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H.R. _____, THE MOTOR VEHICLE SAFETY ACT OF 2010

HEARING

BEFORE THE

SUBCOMMITTEE ON COMMERCE, TRADE, AND CONSUMER PROTECTION

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

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H.R._____, THE MOTOR VEHICLE SAFETY ACT OF 2010

THURSDAY, MAY 6, 2010

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCE, TRADE,
AND CONSUMER PROTECTION,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The Subcommittee met, pursuant to call, at 11:07 a.m., in Room 2322 of the Rayburn House Office Building, Hon. Bobby Rush [Chairman of the Subcommittee] presiding.

Members present: Representatives Rush, Sarbanes, Sutton, Stupak, Green, Barrow, Space, Braley, Dingell, Waxman (ex officio), Whitfield, Stearns, Gingrey, Scalise, Latta, and Barton (ex officio).

Staff present: Michelle Ash, Chief Counsel; Anna Laitin, Professional Staff; Angelle Kwemo, Counsel; Timothy Robinson, Counsel; Bruce Wolpe, Senior Adviser; Karen Lightfoot, Communications Director; David Kohn, Press Secretary; Elizabeth Letter, Special Assistant; Will Cusey, Special Assistant; Daniel Hekier, Intern; Althea Gregory, Intern; Brian McCullough, Minority Senior Professional Staff; Shannon Weinberg, Minority Counsel; Robert Frisby, Minority FTC Detailee; and Sam Justice Costello, Legislative Analyst.

OPENING STATEMENT OF HON. BOBBY L. RUSH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. RUSH. The Subcommittee on Commerce, Trade, and Consumer Protection will now come to order. This chair recognizes himself for 5 minutes for the purposes of opening statement but before my 5 minutes begin, I just want to take a moment to welcome all those who are witnesses today and those who are viewing this from the position of the gallery or those who are sitting in the audience today. Now the chair recognizes himself for 5 minutes for the purposes of opening statement. The focus of today's hearing is the Motor Vehicle Safety Act of 2010 draft legislation. Two months ago we assessed the National Highway Traffic Safety Administration's functionality and effectiveness. The unfortunate accident resulting from unintended acceleration revealed to us the need to modernize NHTSA. The laws were written in the 1960s and 1970s. They do not reflect today's global marketplace.

And I want to take a moment to comment Chairman Waxman for his leadership in drafting this important piece of legislation. There are five suggestions that this legislation will attempt to address. It energizes the agency and with the expertise and technology that is

so in need to achieve its primary goal while responding to today's rapidly advancing electronic technology that is really at the heart of all the new vehicles on America's highways. Secondly, it promotes safety and innovation by establishing tougher baseline of standards that better protect consumers. Certainly, it enhances the enforcement mechanism by increasing the agency's authority to remove vehicles from the road if these vehicles pose a serious, imminent hazard and if the manufacturers do not on their own take appropriate action.

Next is it increases transparency and accountability. The concept of transparency and accountability are pre-requisites for any effective policy regulation. And, lastly, we reform the safety standards for consumers with this piece of legislation. We also protect our industries and the American worker by helping to save jobs and by allowing the industry and the American workers to continue to regain consumer confidence in their brand as they continue to build and sell cars and to generally help America's auto industry stay competitive in the global economy. This is what the proposed Motor Vehicle Safety Act of 2010 is attempting to do. We will get it done. Some of the public will question the need for new legislation to improve the safety and quality of vehicles. I for one, and I am sure that other members of this subcommittee join me, strongly, strongly, strongly disagree with those who take that kind of position.

Despite the fact that I am sure that automakers are attempting to do all they can to win back consumers and improve the safety standards and equipment that is located and found in their vehicles, I think it is more reasonable to say that perhaps the horrific unintended acceleration incidents that have been well-documented before this subcommittee and others might not have happened if we had had the appropriate regulations already on the books. It is my firm belief that this legislation and the reforms that it mandates are long overdue. Simply put, it is time to act, and the time to act is now.

Before I yield back the balance of my time, I want to thank the witnesses again for taking the time out of their schedule to advise members of this subcommittee. The draft legislation that we are examining today is the result of a series of consultations with stakeholders from the consumer groups and also from manufacturers and also from the Administration. We all have the same objective, which is to save lives, prevent injuries, and reduce risk through technology, education, improved safety standards, and through vigorous, robust enforcement. It has been a selective and constructive effort, and I am looking forward to hearing from our witnesses again. Thank you, and with that I yield back the balance of my time. And I recognize now the ranking member, Mr. Whitfield, for 5 minutes for the purposes of an opening statement.

[The discussion draft follows:]

[DISCUSSION DRAFT]

APRIL 29, 2010

111TH CONGRESS
2D SESSION

H. R. _____

To require motor vehicle safety standards relating to vehicle electronics and to reauthorize and provide greater transparency, accountability, and safety authority to the National Highway Traffic Safety Administration.

IN THE HOUSE OF REPRESENTATIVES

M__. _____ introduced the following bill; which was referred to the Committee on _____

A BILL

To require motor vehicle safety standards relating to vehicle electronics and to reauthorize and provide greater transparency, accountability, and safety authority to the National Highway Traffic Safety Administration.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Motor Vehicle Safety Act of 2010".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.
Sec. 2. Definitions.

TITLE I—VEHICLE ELECTRONICS AND SAFETY STANDARDS

Sec. 101. Electronics and Engineering Expertise.
Sec. 102. Vehicle stopping distance and brake override standard.
Sec. 103. Pedal placement standard.
Sec. 104. Electronic systems performance standard.
Sec. 105. Keyless ignition systems standard.
Sec. 106. Transmission configuration standard.
Sec. 107. Vehicle event data recorders.

TITLE II—ENHANCED SAFETY AUTHORITIES

Sec. 201. Civil penalties.
Sec. 202. Imminent hazard authority.

TITLE III—TRANSPARENCY AND ACCOUNTABILITY

Sec. 301. Public availability of early warning data.
Sec. 302. Improved NHTSA vehicle safety database.
Sec. 303. Promotion of vehicle defect reporting.
Sec. 304. NHTSA hotline for manufacturer, dealer, and mechanic personnel.
Sec. 305. Corporate responsibility for NHTSA reports.
Sec. 306. Appeal of defect petition rejection.
Sec. 307. Deadlines for rulemaking.

TITLE IV—FUNDING

Sec. 401. Vehicle safety user fee.
Sec. 402. Authorization of appropriations.

SEC. 2. DEFINITIONS.

As used in this Act, the following definitions apply:

(1) The term "passenger vehicle" means a motor vehicle (as defined in section 30102(a)(6) of title 49, United States Code), other than a motorcycle or trailer, that is rated at less than 10,000 pounds gross vehicular weight.

(2) The term "Secretary" means the Secretary of Transportation, acting through the Administrator

of the National Highway Traffic Safety Administration.

TITLE I—VEHICLE ELECTRONICS AND SAFETY STANDARDS

SEC. 101. ELECTRONICS AND ENGINEERING EXPERTISE.

(a) CENTER FOR VEHICLE ELECTRONICS AND EMERGING TECHNOLOGIES.—The Secretary shall establish, within the National Highway Traffic Safety Administration, a Center for Vehicle Electronics and Emerging Technologies to build, integrate, and aggregate the agency's expertise in vehicle electronics and other new and emerging technologies. The center shall coordinate with all components of the agency responsible for vehicle safety, including research and development, rulemaking, and defects investigation.

(b) HONORS RECRUITMENT PROGRAM.—The Secretary shall establish, within the National Highway Traffic Safety Administration, an honors program for engineering students and other students interested in vehicle safety that will enable them to train with engineers and other safety officials for a career in vehicle safety. The Secretary is authorized to provide a stipend to students during their participation in the program.

SEC. 102. VEHICLE STOPPING DISTANCE AND BRAKE OVERRIDE STANDARD.

(a) UNINTENDED ACCELERATION.—The Secretary shall initiate a rulemaking proceeding to prescribe a Federal motor vehicle safety standard that would prevent unintended acceleration in passenger vehicles. The standard—

(1) shall require manufacturers of passenger vehicles to equip the vehicles with a technology or mechanism that enables a driver to bring a vehicle safely to a full stop within a specified distance, to be determined by the Secretary according to the speed, size, and weight of the vehicle, by normal braking pressure even if the vehicle is operating simultaneously at open throttle;

(2) may permit compliance through a smart pedal system that requires brake pedal input, after a period of time, to override the input signal from the accelerator pedal and other functions, in order to safely control the vehicle;

(3) shall require that redundant circuits or other mechanisms be built into accelerator control systems, including systems controlled by electronic throttle, to maintain vehicle control in the event of failure of the primary circuit or mechanism; and

(4) may permit vehicles to incorporate a means by which the driver would be able to temporarily disengage the function required under paragraph (1) to facilitate operations, such as maneuvering trailers, that may require the simultaneous operation of brake and accelerator.

(b) DEADLINE.—The Secretary shall issue a final rule under subsection (a) within 1 year after the date of enactment of this Act.

(c) LEAD-TIME.—The standard prescribed under subsection (a) shall provide not more than 2 model years of regulatory lead-time.

SEC. 103. PEDAL PLACEMENT STANDARD.

(a) IN GENERAL.—The Secretary shall initiate a rulemaking proceeding to prescribe a Federal motor vehicle safety standard that would prevent potential obstruction of pedal movement in passenger vehicles by establishing minimum clearances for passenger vehicle foot pedals with respect to other pedals, the vehicle floor (including aftermarket floor coverings), and any other potential obstruction to pedal movement, taking into account various pedal mounting configurations.

(b) DEADLINE.—The Secretary shall issue a final rule under subsection (a) within 2 years after the date of enactment of this Act.

(c) COMBINED RULEMAKING.—If appropriate, the Secretary may combine the rulemaking proceeding required by subsection (a) with the rulemaking proceeding required by section 102.

(d) LEAD-TIME.—The standard prescribed under subsection (a) shall provide not more than 2 model years of regulatory lead-time.

SEC. 104. ELECTRONIC SYSTEMS PERFORMANCE STANDARD.

(a) IN GENERAL.—The Secretary shall initiate a rulemaking proceeding to require electronic systems in passenger vehicles to meet minimum performance standards. Such a rule may include requirements for electronic components, the interaction of those electronic components, or the effect of surrounding environments on those electronic systems.

(b) DEADLINE.—The Secretary shall issue a final rule under subsection (a) within 3 years after the date of enactment of this Act.

(c) LEAD-TIME.—The standard prescribed under subsection (a) shall provide not more than 2 model years of regulatory lead-time.

SEC. 105. KEYLESS IGNITION SYSTEMS STANDARD.

