We are pleased that NHTSA has included the submission of consumer complaints, in an aggregated form, in these reporting requirements, despite opposition from many manufacturers and trade associations. As the NPRM notes, many consumers submit complaints to the manufacturer without ever reporting these to NHTSA, so this category represents an important means of identifying potential safety defects.

We also support the inclusion of tire manufacturers and child restraint manufacturers in the category of motor vehicle equipment manufacturers.

- CU endorses NHTSA's broad definition of "claim,"⁴ such that a manufacturer would be required to report claims in specific categories (as the NPRM notes, NHTSA includes in the definition of claim motor vehicle crashes, accidents, component or system failures, or fires, all of which have safety implications, while excluding such events with which the rule is not concerned, such as injuries in

² Defined as "A communication of any kind made by a consumer (or other person) to a manufacturer expressing dissatisfaction with a product or relating the unsatisfactory performance of a product, or any actual or potential defect in a product, or any event that allegedly was caused by any actual or potential defect in a product, but not including a claim of any kind or a notice involving a fatality or injury."

³ "Field Reports" are defined as: "A communication in writing regarding the failure, malfunction, lack of durability or other performance problem, regardless of verification of the allegation or its merit. Field reports can come from employees and fleets."

⁴ "Claim" is defined as: "A written request or 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. 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 stating the claim."

manufacturers' factories) to the agency regardless of the manufacturer's assessment about the merits of a claim.

- We support NHTSA's requirement that manufacturers report all incidents in which persons were injured where there is an accompanying allegation that the injury was caused by a possible defect in the manufacturer's product. The Alliance of Automotive Manufacturers argues that there are 3.2 million injuries per year as a result of 6.3 million police-reported crashes, and that reporting this information will overload NHTSA. While we share the Alliance's concern about NHTSA being flooded with data, we think there is validity in NHTSA's response that the vast majority of those crashes and injuries do not result in claims against manufacturers, and do not involve alleged defects. Further, the Alliance's own comments state that only 9,200 claims alleging death or injury were filed against their manufacturer members and two other manufacturers in the United States in 2000. Finally, NHTSA points out that only a limited amount of information involving injury-producing incidents would be reported, as opposed to copies of the underlying claims or notices themselves.
- The NPRM says ". . . we expect separate reports for the F-150 and F-250, but within each designation, do not want separate reports for the two-door and four-door version, or versions with different engines and transmissions." CU is concerned about NHTSA's requiring only "minimal specificity." It seems to us that each drive system, for example, may experience different kinds of safety problems and therefore need to be reported in an easily distinguished manner.
- The NPRM proposes to divide manufacturers into two groups with different reporting responsibilities. The first group would include larger manufacturers of

motor vehicles and all makers of child restraints and tires and would have broader reporting requirements. The second group would consist of all other manufacturers of motor vehicles and motor vehicle equipment insofar as they produced, imported, or sold in the United States fewer than 500 light vehicles, medium-heavy vehicles, buses, motorcycles or trailers annually, and manufacturers of original and replacement motor vehicle equipment other than child restraints systems and tires, and would report the same information about incidents involving deaths but would not be required to report any other information.

- We support NHTSA's decision to require that both groups report all *deaths*⁵ if they are identified in a claim against a manufacturer or in a notice to the manufacturer alleging or proving that the death was associated with a possible defect in the manufacturer's product, or one that is identical or substantially similar to a product that the manufacturer has offered for sale in the United States.
- CU also supports requiring the first group to report *injuries* associated with a possible defect in the manufacturer's product, or one that is identical or substantially similar to a product that the manufacturer has offered for sale in the United States.
- We are concerned, however, that these provisions alongside the property damage reporting requirement for this first group may create a loophole. The NPRM (page 66201 Federal Register) provides an example of an incident that

⁵ Information about deaths must include, for each incident, the number of deaths that occurred in the incident, the name of the state or foreign country in which it occurred, model and model year of the vehicle or equipment, the date of the incident, and the identification of each component or system that allegedly contributed to the incident or death reported.

would not be reported under the property damage section involving the failure of a vehicle's brakes. "...if the brakes failed and there were no physical consequences other than the need to repair the brake system, there would be no property damage." If we assume that this vehicle's warranty had run out and therefore it would be fixed out of warranty, NHTSA would have no way of learning of this brake failure, which could be a recurring problem in the same make and model after the vehicle's been in use for several years.