(a) IN GENERAL.—The Secretary shall initiate a rulemaking proceeding to prescribe a Federal motor vehi-

cle safety standard for passenger vehicles with keyless and push-button ignition systems, to establish—

(1) the means by which a driver who may be unfamiliar with the vehicle uses the ignition system to safely bring a vehicle under control during an emergency situation; and

(2) the appropriate labeling, size, and location of the controls for such systems.

(b) DEADLINE.—The Secretary shall issue a final rule under subsection (a) within 1 year after the date of enactment of this Act.

(c) LEAD-TIME.—The standard prescribed under subsection (a) shall provide not more than 2 model years of regulatory lead-time.

SEC. 106. TRANSMISSION CONFIGURATION STANDARD.

(a) IN GENERAL.—The Secretary shall initiate a rulemaking proceeding to prescribe a Federal motor vehicle safety standard for passenger vehicles requiring an intuitive configuration and labeling of gear shifting controls for drivers, including drivers unfamiliar with the vehicle, and that makes the neutral position conspicuous.

(b) DEADLINE.—The Secretary shall issue a final rule under subsection (a) within 1 year after the date of enactment of this Act.

(c) LEAD-TIME.—The standard prescribed under subsection (a) shall provide not more than 1 model year of regulatory lead-time.

SEC. 107. VEHICLE EVENT DATA RECORDERS.

(a) MANDATORY EVENT DATA RECORDERS.—Not later than 60 days after the date of enactment of this Act, the Secretary shall require that all passenger vehicles be equipped with an event data recorder that meets the requirements for such recorders established in part 563 of title 49, Code of Federal Regulations. The Secretary shall require compliance with such requirement for all passenger vehicles manufactured in the first model year that is 2 years after the date of enactment of this Act.

(b) REVISED REQUIREMENTS FOR EVENT DATA RECORDERS.—The Secretary shall initiate a rulemaking proceeding requiring that the event data recorders required to be installed in passenger vehicles pursuant to subsection (a)—

(1) be temperature, water, crash, and tamper resistant; and

(2) continuously record vehicle operational data that can be accessed for retrieval and analysis in accordance with subsections (c) and (d).

(c) SPECIFICATIONS.—The rule—

(1) shall require such recorders to record, for a reasonable time before, during, and after a crash or airbag deployment, information that includes engine performance, steering, braking, acceleration, vehicle speed, seat belt use, and airbag deployment level, deactivation status, deployment time, and deployment stage, and may require such recorders to record other data, such as data related to vehicle rollovers, as the Secretary considers appropriate;

(2) shall require such recorders to store data for at least 60 seconds prior to, and 15 seconds after, a crash or airbag deployment;

(3) may require such recorders to capture certain events such as rapid deceleration, full-throttle acceleration lasting more than 15 seconds, and full braking lasting more than 10 seconds, even if there is not a crash or airbag deployment;

(4) may not require information recorded or transmitted by such data recorders to include the vehicle's location;

(5) shall require that data stored on such recorders be accessible, regardless of vehicle manufacturer or model, with commercially available equipment; and

(6) shall specify any data format requirements or other requirements, including an interoperable data access port, the Secretary determines appropriate to facilitate accessibility and analysis.

(d) LIMITATIONS ON INFORMATION RETRIEVAL.—

(1) OWNERSHIP OF DATA.—The rule issued under subsection (b) shall provide that any data in a data recorder required under the rule is the property of the owner or lessee of the motor vehicle in which the data recorder is installed.

(2) PRIVACY.—The rule issued under subsection (b) shall provide that information recorded or transmitted by such a data recorder may not be retrieved by a person other than the owner or lessee of the motor vehicle in which the recorder is installed unless—

(A) a court authorizes retrieval of the information in furtherance of a legal proceeding;

(B) the owner or lessee consents to the retrieval of the information for any purpose, including the purpose of diagnosing, servicing, or repairing the motor vehicle; or

(C) the information is retrieved by a government motor vehicle safety agency for the purpose of improving motor vehicle safety if the

personally identifiable information of the owner, lessee, or driver of the vehicle and the vehicle identification number is not disclosed in connection with the retrieved information.

(e) DISCLOSURE OF EXISTENCE AND PURPOSE OF EVENT DATA RECORDER.—The rule issued under subsection (b) shall provide that any owner's manual or similar documentation provided to the first purchaser of a passenger vehicle for purposes other than resale shall disclose that the vehicle is equipped with such a data recorder and explain the purpose of the recorder.

(f) ACCESS TO EVENT DATA RECORDERS IN DEFECT INVESTIGATIONS.—Section 30166(e)(3)(C) of title 49, United States Code, is amended by inserting ", including any electronic data contained within the vehicle's diagnostic system or event data recorder" after "equipment".

(g) DEADLINE FOR RULEMAKING.—The Secretary shall issue a final rule under subsection (b) not later than 3 years after the date of enactment of this Act.

(h) LEAD TIME.—The rule issued under subsection (b) shall take effect beginning with passenger vehicles manufactured in the first model year that is 2 years after the date on which a final rule is issued under this section.

TITLE II—ENHANCED SAFETY AUTHORITIES

SEC. 201. CIVIL PENALTIES.

Section 30165 of title 49, United States Code, is amended—

(1) in subsection (a)(1)—

(A) in the first sentence by striking "$5,000"and inserting "$25,000"; and

(B) by striking the third sentence; and

(2) in subsection (a)(3)—

(A) in the second sentence by striking "$5,000" and inserting "$25,000" ; and

(B) by striking the third sentence.

SEC. 202. IMMINENT HAZARD AUTHORITY.

(a) IN GENERAL.—Section 30118(b) of title 49, United States Code, is amended by adding at the end the following:

"(3) IMMINENT HAZARDS.—

"(A) ORDERS.—Notwithstanding the procedures set forth in paragraphs (1) and (2), if the Secretary decides that a motor vehicle or an item of motor vehicle replacement equipment is not compliant with a motor vehicle safety standard or contains a defect related to motor vehicle safety and presents an imminent hazard

to public safety that may result in death or serious bodily harm, the Secretary—

"(i) shall notify the manufacturer of the motor vehicle or replacement equipment of the decision that the vehicle or equipment poses an imminent safety hazard to the public and the basis for that decision;

"(ii) may order the manufacturer and any person having a legal relationship with the manufacturer, including dealers and distributors, to stop any further production, sale, offer for sale, lease, offer for lease, distribution, the introduction or delivery for introduction in interstate commerce, or importation into the United States of that motor vehicle or item of replacement equipment; and

"(iii) may order the manufacturer and any person having a legal relationship with the manufacturer, including dealers and distributors, to notify purchasers of the vehicle or item of replacement equipment of the Secretary's decision that the vehicle or the item of replacement equipment poses

an imminent safety hazard and provide the purchaser of such vehicle or item of replacement equipment with information explaining the safety risk and actions the purchasers can take to reduce that risk.".

(b) JUDICIAL REVIEW OF RECALL ORDERS.—Section 30161 of title 49, United States Code, is amended—

(1) in subsection (a)—

(A) by striking "A person" and inserting "(1) A person"; and

(B) by adding at the end the following:

"(2) A person adversely affected by an order issued under section 30118 may apply for review of the order by filing a petition for review in court of appeals of the United States for the circuit in which the person resides or has its principal place of business or the United States Court of Appeals for the District of Columbia Circuit. The petition must be filed not later than 59 days after the order is issued."; and

(2) by adding at the end the following:

"(f) AVAILABILITY OF REVIEW.—An action of the Secretary with respect to which review could have been obtained under subsection (a)(2) shall not be subject to judicial review in a civil action for enforcement.".

TITLE III—TRANSPARENCY AND ACCOUNTABILITY

SEC. 301. PUBLIC AVAILABILITY OF EARLY WARNING DATA.

(a) IN GENERAL.—Section 30166(m) of title 49, United States Code, is amended by—

(1) in paragraph (3)(A) by striking clause (ii) and inserting the following:

"(ii) customer satisfaction campaigns, customer advisories, recalls, consumer complaints, warranty claims, field reports, dealer communications, or other information involving the repair or replacement of, or software upgrades for, motor vehicles or motor vehicle equipment."; and

(2) in paragraph (4), by striking subparagraph (C) and inserting the following:

"(C) DISCLOSURE.—The information provided to the Secretary pursuant to this subsection shall be disclosed publicly unless exempt from disclosure under section 552(b) of title 5.".

(b) REGULATIONS.—Not later than 2 years after the date of enactment of this Act, the Secretary shall issue regulations establishing categories of information provided to the Secretary pursuant to this subsection that must be

made available to the public. The Secretary may also establish categories of information that may be withheld from public disclosure under paragraphs (4) and (6) of section 552(b) of title 5, United States Code.

(c) CONSULTATION.—In conducting the rulemaking required under subsection (a), the Secretary shall consult with the Director of the Office of Government Information Services within the National Archives and the Director of the Office of Information Policy of the Department of Justice.

(d) PRESUMPTION AND LIMITATION.—The Secretary shall issue the regulations with a presumption in favor of maximum public availability of information. The following types of information shall not be eligible for protection under section 552(b) of title 5, United States Code, and shall not be withheld from public disclosure:

(1) Production information regarding passenger vehicles, information on incidents involving death or injury, and numbers of property damage claims.

(2) Aggregated numbers of consumer complaints.

(e) NULLIFICATION OF PRIOR REGULATIONS.—Beginning 2 years after the date of the enactment of this Act, the regulations establishing early warning reporting class determinations in Appendix C of section 512 of title

49, Code of Federal Regulations, shall have no force or effect.

SEC. 302. IMPROVED NHTSA VEHICLE SAFETY DATABASE.

(a) IN GENERAL.—Not later than 2 years after the date of the enactment of this Act, the Secretary shall improve public accessibility to information on the National Highway Traffic Safety Administration's publicly accessible vehicle safety databases by—

(1) improving organization and functionality, including design features such as dropdown menus, and allowing for data to be searched, aggregated, and downloaded;

(2) providing greater consistency in presentation of vehicle safety issues; and

(3) improving searchability about specific vehicles and issues through standardization of commonly used search terms.

(b) VEHICLE RECALL INFORMATION.—The Secretary shall require that motor vehicle recall information be made available to consumers on the Internet, searchable by vehicle identification number in a format that preserves consumer privacy. The Secretary may initiate a rulemaking proceeding to require that such information be available on manufacturer websites or through other reasonable means.

(c) ACCESSIBILITY OF MANUFACTURER COMMUNICATIONS.—Section 30166(f) of title 49, United States Code, is amended by inserting ", and make available on a publicly accessible Internet website," after "Secretary of Transportation".

SEC. 303. PROMOTION OF VEHICLE DEFECT REPORTING.

Section 32302 of title 49, United States Code, is amended by adding at the end the following:

"(d) MOTOR VEHICLE DEFECT REPORTING INFORMATION.—

"(1) RULEMAKING REQUIRED.—Within 1 year after the date of enactment of the Motor Vehicle Safety Act of 2010 the Secretary shall prescribe regulations that require passenger motor vehicle manufacturers to affix, in the glove compartment or in another readily accessible location on the vehicle, a sticker, decal, or other device that provides, in simple and understandable language, information about how to submit a safety-related motor vehicle defect complaint with the National Highway Traffic Safety Administration. The information may not be placed on the label required by section 3 of the Automobile Information Disclosure Act (15 U.S.C. 1232).

"(2) APPLICATION.—The requirements established under paragraph (1) shall apply to passenger

motor vehicles manufactured in model years beginning more than 1 year after the date on which a final rule is published under that paragraph.".

SEC. 304. NHTSA HOTLINE FOR MANUFACTURER, DEALER, AND MECHANIC PERSONNEL.

The Secretary shall—

(1) establish a means by which mechanics, automobile dealership personnel, and automobile manufacturer personnel may contact the National Highway Traffic Safety Administration directly and confidentially regarding potential passenger automobile safety defects; and

(2) publicize the means for contacting the National Highway Traffic Safety Administration in a manner that targets mechanics, automobile dealership personnel, and manufacturer personnel.

SEC. 305. CORPORATE RESPONSIBILITY FOR NHTSA REPORTS.

(a) IN GENERAL.—Section 30166 of title 49, United States Code, is amended by adding at the end the following:

"(o) CORPORATE RESPONSIBILITY FOR REPORTS.—The Secretary shall require, for each company submitting information to the Secretary in response to a preliminary safety investigation, or in response to an official safety in-

vestigation under this chapter, that the principal executive officer or officers residing in the United States certify that—

"(1) the signing officer has reviewed the submission; and

"(2) based on the officer's knowledge, the submission does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading.".

(b) CIVIL PENALTY.—Section 30165(a) of title 49, United States Code, is amended—

(1) by striking "A person" in paragraph (3) and inserting "Except as provided in paragraph (4), a person"; and

(2) by adding at the end thereof the following:

"(4) FALSE, MISLEADING OR INCOMPLETE REPORTS.—A person who knowingly and willfully submits materially false, misleading, or incomplete information to the Secretary, after certifying the same information as accurate and complete under the certification process established pursuant to section 30166(o), shall be subject to a civil penalty of not more than $50,000 per day. The maximum penalty

under this paragraph for a related series of daily violations is $250,000,000.".

SEC. 306. APPEAL OF DEFECT PETITION REJECTION.

Section 30162 of title 49, United States Code, is amended by adding at the end the following:

"(f) JUDICIAL REVIEW.—A decision of the Secretary to deny a petition under this section is agency action subject to judicial review under chapter 7 of title 5, and such action shall not be considered committed to agency discretion within the meaning of section 701(a)(2) of such title. A person aggrieved by the denial of a petition may obtain judicial review by filing an action in the United States district court for the District of Columbia or the judicial district in which such person resides or has its principal place of business no more than 180 days after notice of the denial of the petition is published in the Federal Register.".

SEC. 307. DEADLINES FOR RULEMAKING.

If the Secretary determines that a deadline for a final rule under this Act, or an amendment made by this Act, cannot be met, the Secretary shall—

(1) notify the Committee on Energy and Commerce of the House of Representatives and the Senate Committee on Commerce, Science, and Transportation and explain why that deadline cannot be met; and

(2) establish a new deadline for that rule.

TITLE IV—FUNDING

SEC. 401. VEHICLE SAFETY USER FEE.

(a) AMENDMENT.—Subchapter I of chapter 301 of title 49, United States Code, is amended by adding at the end the following:

"SEC. 30107. VEHICLE SAFETY USER FEE.

"(a) ESTABLISHMENT OF FUND.—There is established in the Treasury of the United States a separate account for the deposit of fees under this section to be known as the Vehicle Safety Fund.

"(b) ASSESSMENT AND COLLECTION OF VEHICLE SAFETY FEES.—Beginning 1 year after the date of enactment of the Motor Vehicle Safety Act of 2010, the Secretary shall assess and collect, in accordance with this section, a vehicle safety user fee from the manufacturer for each motor vehicle that is certified as compliant with applicable motor vehicle safety standards pursuant to section 30115.

"(c) DEPOSIT.—The Secretary shall deposit any fees collected pursuant to subsection (b) into the Vehicle Safety Fund established by subsection (a).

"(d) USE.—Amounts in the Vehicle Safety Fund shall be available to the Secretary, as provided in appropriation Acts enacted after the date of enactment of the

Motor Vehicle Safety Act of 2010, for making expenditures to meet the obligations of the United States to carry out vehicle safety programs of the National Highway Traffic Safety Administration. Such amounts are authorized to remain available until expended.

"(e) VEHICLE SAFETY USER FEE.—

"(1) FIRST, SECOND, AND THIRD YEAR FEES.—The fee assessed under this section for the first three years shall be as follows:

"(A) $3 for each vehicle certified during the first year in which such fees are assessed.

"(B) $6 for each vehicle certified during the second year in which such fees are assessed.

"(C) $9 for each vehicle certified during the third year in which such fees are assessed.

"(2) SUBSEQUENT YEARS.—The fee assessed under this section for each vehicle certified after the third year in which such fees are assessed shall be adjusted by the Secretary by notice published in the Federal Register to reflect the total percentage change that occurred in the Consumer Price Index for all Urban Consumers for the 12 month period ending June 30 preceding the fiscal year for which fees are being established.

"(3) PAYMENT.—The Secretary shall require payment of fees under this section on a quarterly basis and not later than one quarter after the date on which the fee was assessed.

"(f) RULEMAKING.—Not later than 9 months after the date of enactment of the Motor Vehicle Safety Act of 2010, the Secretary shall promulgate rules governing the collection and payment of fees pursuant to this section.

"(g) LIMITATIONS.—

"(1) IN GENERAL.—Fees under this section shall not be collected, or if already collected, shall be refunded, for a fiscal year unless appropriations for vehicle safety programs of the National Highway Traffic Safety Administration for such fiscal year (excluding the amount of fees appropriated for such fiscal year) are equal to or greater than the amount of appropriations for vehicle safety programs of the National Highway Traffic Safety Administration for fiscal year 2010.

"(2) AUTHORITY.—If the Secretary does not assess fees under this section during any portion of a fiscal year because of paragraph (1), the Secretary may assess and collect such fees, without any modification in the rate, at a later date in such fiscal

year notwithstanding the provisions of subsection (e)(3) relating to the date fees are to be paid.

"(h) COLLECTION OF UNPAID FEES.—In any case where the Secretary does not receive payment of a fee assessed under this section within 30 days after it is due, such fee shall be treated as a claim of the United States Government subject to subchapter II of chapter 37 of title 31.

"(i) AUTHORIZATION OF APPROPRIATIONS.—In addition to funds appropriated under section 30104, there is authorized to be appropriated to the Secretary for the National Highway Traffic Safety Administration for each fiscal year in which fees are collected under subsection (b) an amount equal to the total revenue amount collected during the previous fiscal year from fees assessed pursuant to this section.".

(b) CLERICAL AMENDMENT.—The analysis for such chapter is amended by inserting after the item relating to section 30106 the following:

"30107. Vehicle safety user fee.".

SEC. 402. AUTHORIZATION OF APPROPRIATIONS.

Section 30104 of title 49, United States Code, is amended—

(1) by striking "$98,313,500"; and

(2) by striking "in each fiscal year beginning" and all that follows and inserting "and to carry out the Motor Vehicle Safety Act of 2010—

"(1) $200,000,000 for fiscal year 2011;

"(2) $240,000,000 for fiscal year 2012; and

"(3) $280,000,000 for fiscal year 2013.".

OPENING STATEMENT OF HON. ED WHITFIELD, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF KENTUCKY

Mr. WHITFIELD. Thank you very much, Mr. Chairman. This is our third hearing on NHTSA and auto safety issues including an oversight subcommittee hearing into the Toyota recalls. And today we are going to hear testimony about the discussion draft for the Motor Vehicle Safety Act of 2010, and we look forward to that testimony. During those previous hearings, we learned that we now are in the safest period of automobile history. NHTSA's report for 2009 revealed the lowest fatality rate on record, at one point, 1/6 fatality per 100 million vehicle miles traveled. Thirty years earlier, 1979, that number was 3.34 fatalities per 100 million vehicle miles traveled. We have more cars and more drivers on the road now than we did then.

Today we have more than 255 million vehicles registered, and they travel over 2.9 trillion miles per year. Thirty years ago we had 157 million vehicles registered traveling 1.5 trillion miles per year. These are impressive statistics and it speaks volumes about not only the job that NHTSA has done but it also speaks to the innovation of automobile manufacturers. And we also know that 90 percent of all accidents are caused by human error. Now today we are looking at this draft and this draft requires 7 specific safety mandates on manufacturers. It increases penalties exponentially. It expands the reporting data manufacturers must turn over to NHTSA without confidentiality protections.

And the thing that is most troublesome about this is that this is being proposed without taking into account what industry is already doing, what safety reviews are currently underway, and most significantly, whether this will result in any real safety benefits that saves lives. As a matter of fact, I don't think that we really even know the cause of the Toyota acceleration problem. All of us want our cars to be safer. We want regulators to have the appropriate tools to be an effective regulator. And Mr. Strickland testified in his last appearance before us that he had the necessary expertise to deal with this issue. And so I am very much concerned about the breadth of this bill, the width of this bill, the mandates in this bill.

I am particularly concerned about the unilateral authority for the administrator to stop production, sale, distribution, or even importation with no time limits, and I also think there is a lack of due process for manufacturers that may be hit with one of these mandatory stop orders. So I look forward to the testimony today. We have a lot of unanswered questions. I know this will be a productive hearing, and I might just also say another part of this bill that I am pretty much concerned about is that it gives authority to bring fines of up to $250 million against corporate executives for data that they submit to NHTSA. So we need to explore this closely, and I am confident that at the end of this hearing, at the end of this process, we will come up with a system that will improve highway safety and will be productive for the American people. Thank you.

[The prepared statement of Mr. Whitfield follows:]

Statement of the Honorable Ed Whitfield
Ranking Member, Subcommittee on Commerce, Trade, and Consumer Protection
Legislative Hearing on the Discussion Draft of the
"Motor Vehicle Safety Act of 2010"

Thank you, Mr. Chairman.

- This is our third hearing on NHTSA and auto safety issues, including an Oversight Subcommittee hearing into the Toyota recalls. I am concerned by what we learned following those hearings, and my deepest sympathies go to the friends and loved ones of those who died in tragic car accidents. I believe that our role here is to make sure NHTSA investigates the safety issues not only of the vehicles under recall, but all safety issues related to cars.