- We support NHTSA's decision to require that manufacturers report any documents sent to dealers, distributors and owners regarding consumer advisories, recalls, or activities involving the repair or replacement of vehicles or equipment.
- We support NHTSA's intent to require record retention by manufacturers for ten years, up from the current eight year record retention requirement, including in this requirement manufacturers of tires and child restraints, with motor vehicle and tire manufacturers required to retain records on purchasers of tires and vehicles for five, up from the current three year requirement.
- We support NHTSA's determination that all claims and notices of injury will be reported and won't depend on the gravity of the incident. That is more expansive than what CU recommended in response to the Early Warning ANPRM, but we think, given the serious nature of the information, NHTSA is making the right decision.
- The NPRM asks whether NHTSA should exclude historical data for deaths and injuries in gathering this "baseline" information. We disagree with the agency's statement that these data are not likely to indicate trends in potential defects. CU

believes these historical data on deaths and injuries help establish a baseline and are important to the overall picture as NHTSA attempts to discern potential defect trends for the future.

- CU strongly supports NHTSA's conclusion about the confidentiality of the information submitted under these early warning requirements. "Historically these types of information [information that manufacturers would be required to submit to the agency under this NPRM] generally have not been considered by the agency to be entitled to confidential treatment unless the disclosure of the information would reveal other proprietary business information . . ." The NPRM also notes that NHTSA does not expect to receive many requests for confidential treatment of the information.

If nothing else, TREAD's passage enunciated clearly the public's need to have complete disclosure and better information about motor vehicle safety. Giving the public and the media access to the body of information submitted under these early warning provisions of TREAD is critical to the success of this program. Further, to insure that the availability of these data will not infringe on the privacy rights of individuals, NHTSA needs to assure that careful systems are in place to avoid using personal information in the reporting process.

- NHTSA estimates start up costs under this Early Warning NPRM at about eighteen million dollars for all affected industries, while recurring annual costs are estimated to be in the six million dollar range. CU strongly believes that the value to the consuming public that early warning information will bring, if it is properly organized and systematically reviewed and analyzed by NHTSA, will far outweigh the cost of the program. The Ford/Firestone product safety crisis of

2000 should serve as an important reminder of the ultimate costs of delayed action on product safety failures: Notwithstanding the horrific costs to consumers injured or killed in this group of accidents, Ford Motor Company paid more than \$3 billion to replace Firestone tires on Ford vehicles from August 2000 to August 2001. The cost to Ford for settling one case (a crash that left a Texas woman brain damaged and paralyzed) was reported to be \$6 million⁶. By August of 2001, Firestone's net worth had reportedly plunged to \$1.3 billion from \$2.4 billion in 1999⁷. These are but two examples of the extraordinary financial burdens placed upon companies facing a series of product safety claims.

It is entirely possible that had early warning systems been in place at the auto and tire companies and at NHTSA, detection of the problem might have prevented many of the deaths, injuries and subsequent lawsuits that were so costly to consumers and to each of these companies. Eighteen million dollars in start up costs with six million dollars in recurring costs each year, expense that will be spread across the industry, appear to us to be a reasonable, cost-effective investment toward improving the consumer's safe use of these products.

The biggest challenge remains NHTSA's ability to effectively gather and evaluate the volume of data that will come into the agency under these early warning reporting requirements. We urge NHTSA to consider in a constructive light the IG report and to implement with all deliberate speed those recommendations in a manner most productive and efficient to the agency and its mission.

In the end, however, after all the information has been collected and analyzed, the agency's criteria for opening defect investigations must be driven by the ultimate

⁶ *USA Today*, August 20, 2001.

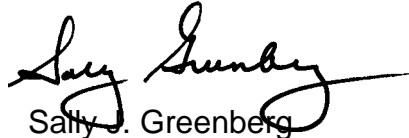
goal of protecting consumers in a timely manner, even when such actions involve some uncertainty. NHTSA, after all, is all that stands between the consumer and injury or death from hazardous and defective vehicles.

Respectfully submitted,

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⁷ *Washington Post*, August 23, 2001, quoting from Congressional testimony of John Lampe, Bridgestone/Firestone Chief Executive Officer.