- That said, I have serious reservations about a number of provisions within this discussion draft. To me, it appears the Toyota recalls were a springboard for accomplishing a number of so-called reforms – at least one of which has been posed before and rejected by a court of law. It seems unfortunate to me to capitalize on such events. It also is evident to me that we have some of the best and brightest minds in the auto safety world - as Administrator Strickland testified at the previous hearing - working to find and address whatever safety issues may be behind these incidents. We

should allow those experts to properly identify the root of the problem and then propose a solution with a feasible timeline for implementation, in my view.

- As drafted, however, this bill imposes a number of mandates and required rulemakings (one of which is redundant to an existing mandatory safety standard) resulting in thousands of dollars of direct costs to consumers – all without taking into account what industry is already doing, what safety reviews are currently under way, and most significantly, whether this will result in any real safety benefit that saves lives.

- Safety performance improvements are laudable, but the fact is over 95 percent of accidents are due to human factors and errors – not vehicle defects. Tying NHTSA down in rulemakings and legal proceeding will necessarily divert resources from other priorities that might better serve to limit the human factor errors, such as distracted driving which NHTSA estimated to cause 6,000 highway deaths per year.

- As we discovered at this Subcommittee's hearing just a few weeks ago, we are now in the safest period in automobile history. NHTSA's report for 2009 reveals the lowest fatality

rate on record at 1.16 fatalities per 100 million vehicle miles traveled. Thirty years earlier in 1979, that number was 3.34 fatalities per 100 million vehicle miles traveled. We certainly have more cars and more drivers on the road now than we did then. Today we have more than 255 million vehicles registered and they travel over 2.9 trillion miles per year. Thirty years ago, we had 157 million vehicles registered travelling 1.5 trillion miles per year. Those are impressive statistics and it speaks volumes about not only the job that NHTSA's performed, but it also speaks to the innovation of automobile manufacturers.

- I want our cars to be safer, and I want our regulator to have the appropriate tools to be an effective regulator. But I want to make sure that any requirements we impose on industry – and thus on consumers – have a legitimate purpose and won't just increase price tags or expand the Federal government. I also want to make sure that we do not create a chilling effect on the innovations that have clearly made us safer.

- Mr. Chairman, this is not at all to say I do not support your efforts. Let me reiterate. I support any reasonable effort to make automobiles safer, and I think that if we work together

in a truly open, transparent, and bipartisan process – one that includes all relevant stakeholders rather than just a few – we can find workable middle ground.

Thank you, and I yield back the balance of my time.

Mr. RUSH. Thank you. The chair now recognizes the chairman emeritus of the full committee, the dean of the house, my friend from Michigan, Mr. Dingell, for 5 minutes for the purposes of opening statement.

Mr. DINGELL. Mr. Chairman, I will waive my opening statement. It is an excellent one and I would urge everybody to read it. However, in the interest of time of the committee, I would ask unanimous consent that it be inserted into the record, and I thank you for your courtesy and commend you for holding this hearing.

[The information was unavailable at the time of printing.]

Mr. RUSH. So ordered. Now the chair recognizes the gentleman from Maryland, Mr. Sarbanes, for 2 minutes for the purposes of opening statement.

OPENING STATEMENT OF HON. JOHN P. SARBANES, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Mr. SARBANES. Thank you, Mr. Chairman, for holding the hearing. I appreciate it very much. I look forward to the testimony today on what this legislation can offer to the National Highway, Traffic, and Safety Administration, both in terms of resources and in terms of extra authority. Of course, you know, Americans will make reasonable assumptions that we are protecting them until an incident occurs and then it points out some of the thin places in the oversight and regulation that we have, and we got to make sure that the agency is responsible for that oversight, have the tools they need, and have been given the charge that they deserve in order to provide that protection.

I am particularly interested in the testimony today that I hope will address the need or the issue of technology getting ahead of our oversight and how we have to keep up with that, and particularly the enhanced expertise when it comes to electronics within the department because of course that is where all the cutting edge technology has taken the automobile fleets. So I am looking forward to the testimony. I appreciate the hearing, and I yield back my time.

Mr. RUSH. The chair now recognizes the ranking member for the full committee, my friend from Texas, Mr. Barton, for 5 minutes for the purposes of opening statement.

OPENING STATEMENT OF HON. JOE BARTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. BARTON. I thank the distinguished chairman. It is good news that you appear to want to move in a regular order process on this piece of legislation. Those of us on the Republican side, at least myself, have just now seen it or we saw it last week, so it is going to take us a while to digest it, Mr. Chairman. But you have shown that you want to use the subcommittee process in terms of hearings and markup before we go to full committee, and I sincerely appreciate that. There are some provisions in the proposed legislation that make sense making the NHTSA consumer complaint database more user friendly. It is certainly something that I can support. I don't know that we have to have an act of Congress to make that happen, but I do support the concept.

I don't have an objection to targeting resources to improve the agency's technical capability. It is obvious that in this day and age we need our regulatory authorities to have as much technical competence as it is possible to have. Standardizing the brake override function is something that we certainly support. There are provisions in the proposed legislation that are troublesome. Ranking subcommittee member Whitfield mentioned some of those. I echo his concerns. I also echo or at least state that it appears this legislation in its current form would increase taxes. It would give the government some authority that I am not sure it deserves and some of the penalties to me seem like overkill.

I don't believe this is the time, Mr. Chairman, to just pile on the automobile industry or at least potentially pile on because they are facing tough times. On the issue of unintended acceleration, it is obvious that this is something that we still don't have an answer for with regards to what happened at Toyota. NHTSA has found, I understand, that Toyota has violated some of the reporting requirements of the TRED Act. They are not resubmitting its reports of unintended acceleration in a timely manner. NHTSA is a consequence of that and other Toyota issues, has assisted Toyota with the largest civil penalty ever assessed by itself, a little over $16 million. Six million Toyota cars have been recalled in the United States and adjustments have been made.

I am not sure, Mr. Chairman, those adjustments really address the problem, but at least Toyota did make an attempt to make some of those adjustments. We still don't have a—at least if we do, I don't know it, a concrete explanation of what has actually happened and why it happened. We do have two separate panels that are looking into the issue. I am prepared to wait for those expert studies to be presented to the committee before we begin the process of mandating new requirements that almost certain will raise cost and may be of questionable safety benefit although if the evidence is conclusive that there is a real safety benefit certainly myself and the other Republicans are going to be supportive of that.

We have specific concerns with the draft legislation, Mr. Chairman. It mandates that all vehicles be equipped with a data event recorder. I have a new hybrid, Tahoe hybrid, made in my congressional district in Arlington, Texas, and it has one of these recorders. I can see why you would want to have it especially if your vehicle is in an accident and you are accused of being at fault. One of the workers at the plant that gave a test drive in my new vehicle said that he has one on his and was able to point out in an accident that he was involved in because of the data recorder that he was not at fault and he had the data to back it up. So I certainly see that there is some value to these devices but we also have some privacy concerns, and we want to make sure that people know that the data recorder is in their vehicle and how it is going to be used.

As I said, the civil penalties in the draft legislation are excessive. Civil penalties of $5,000 per day are capped at $16.4 million. The draft legislation would raise that to $25,000 per violation and remove the cap. We certainly need to investigate that, Mr. Chairman. My time has almost expired, so I have got a few more things to say, but I will put that in the record. Again, kudos to you and Chairman Waxman for agreeing to go through regular order. If Repub-

licans are actually included in the drafting and in the witness process if there is a need to legislate, I am sure that Mr. Whitfield will be very interested in working with you and I with you and Mr. Waxman to try to do what is responsible. Thank you for holding this hearing.

[The prepared statement of Mr. Barton follows:]

Statement of the Honorable Joe Barton
Ranking Member, Committee on Energy and Commerce
Hearing on Committee Print of "H.R. __The Motor Vehicle Safety Act"
May 6, 2010

Thank you Mr. Chairman.

I appreciate moving through regular order on this proposed legislation. Because many of us first saw this draft legislation only last week, it's nice to have a chance to discuss the bill and understand how it may be implemented. Of course, the Majority is free to propose legislation and try to pass it without Republican support. And although this subcommittee held one oversight hearing following the Toyota recalls, the Majority followed that hearing by holding numerous meetings with stakeholders and drafting this legislation without Republican input. I hope we can now work together.

I believe there are several provisions in this bill that make sense. Making the NHTSA consumer complaint database more user-friendly is not a bad idea, though I'm not sure an act of Congress is necessary to do so. Similarly, I don't object to targeting resources to improve the agency's technical capabilities, if warranted, to save more lives. Similarly, standardizing brake override functions to prevent what Mrs. Smith experienced in her Lexus should be non-controversial.

Unfortunately, there are more troubling provisions in the legislation that take it far beyond a rational response to the Toyota recalls. This bill imposes more taxes, gives big government new unfettered authorities, and provides potentially crippling penalties on industry while providing questionable

safety benefits. We have been down this road before with consumer products, which caused substantial disruption to industry and little discernible benefit.

As we learned in our previous hearing, sudden unintended acceleration is not a new phenomenon. To the contrary, it has affected nearly every manufacturer over the years but a conclusive cause has never been determined - despite repeated attempts and petitions to find the root cause of each incident. In the most recent incarnation of the phenomenon, NHTSA found that Toyota violated the reporting requirements of the TREAD Act by not submitting its reports of unintended acceleration in a timely manner. And NHTSA assessed Toyota with the largest civil penalty ever assessed by NHTSA - $16.4 million dollars.

Six million Toyota cars have been recalled in the U.S. and adjustments have been made. Many theories and fabricated stories have also arisen. But no definitive cause of the unintended acceleration has been found. We have two separate panels of the best scientists from NASA and the National Academy of Science working with DOT to find answers. I believe we should wait for the results of those expert studies before mandating new requirements that will only raise costs and thereby put the safety benefits they may offer further out of reach of many Americans.

I have some specific concerns with the draft legislation. For example, Chairman Waxman's draft legislation mandates that all vehicles be equipped with event data recorders. I understand they can be a useful tool in accident reconstruction and providing information to help cars respond to extreme

conditions. But I have privacy concerns with a government-mandated data collection device and I am not comforted by the limitations in the text. Most Americans are probably unaware that their cars may already be equipped with such a device. Regardless, the surveillance this legislation mandates is a step that should make us all uncomfortable. There are benefits to recorders, but we must be careful not to give an unfettered right to the government or private entities to access the data. Similarly, I think it is perfectly reasonable to consider limiting the increasingly pervasive data collection of on-board GPS systems and how that information is used.

I am also concerned with the civil penalties in this draft legislation. Currently, civil penalties are $5,000 per violation per day, but are capped at $16.4 million. The draft legislation proposes to raise the daily penalty to $25,000 per violation and remove the cap. I believe the increase in penalties is unnecessary. The market has provided a more severe lesson -- not just for Toyota but for all other manufacturers -- than uncapped civil penalties will ever garner. Toyota's reputational damage is a warning notice to all manufacturers, and the more than three hundred lawsuits they now face are a far more severe penalty than any amount of civil fines can effect.

Additionally, I believe the fee assessed on all cars is just a new tax, plain and simple, and an unwise provision I cannot support. The agency should be funded through general appropriations. Congress will have to make decisions about priorities, rather than increasing taxes on consumers.

With respect to the imminent hazard authority, I do not object to the concept of giving the Administrator some extraordinary authority to prevent unsafe

vehicles from entering the marketplace. But the provisions in this draft should be more carefully designed to ensure a meaningful, useful, and rarely used tool.

I also wonder why we are increasing budget authorizations without understanding why the substantial increase is needed or how the money will be spent. And, finally, I wonder if any of these provisions should be enacted while the government maintains ownership of major domestic auto manufacturers. The federal government is now playing both regulator of and competitor in the auto industry. This situation raises serious questions about the appropriateness of these provisions and whether they decrease the chances that American taxpayers will ever be repaid for their investment in GM and Chrysler.

I look forward to the testimony and yield back.

Mr. SARBANES [presiding.] Thank the gentleman for his comments. We have been joined by the chair of the full committee, Chairman Waxman. The chair will yield 5 minutes to Chairman Waxman.

OPENING STATEMENT OF HON. HENRY A. WAXMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. WAXMAN. Thank you very much, Mr. Chairman. I want to thank Chairman Rush for convening the hearing on this discussion draft of the Motor Vehicle Safety Act of 2010, and for being a coauthor of the bill. This may be the most important vehicle safety bill in a generation. The objectives of this bill are to improve vehicle safety and strengthen the National Highway Traffic Safety Administration. With new safety standards requirements for data recorders, expertise at NHTSA, we hope to restore consumers faith in the cars the drive and the companies that make those cars. With new resources and tools available, we hope NHTSA will be able to critically evaluate the claims auto manufacturers make about the operation of their vehicle, conduct more thorough defect investigations and bring about timely recalls when necessary.

This legislation is what I call a win, win, win. It is a win for the public by protecting vehicle safety, a win for the auto industry by restoring confidence in their vehicles, and a win for the National Highway Traffic Safety Administration by giving the agency tasked with overseeing vehicle safety programs the resources to do the job. The recent Toyota recall severely rattled the driving public. This legislation meets the public's urgent concerns. The bill has four components. First, it improves electronics and expertise at the National Highway Traffic Safety Administration and calls for new safety standards to require brake overrides, to prevent pedal entrapment, and to meet performance requirements for electronic vehicle components.

New vehicles would also be required to be equipped with robust event data recorders to assist defect investigators in accident reconstruction. Second, it provides NHTSA with new enforcement authorities including lifting the cap on civil penalties and granting the agency the authority to order a recall if the agency identifies an imminent hazard of death or serious injury. Third, it requires greater transparency of early warning data submitted by companies to help NHTSA identify defect trends and restores judicial oversight of agency decisions to deny a defect petition. And finally, the bill addresses NHTSA's chronic resource efficiency for vehicle safety programs with an increased authorization of appropriations and the introduction of a modest user fee.

In addition to Chairman Rush, I want to thank Chairman Dingell for his contributions to this draft. I know that Chairman Dingell still has concerns about the bill, but he and his staff made many helpful and important contributions to the draft language, and it is my goal that when we report this bill from full committee Chairman Dingell and I will support the final product. I also hope that we will be able to earn the support of Ranking Member Barton and other members on his side of the aisle so this will be a true bipartisan effort.

What this bill does not do, and what no legislation can do, is ensure that NHTSA has the willingness and leadership to use its authority to the fullest extent. For that, we are relying on you, Administrator Strickland, and I must take this opportunity to commend you for your leadership overseeing the agency's response to the Toyota situation beginning just moments after your confirmation. It is clear that together with Secretary LaHood you are committed to putting NHTSA ahead of the curve when it comes to safety and it is our intention to make sure this bill gives you the authority and the resources you need. Thank you, Mr. Chairman.

Mr. SARBANES. Thank you, Mr. Chairman. The chair now recognizes Representative Sutton from Ohio for 5 minutes. Sorry about that. We got a vote coming up so we will try to get as many in as we can. Representative Stearns from Florida is recognized for 5 minutes.

OPENING STATEMENT OF HON. CLIFF STEARNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. STEARNS. Thank you. Mr. Chairman, thank you for holding this hearing on a draft bill. This is a draft bill, the Motor Vehicle Safety Act. I understand, and I think all of us do on this committee, the importance of needing to improve the National Highway Traffic Safety Administration, NHTSA's ability to handle and manage automobile recalls and the need for some changes to its safety authorities. I think we all agree. I support enhanced motor vehicle safety protections for American consumers, but, frankly, I do have some concerns with the draft bill as currently written. To begin with, this bill mandates that all auto manufacturers equip their vehicles with an event data recorder, an EDR, within 2 years, and also mandates the collection of additional specific data.

Most vehicles on the road today already have EDRs. This bill will allow the government access to all sorts of new information that these EDRs record in the name of "improving vehicle safety." My colleagues, there is some serious concerns about privacy here. What is the information it can collect and how is it going to be used and will the consumer know about it? This bill also contains a brand new text as mentioned, an auto manufacturers text. It is phased in at $3 per vehicle and increases to $9 per vehicle within 3 years. Now this is a tax. This is not within the jurisdiction of this committee. We have no oversight of it.

We also need to steer clear of dictating the way cars are designed, where parts are placed, particularly when it is unrelated to safety and there is no specific evidence demonstrating an identifiable problem. This bill contains overly prescriptive rulemaking authority for NHTSA to determine the size, location of all keyless ignition systems and a pedal placement standard. Manufacturers may have to redesign their current system. Obviously, those costs are going to be passed on to the consumer. This bill has serious economic ramifications. There is an $80 million increase for NHTSA. Many of us are concerned about that. I think we all agree that NHTSA needs some support but this $80 million, how is it going to be spent? Where is it going to be used? Is it going to hire more bureaucrats or is it actually going to make a difference?

There are additional problems with the elimination of a cap on civil penalties and a broad new eminent hazard authority that requires no fact checking. So I hope, Mr. Chairman, we can move this bill forward but in a bipartisan manner because I think the bill needs improvement today. Thank you.

Mr. SARBANES. Thank you. We have got votes pending so I would encourage people if they could maybe keep their opening statements a little bit shorter, we could get to a couple more people before we adjourn for a short break. I recognize the gentlelady from Ohio, Congresswoman Sutton.

OPENING STATEMENT OF HON. BETTY SUTTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Ms. SUTTON. Thank you, Mr. Chairman. Over the last few months consumers have been alarmed by the recall of millions of Toyota vehicles due to unintended acceleration. For consumers, the safety of a vehicle is a top priority which is why it was especially daunting to learn that for Toyota the decision of whether to recall vehicles on our roads was made outside of the U.S. Our consumers expect better and with the Motor Vehicles Safety Act we have the opportunity to ensure that NHTSA's mission to save lives, prevent injuries, and reduce economic costs due to traffic, to road traffic crashes is accomplished. It is essential that we work together to produce a good bill, a bill that will address the problems that have become apparent in recent months.

NHTSA must be capable of conducting necessary, in-depth investigations into new and complex systems and lighter materials in vehicles. NHTSA must also be able to effectuate necessary, timely recalls so that U.S. officials are not left in the position of having to travel overseas to ask for a voluntary recall of unsafe vehicles on our roadways carrying our families, and we must find a way to address the revolving door issue so that the American people can be assured that officials are always working to ensure the safety with the sharp focus that it requires. The Motor Vehicle Safety Act also would require NHTSA to promulgate a rule that requires all vehicles to be equipped with an event data recorder, which I think is overdue. In 2004, some automakers urged NHTSA to adopt a federal motor vehicle safety standard that mandated the installation of event data recorders on passenger cars and light trucks.

NHTSA did not go forward at that time with the proposed rulemaking for EDRs, and that was 6 years ago, so I am concerned that the issues with the unintended acceleration in recent months may also delay the agency's rulemaking of stability control for commercial vehicles. And I would like to hear about when NHTSA plans to release a Notice of Proposed Rulemaking for stability control systems for commercial vehicles. I want to stress that I appreciate your commitment to fulfilling NHTSA's important responsibilities, Administrator Strickland, and the commitment of Secretary LaHood, and I look forward to hearing from you and all the witnesses today about ways we might improve the Motor Vehicle Safety Act. Thank you.

Mr. SARBANES. The chair recognizes Mr. Latta from Ohio for 2 minutes.

OPENING STATEMENT OF HON. ROBERT E. LATTA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. LATTA. Thank you, Mr. Chairman, and Ranking Member Whitfield, thank you for holding this hearing today to discuss the discussion draft on the Motor Vehicle Safety Act for 2010. I think it is very important that the United States looks at the recent incidents involving motor vehicle safety and ensure that our citizens are safe behind the wheel. With that in mind, I have serious concerns about this draft legislation and particularly with privacy concerns and user fees that will be passed along to consumers. Section 401 of this legislation requires a new per vehicle manufacturer user fee. This provision is not capped in the proposed legislation and will be passed along to the consumer. My district, the 5th of Ohio, currently has an average unemployment rate of 13.5 percent.

The federal government cannot continue to hinder businesses and consumers with unnecessary fees and burdensome regulations. In addition, I have concerns with Section 107 mandating the EDRs in all new vehicles within 2 years. Not only will this mandatory requirement drive up the cost to the manufacturer which will, again, be passed along to the consumer but will with no opt out provision or ability to turn the device off will bring serious privacy concerns for American citizens.

While it is my understanding that 80 percent of new cars sold today are equipped with EDRs there still remains significant privacy concerns dealing with the rights of what information the government has access to including information gathering for court orders, defect investigations, and vehicle safety improvement information gathering. Finally, this draft legislation will authorize $720 million for fiscal year 2011 to 2013 and 2011. In 2011 until 2013 this is an $80 billion increase in authorized funding without an explanation on how these additional funds will be used by NHTSA or how it will go towards saving lives. This legislation is in the same theme of hidden costs and tax increases on hard-working Americans.

At the time of economic hardship, this legislation looks to force more bureaucratic mandates on businesses. Our nation's economic future requires that this Congress and Administration exercise serious fiscal restraint and stop excessive spending and be held accountable and be transparent. Mr. Chairman, I appreciate your holding the hearing on the Motor Vehicle Safety Act of 2010. I look forward to working with you and Ranking Member Whitfield, and I yield back.

Mr. SARBANES. I thank the gentleman. The chair recognizes the gentleman from Michigan, Mr. Stupak, 2 minutes.

OPENING STATEMENT OF HON. BART STUPAK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. STUPAK. Thank you, Mr. Chairman, and Ranking Member Whitfield, for holding this hearing on draft legislation to strengthen the National Highway Traffic Safety Administration, NHTSA's authority to provide the resources necessary to keep consumers safe on the road. On February 23 of this year, I chaired a hearing on the Oversight and Investigation Subcommittee to examine the response by Toyota and NHTSA to incidents of sudden unintended

acceleration in Toyota vehicles. The subcommittee found that NHTSA lacks the personnel, resources, and authority to adequately address and investigate auto safety complaints. My subcommittee will further examine these issues in a May 20 hearing. As we continue to explore the specific failures of Toyota and the federal regulators in this specific incidence, it is imperative that we begin the process of enacting legislation to address the weaknesses we already know exist.

Through the Toyota investigation, we learned a lot about event data recorders or EDRs and about the problems that exist in allowing federal regulators, law enforcement, and vehicle owners, consumers, access to the data they contain. The new requirements contained in Section 107 of the draft bill making EDRs mandatory setting a set standard of data they must contain and ensuring they are accessible with commercially available equipment will provide all parties the information they need to troubleshoot, investigate, and ultimately remedy future safety issues. Granting it is an eminent hazard recall authority is an equally necessary step to protect Americans. I am also pleased that committee draft requires that information submitted through the early warning reporting system is publicly disclosed. I look forward to delving into these issues more thoroughly and hearing from our witnesses as to whether the disclosure requirements in the draft legislation adequately provide regulators, law enforcement, and consumers access to the information they need.

I look forward to a productive hearing to discuss meaningful improvements to the National Highway Traffic Safety Administration and to our additional oversight hearings. I appreciate the willingness of our witnesses to be here, and I will listen closely to any suggestions they may have to improve this legislation. I yield back, Mr. Chairman.

Mr. SARBANES. I thank the gentleman. We are going to have one more opening statement before we adjourn for the votes. I recognize the gentleman from Louisiana, Mr. Scalise.

OPENING STATEMENT OF HON. STEVE SCALISE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Mr. SCALISE. Thank you, Mr. Chairman. I appreciate you having this hearing on the Motor Vehicle Safety Act. I would like to acknowledge Chairman Rush for bringing this legislation forward and his hard work on behalf of consumers. The goals of this draft legislation strengthening NHTSA and improving vehicle safety are good, but I have concerns about the steps it takes to get there. To start with, Section 202 provides NHTSA with new expansive imminent hazard authority to order a manufacturer to stop production, sale, distribution or importation of vehicles. I am concerned that this provision would short circuit the recall process, not improve it, and it will give unilateral authority to the Administrator while taking away due process from manufacturers.

What is more alarming is that this provision is in the draft while DOT Secretary LaHood and NHTSA Administrator Strickland both previously testified that they had existing authority to pursue potential violations. The draft legislation also places a vehicle safety

user fee on manufacturers which is, of course, another word for a tax increase that will raise the cost of buying a car on families. Furthermore, this tax is uncapped and would continue to rise each year after it is enacted. Not only does the draft increase the cost of vehicles for consumers but it also increases the burden of American taxpayers by raising the authorized funding for NHTSA by $80 million over 2 years with no explanation of where this new spending will come from or how the money will be used.

While I understand that we need to examine improving NHTSA's capabilities, we must keep in mind the need to restore fiscal discipline. With a $1.5 trillion deficit there might be some in Washington who don't see anything wrong with increasing a budget by 40 percent over 2 years, but there are also those of us who are adamant that we must reign in the out of control spending that is taking place here in this Congress, and finally there are also 2 provisions I must mention. Section 201 eliminates the total cap on penalties, and the second provision is 301 that expands the categories of data that must be made public as part of any early warning reporting program, which could include confidential business information and unwarranted claims.

Removing the cap on total penalties and requiring the disclosure of proprietary information makes me question who we are trying to strengthen, NHTSA or the trial lawyers. I would like to close by reiterating that I am pleased we are trying to improve vehicle safety and support NHTSA, but I am concerned that this bill is driving down the wrong road. Thank you, and I yield back.

Mr. SARBANES. Thank you, Mr. Scalise. I have been promised by the next two that they will be 30 seconds, real quick. Mr. Green of Texas.

Mr. GREEN. Mr. Chairman, I would like to ask unanimous consent for my full statement to be placed in the record and just make one statement. I introduced H.R. 5169, the Event Data Recorder Enhancement Act. The draft bill, our bill I think looks like the Chevy whereas what the draft is more like a Mercedes, and we would hope we could afford the Chevy plan on the EDR. But I am glad the bills—we have a draft. Obviously, after our hearing we heard from Toyota owners. We need legislation, and I would be glad to work with the chair on the bill.

[The prepared statement of Mr. Green follows:]

Congressman Gene Green
House Committee on Energy and Commerce
Subcommittee on Commerce, Trade, and Consumer Protection
Hearing on the Motor Vehicle Safety Act of 2010
May 6, 2010

Mr. Chairman, thank you for holding this hearing on draft legislation to enhance the jurisdiction of the National Highway Transportation Safety Administration (NHTSA) and to give it direction for rulemakings this Committee has found necessary through previous oversight hearings.

Chairman Waxman, along with Senator Rockefeller released discussion drafts last week that address a number of issues that have come up as this Committee has looked into recent recalls and worked with the Department of Transportation and NHTSA to find areas where additional authority and resources are necessary.

One issue I have taken particular interest in is the area of event data recorders, or EDRs. Time and time again, there are conflicting accounts between what drivers of vehicles report happening prior to an accident, and what is ultimately concluded to have happened.

Earlier this year the Subcommittee on Oversight and Investigations heard testimony from Rhonda Smith about unintended acceleration in her vehicle, which Toyota and NHTSA concluded was the result of floor mats. Ms. Smith has adamantly said she took numerous different steps to get the car to stop and it could not have been just a floor mat problem.

Issues like this are why I introduced H.R. 5169, the Event Data Recorder Enhancement Act. This bill would require all passenger motor vehicles sold in the U.S. to have an EDR by model year 2015.

It builds on what NHTSA has already done in this area by making the voluntary rule NHTSA established on EDRs mandatory. It also goes a step further to require NHTSA to establish a standard method for accessing the information, and sets privacy provisions that establishes the vehicle owner or lessee as the sole owner of the EDR information, and only allows others to access the information with the owner's consent, with a court order, or for the purposes of improving vehicle safety by a government official.

This is a balanced approach that builds on the work NHTSA has already done on EDRs, ensures that manufacturers who have not started voluntarily installing EDRs have a sufficient phase in period to meet the requirement, and most importantly it gets these important devices in every passenger vehicle sold in the U.S.

I have concern that the second part EDR provisions in this bill go too far for what is technologically and financially feasible for the benefits it would provide, and believe the lead time is much too short for what is necessary for manufacturer compliance.

Getting EDRs into every car should be the car, and NHTSA has the authority to amend and revise its EDR rule as necessary and should be left to do so as it gets information that advancements are necessary and technologically feasible.

Mr. Chairman, I have questions with other portions of this bill as well, but look forward to hearing testimony from today's witnesses first to get their perspective on the different requirements in this bill.

Mr. SARBANES. Mr. Gingrey is recognized for 100 milliseconds.

Mr. GINGREY. Mr. Chairman, you know I am from Georgia and not Maryland so that might be awfully difficult for me to do. But if you will yield unanimous consent to let me submit my entire testimony, I will get going quickly.

Mr. SARBANES. Without objection.

Mr. GINGREY. Mr. Chairman, I want to thank you for calling today's hearing on the discussion draft of the Motor Vehicle Safety Act of 2010. In light of recent events that have occurred, it is very important that we use the opportunity today to review the way NHTSA, National Highway Traffic Safety Administration, operates but with the ultimate goal of keeping vehicular travel as safe as possible for drivers across the country. Mr. Chairman, while I believe it is important to review the actions and work of NHTSA, I think it is equally important that we do not move forward on legislation that would add mandates on the transportation industry or create more of a burden for the already struggling American taxpayer. So I certainly hope that we keep this in mind as we hear from our witnesses today and work to craft the proper legislation to reauthorize NHTSA, and I yield back.

Mr. SARBANES. Thank the gentleman. Mr. Braley, do you want to enter something into the record?

Mr. BRALEY. I just want to make a very brief comment. I am a firm believer in the power of symbolism, and as I was coming back from baseball practice this morning, Mr. Chairman, I saw a Ford Maverick with a Ron Paul sticker on it. It reminded me that the Maverick was the predecessor of the Fort Pinto, which was introduced in 1970, the same year that NHTSA was founded, and as we consider the important subject matter of this hearing and how we go about improving safety for all auto consumers and passengers and operators in this country, I think it is important to think back over the history of this agency and the important mission that it has, and that is why I will yield back the balance of my time and rush to the floor to vote. Thank you.

Mr. SARBANES. We are going to adjourn the committee for the votes. When we come back, we will go straight to the first panel. We appreciate your patience. We are adjourned.

[Recess.]

Mr. RUSH. The subcommittee is called back to order. The chair really wants to, first of all, extend my deepest and sincere apologies for the delay. It is just the way we have had to move today. I had a number of conflicting items on the agenda and we had to try to cover a lot of bases. And now the chair wants to recognize the esteemed administrator of the National Highway Traffic Safety Administration, the Honorable David Strickland. Mr. Strickland, we really appreciate the fact that you have taken your time to be here and that you have been so patient with us. And you are recognized now for 5 minutes for the purposes of an opening statement. And before I do recognize you, Mr. Strickland, I would ask that you allow me to swear you in. That is the practice of the subcommittee.

[Witness sworn.]

Mr. RUSH. Let the record reflect that the witness has answered in the affirmative. And now you are recognized for 5 minutes.

TESTIMONY OF THE HONORABLE DAVID STRICKLAND, ADMINISTRATOR, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

Mr. STRICKLAND. Mr. Chairman, thank you so much for this opportunity, Mr. Whitfield and other members of the committee. Again, the men and women of NHTSA thank you for the chance today to discuss the proposals to strengthen the authority of the National Highway Traffic Safety Administration. I applaud the committee members and their staff for working so hard to understand these issues and for reflecting that understanding in the committee draft of the Motor Vehicle Safety Act of 2010. Time has not permitted full review of all the draft legislation's provisions throughout the executive branch, so my remarks will be confined to some of the major provisions.

Today's hearing is an opportunity to work together to improve the safety of our Nation's roadways. We very much appreciate the provisions in the committee draft that would enhance NHTSA's vehicle safety authority. NHTSA is a strong agency. The bill's authorities would make us stronger. If enacted, these measures would significantly increase the agency's leverage in dealing with manufacturers. The addition of imminent hazard authority would bring NHTSA's authority into line with many of its other sister safety and health agencies. This provision gives NHTSA an important avenue through which to deliver on its consumer protection mission, a mission that I strongly believe in.

As part of that safety mission, NHTSA collects a wealth of information in its various databases. We share in President Obama's assessment that information maintained by the federal government is a national asset. This proposed bill would require NHTSA to improve the accessibility of the information on its publicly available databases. We will be very happy to do so in looking at several ideas on how to make our recall and our investigations data more user friendly. Even in the current state, NHTSA's information stores are among the most outstanding consumer safety databases in government. Improving them would promote transparency. Transparency promotes accountability and provides information for citizens about what their government is doing.

I will work with the Secretary and the Congress to strengthen and improve NHTSA so that it can continue to achieve its mission in saving lives, preventing injuries, and reducing economic costs due to road traffic crashes. We will be accountable to the President, to Secretary LaHood, and to the American Public, for whom we at NHTSA proudly serve. Thank you very much, Mr. Chairman, and I look forward to answering the questions of the committee.

[The prepared statement of Mr. Strickland follows:]

ORAL TESTIMONY OF
THE HONORABLE DAVID L. STRICKLAND
ADMINISTRATOR, NATIONAL HIGHWAY
TRAFFIC SAFETY ADMINISTRATION
BEFORE THE

COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITEE ON COMMERCE, TRADE, AND
CONSUMER PROTECTION
U.S. HOUSE OF REPRESENTATIVES

HEARING ON

Committee Draft of The Motor Vehicle Safety Act of 2010

May 6, 2010

Chairman Rush, Ranking Member Whitfield, and

Members of the Committee:

Thank you for the opportunity to appear before you today to discuss proposals to strengthen the authority of the National Highway Traffic Safety Administration (NHTSA). I applaud the committee members and their staff for working so hard to understand these issues and for reflecting that understanding in the committee draft of "The Motor Vehicle Safety Act of 2010." Time has not permitted full review of all of the draft legislation's provisions throughout the Executive Branch, so my remarks will be confined to some of the major provisions.

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of Transportation, and to the American Public, whom we are proud to serve.

Thank you and I look forward to answering your questions.

Mr. RUSH. The chair thanks the witness. Now the chair recognizes himself for 5 minutes for questioning of the witness. Mr. Strickland, I have a lot of respect for you. I know you, and I have known you and your family for quite some time and have nothing—I am very proud of what you have accomplished and am proud of the things that you have done in terms of your public service work. But I am a little disappointed, I must say, in your opening statement. I have to be very honest with you. This legislation—first of all, I know there is a process for developing testimony in the executive branch, and I am very cognizant of the fact that you only have a short turnaround time in terms of developing your testimony here. With that said, there is really a gaping hole that exists in your testimony in the complete lack of detail that I was expecting, and I know that you are capable of and I have seen you do this in the past.

There is a lack of detail in your testimony that leaves us kind of wanting as a subcommittee. This legislation that is before us aims to overhaul your agency providing you with new enforcement authorities and additional resources. And we are glad to do this. We are proud to do this. We are giddy about doing this for NHTSA and giving it new authorities and resources. And it also mandates several new safety standards and creates new transparencies in auto safety. And I know you got more to say in regards to whether it is in this bill or not. What do you see as the most important new authority Congress could grant NHTSA that would strengthen the agency and improve auto safety? What is the most important new authority that you need?

Mr. STRICKLAND. Well, Mr. Rush, I definitely do not want to disappoint you or the rest of the committee with the breadth of my statement. As you are aware, we at the Department of Transportation and also with the executive branch do have a process by which we evaluate both discussion and introduce legislation, and that is in process. I apologize profusely that we were not able to give you more granulated and detailed assessment of the work. That will be coming. I will be more than happy to provide that more detailed recitation when it has completed the review. I am happy to appear before the committee if that is your wish to do so at that time, but I will do my best to try to fill in some of the issues that you wish to discuss.

The bill, to give an overview, anything that provides NHTSA the authority to be able to expedite the recall process, whether it is in negotiating with the manufacturers of trying to get them to issue a voluntary recall or an ability for the agency to be able to move forward in a fashion—to do so in a mandatory fashion such as with the imminent hazard authority. Those are the core, I think, of what we will want to achieve here at NHTSA, which is to be an agency that can take risks off the road as quickly as we can, and anything in this legislation that helps us achieve that is something that I believe that NHTSA would wholly embrace. There is lots of details in part of those new authorities and process that we stand at the ready to discuss.

Anything that helps us achieve that goal, which is including the increase in penalty authority, I think the opportunity for us to really have a penalty that creates a real deterrent for manufacturers

and equipment manufacturers as well to not violate the Act, I think helps in that leverage in the negotiation process and also helps those manufacturers make quicker decisions in terms of safety.

Mr. RUSH. My time is running down, but the other question that I have, what is missing from this bill in your opinion? What is missing? What can we do additionally?

Mr. STRICKLAND. In our evaluation, our preliminary evaluation and discussions with your staff and other staff members, this does capture the universe of what, I think, would be helpful to NHTSA. There are clearly other things that could be of assistance, but in terms of what we would anticipate as being helpful to strengthen the authority, the bill does give a fantastic foundation for the first steps in helping us be a stronger and more transparent agency.

Mr. RUSH. The chair yields back the balance of his time. I recognize the gentleman from Kentucky, Mr. Whitfield, for 5 minutes.

Mr. WHITFIELD. Thank you, Chairman Rush, and, Mr. Strickland, for your testimony. I for one am pleased that you all are reviewing this legislation carefully because it would bring about significant changes, not only to NHTSA but certainly to a lot of manufacturers around the country, as well as to consumers, and I do think it is imperative that you all take the necessary time to look at this closely. You testified before our committee not too long ago, and if I were the administrator of a federal agency, I would be thrilled if some legislation came along giving me new authority, giving me new money, and so I can understand how you all would not be opposed to this legislation. But when you testified before—I mean the important thing is that you be able to do your job, which I think NHTSA is doing.

But you testified before that you have engineers at NHTSA, you have electrical engineers at NHTSA, you have software engineers, you have engineers in East Liberty, Ohio. You can hire consultants for additional expertise, and you said there is not a notion that we don't have the proper expertise to handle today's automobiles. And then Mr. Dingell asked you a question, and I know that President Obama has given you additional money in his budget for this year, and you said when the President's budget is passed, we will have the resources we need.

And, you know, this is all we can expect from people who have the responsibility for these agencies in our government is to give us an honest, candid view of whether or not they have adequate resources. And you said very clearly that you had adequate resources, so many of us feel like this bill is too broad. But I want to ask you this question. The center that this bill establishes, the Center for Vehicle Electronics and Emerging Technologies, is there such a center similar to that at the Department of Transportation for railroads or for airlines or for any other type of transportation?

Mr. STRICKLAND. I am not familiar if there is a similar center that focuses on that particular area. I will have to get back to you on the record with some specificity. I may be incorrect on that, but from my recollection I don't believe there is one.

Mr. WHITFIELD. Was your opinion solicited on whether or not this center should be placed in this legislation before the draft was written?

Mr. STRICKLAND. We were not asked in terms of to give a particular comment when the discussion draft was transmitted to the Department of Transportation. We put it in for internal review and also sent it over to the White House also for their review, so we have not issued an opinion about that particular concept at this time but when we have finished our review, we will definitely transmit that opinion.

Mr. WHITFIELD. But it sounds like you were not really involved in drafting this legislation in your agency and providing information to draft this legislation.

Mr. STRICKLAND. No, sir. We were asked—we were consulted in terms of concepts but the actual technical assistance and drafting was handled by the committee staff.

Mr. DINGELL. Will the gentleman yield?

Mr. WHITFIELD. Yes, sir.

Mr. DINGELL. I thank you. Would you make that review available to this committee as soon as you can, please?

Mr. STRICKLAND. Yes, sir. Absolutely, Mr. Dingell.

Mr. DINGELL. I thank the gentleman.

Mr. WHITFIELD. I wish that they had talked to you in some detail before this legislation was written because it is your agency's responsibility to carry out the role and the responsibility, and if there was any group that would have a clear understanding of this, it would be your agency. One other question I would just like to ask. Toyota was fined, I think, $16 million which I guess was the maximized——

Mr. STRICKLAND. Yes, sir, that is correct.

Mr. WHITFIELD. —fine that could be levied. How was it actually determined what that dollar value should be for that fine?

Mr. STRICKLAND. That is actually a straight calculus of the actual violation times the number of cars that were in violation. If I am not mistaken, I believe that there was not a cap that limited us to $16.375 million. I believe the fine could have been well over $13 billion for the entire population of cars that were subject to the violation of the timeliness query.

Mr. WHITFIELD. It could be how much?

Mr. STRICKLAND. $13 billion.

Mr. WHITFIELD. Billion?

Mr. SRICKLAND. Yes.

Mr. WHITFIELD. You have that authority?

Mr. STRICKLAND. That would be the maximum per violation but we are limited to $16 million. I believe our recitation of breakdown of the possible maximum fine without the gap was included in our demand letter to Toyota.

Mr. WHITFIELD. OK. Thank you.

Mr. RUSH. The chair now recognizes the chairman emeritus of the full committee who graciously relinquished his time for an opening statement to be used now during the time of questioning, so the chair recognizes the chairman emeritus for 10 minutes for the purpose of questioning the witness.

Mr. DINGELL. Mr. Chairman, I thank you for your courtesy. I commend you for the hearings. My questions, Mr. Administrator, will be answerable yes or no. The first question, Title I of the discussion draft under question mandates that DOT prescribe new

federal motor vehicle safety standards for passenger cars without any preliminary study by NHTSA or DOT or any of them. Is DOT or NHTSA sufficiently prepared to undertake such rulemakings for each of these proposals without any preliminary study of the need, practicality and appropriateness of each such rule for all manufacturers and their models, yes or no?

Mr. STRICKLAND. NHTSA at this time is beginning its preliminary research——

Mr. DINGELL. No, no. I want a yes or no. I have limited time. Yes or no.

Mr. STRICKLAND. At this particular time, Mr. Dingell, we are preparing to undertake possible rulemaking——

Mr. DINGELL. So you are not at this time prepared—you are not prepared to answer the question or you are not prepared to perform the rulemaking without the necessary study switch?

Mr. STRICKLAND. We have work underway for all of those things right now.

Mr. DINGELL. I don't want to filibuster. I just want a yes or no answer. I know that is going to be fairly easy once we get to working together.

Mr. STRICKLAND. Yes, sir, Mr. Dingell.

Mr. DINGELL. Yes or no.

Mr. STRICKLAND. At this time, no, we would not be prepared to go to immediate rulemaking on those issues.

Mr. DINGELL. Thank you. It is really easier than we thought, isn't it. My reading of Title I of the discussion draft shows that it does not amend the existing safety act of Title 49 of U.S. Code, and thus does not require any new federal motor vehicle safety standard to be prescribed in accordance with Section 3011 of the Safety Act. Do you agree?

Mr. STRICKLAND. As drafted, that is correct. Yes, Mr. Dingell.

Mr. DINGELL. Thank you. Now, Mr. Strickland, further to my knowledge there is nothing in Title I of the discussion draft that would make these new standards subject to the provisions of the existing safety statute and thus enforceable. Is this observation correct, yes or no?

Mr. STRICKLAND. That is a correct observation, Mr. Dingell.

Mr. DINGELL. Now, Mr. Administrator, as you know, the Safety Act generally applies to new motor vehicles because Title I of the discussion draft does not amend the Safety Act and thus is not subject to the Act's definition. Is it conceivable that the term passenger vehicles as used in the discussion draft would include new cars and cars also that are already on the road, yes or no?

Mr. STRICKLAND. It is not conceivable, sir. I believe it would only apply to new cars because the definition is cross applied throughout Title 49 but we will definitely be happy to give technical assistance to——

Mr. DINGELL. Is the answer yes or no?

Mr. STRICKLAND. Is it conceivable? No, it is not. It will only apply to new cars.

Mr. DINGELL. It will not?

Mr. STRICKLAND. It will not be retroactive.

Mr. DINGELL. I would like to have you submit further information as to why you make that statement.

Mr. STRICKLAND. Yes, sir.

Mr. DINGELL. The rule proposes in Title I of the discussion draft each provide lead time requirements of one or two model years, and in one case 60 days after enactment for all makes and all models of passenger cars without any determination by the Secretary as to the reasonableness and practicability of those deadlines or applicable rule. Does DOT today know that such lead times are realistic and practical taking into consideration energy, needed technology, impacts on models, as well as costs of compliance? Yes or no.

Mr. STRICKLAND. Past practice and rulemaking, those are very aggressive deadlines——

Mr. DINGELL. Just yes or no if you please.

Mr. STRICKLAND. No, sir. I believe that those deadlines are impractical at this point.

Mr. DINGELL. You believe what?

Mr. STRICKLAND. I believe that those deadlines are very tight and possibly impractical until we can actually work with the manufacturers in terms of meeting lead time needs.

Mr. DINGELL. Thank you very much, Mr. Administrator. Now, Mr. Administrator, my understanding of the federal motor vehicle safety standards is that they are almost universally performance standards, yet only one proposal, Section 104 on electronic systems, calls for a performance standard while event data recorder and brake override proposals are quite prescriptive. Is DOT now ready to develop such prescriptive rules and know definitively that they will provide "motor vehicle safety" as the term is defined in the Safety Act? Yes or no.

Mr. STRICKLAND. Research is under way. NHTSA is not prepared to do that at this time.

Mr. DINGELL. OK. Now, Mr. Administrator, with respect to Section 201, the discussion draft related to civil penalties, I note it contains no provision for judicial review or penalty assessment criteria such as the size of the business, economic impact, history, duration of the violation, seriousness, and willfulness. EPA must take into account these factors when assessing civil penalties under the Clean Air Act and under your administration or other provisions requiring similar actions. Should the Safety Act be amended to include possible judicial reviews of penalties and require DOT to take into account penalty assessment criteria such as EPA must? Yes or no.

Mr. STRICKLAND. May I get back to you on the record for that specifically, Mr. Dingell?

Mr. DINGELL. Mr. Administrator, the discussion draft strikes the maximum penalty for related series of violations. Do you believe that this is justified especially in view of the fact that the Safety Act contains no provision for judicial review of penalties or requires the Secretary to take into account any penalty assessment criteria? Yes or no.

Mr. STRICKLAND. There are factors that we currently consider for the evaluation of a penalty right now for current authorities. That would cross apply to this situation so as drafted the NHTSA would take those under consideration——

Mr. DINGELL. How could you do it if you are not required by law?

Mr. STRICKLAND. It is by our current administration practice in assessing penalties.

Mr. DINGELL. That is just policy which would change with the wind. Mr. Administrator, Section 202 of the discussion draft allows the Secretary to issue an imminent hazard order against vehicle manufacturers. Does DOT have a definition for the term "imminent hazard" either in the regulation or the statute? If you have such, will you submit it for the record?

Mr. STRICKLAND. Yes, sir, I will.

Mr. DINGELL. Now, Mr. Administrator, likewise, Section 202 permits the Secretary to issue such imminent hazard orders absent prior judicial review and consent. Should DOT have to show by suit in federal court that hazard is imminent just as EPA must do under Section 303 of the Clean Air Act and CPSC must do under Section 11 of the Consumer Product Safety Act as opposed to forcing the aggrieved person to seek judicial review at the Circuit Court level where there is no trial of facts? Yes or no.

Mr. STRICKLAND. I would like to get back to you for the record on that, Mr. Dingell, but to let you know that our sister model agencies such as the Federal Rail Administration and others have similar imminent hazard authority as seen in the committee draft.

Mr. DINGELL. This is not, remember, Mr. Administrator, tied to the Automotive Safety Act nor to the Administrative Procedure Act. Now Section 301 of the discussion draft requires DOT to conduct rulemaking on disclosure of information about vehicle defects, repairs, et cetera, with a presumption favoring maximum public disclosure. Given that DOT has existing regulations on public disclosure and must comply with the Freedom of Information Act, is such a disclosure rulemaking as the discussion draft mandates? Yes or no.

Mr. STRICKLAND. I would like to get back to you on the record with that, Mr. Dingell.

Mr. DINGELL. Mr. Administrator, Section 401 of the discussion draft requires vehicle manufacturers to pay an annual fee on a per vehicle basis. Such fees shall be used according to the discussion draft to meet the obligations of the United States to carry out the vehicle safety programs of the National Highway Traffic Administration. To the best of my knowledge, these obligations are not defined in the discussion draft. Do you agree? Yes or no.

Mr. STRICKLAND. The obligations are not defined. We will be happy to get back for the record on the question.

Mr. DINGELL. Now, Mr. Administrator, the discussion draft sets out per vehicle fees to meet NHTSA's obligations. Absent a clear definition of these obligations, do you believe that the level of these fees as defined in the discussion draft are arbitrary? Yes or no.

Mr. STRICKLAND. I will have to get back for the record, Mr. Dingell.

Mr. DINGELL. Mr. Administrator, similarly, is DOT in possession of any information that would verify the level of these fees is appropriate to meet its obligations, whatever they might be? Yes or no.

Mr. STRICKLAND. I will respond to you for the record, Mr. Dingell.

Mr. DINGELL. You don't know?

Mr. STRICKLAND. At this point, we have the 2011 budget that the President has issued to the Congress——

Mr. DINGELL. The answer is though, Mr. Secretary, you don't know—or, rather, Mr. Administrator, you don't know?

Mr. STRICKLAND. At this point, sir, we have allocated our budget for the 2011 budget. The levels that are produced in this bill, we are happy to review.

Mr. DINGELL. The question is you still don't know. Mr. Chairman, you have been most gracious on your gift of time to me. I express to you my thanks and also to my good friend from Kentucky my gratitude for this kindness in yielding to me earlier. Thank you.

Mr. RUSH. The chair thanks the chairman emeritus. And now the chair recognizes the gentleman from Ohio, Mr. Space, for 5 minutes.

Mr. SPACE. Thank you, Mr. Chairman. Thank you, Mr. Administrator, for your testimony today. I want to shift gears and talk a little bit about the testing center in East Liberty, Ohio that NHTSA has. And there is no suggestion in this bill that that facility be abandoned, but there have been some suggestions externally about the prospect of moving it. And the impetus behind those suggestions has been that because the facility is technically owned by Honda of America Manufacturing Corporation that that would represent some kind of a conflict of interest. I guess my question to you is are you familiar with the facility I am talking about?

Mr. STRICKLAND. I am very familiar with the facility.

Mr. SPACE. And you are familiar with the fact that the facility itself that is owned by Honda is actually operated pursuant to a management agreement by a not-for-profit corporation that was founded by Ohio State University?

Mr. STRICKLAND. That is correct.

Mr. SPACE. And in your experience have you in the past been alerted to any problems associated with the ownership specifically that may have arisen as the result of a conflict of interest?

Mr. STRICKLAND. Mr. Space, my job before I was sworn in as administrator of NHTSA, I was an oversight counsel and part of my duty was oversight of National Highway Traffic Safety Administration for over 8 years. I was very familiar with the ownership structure of the VRTC with TRC in Ohio State. I never had any knowledge of any conflict of interest during my time as a staffer. I took a look at this issue very specifically when this was brought to my attention. I have seen no indication whatsoever of there being an improper relationship. It is a firewall relationship between TRC, the Ohio State University for whom we pay, and Honda of America, which actually owns the land.

Mr. SPACE. Thank you, Mr. Administrator. Are you aware of any other manufacturers apart from Honda that may have registered complaints about the ownership structure of the facility?

Mr. STRICKLAND. There have been no complaints from any manufacturer.

Mr. SPACE. And, finally, has the weather been a problem, the Ohio weather been a problem. I know we don't have the claim to snow apocalypse, but I am curious as to whether that has been a problem for the facility.

Mr. STRICKLAND. Our staffs have been able to use the pad and the other facilities. That has never been an impediment to our work in terms of the availability of the actual test track itself or the buildings that we use.

Mr. SPACE. OK. Thank you, Mr. Administrator. I yield back my time.

Mr. RUSH. The chair thanks the gentleman. The chair now recognizes the gentleman from Iowa, Mr. Braley, for 5 minutes.

Mr. BRALEY. Thank you, Mr. Chairman. Mr. Strickland, thank you for joining us again.

Mr. STRICKLAND. Thank you, Mr. Braley.

Mr. BRALEY. And I want to start with a follow-up question to Mr. Dingell's question to you about the scope of administrative judicial review. And I want to make sure that I understood your response as it relates to NHTSA because my understanding is that as a general rule any federal agency that falls within the Federal Administrative Procedure Act, in order to overturn the action of the agency you have to demonstrate in that judicial review process that the action of the agency was arbitrary and capricious. That is the baseline definition of judicial review for any federal agency action. Is that your understanding?

Mr. STRICKLAND. That is correct, Mr. Braley.

Mr. BRALEY. But that Congress may, if it chooses to, also include in the organic law that gives rise to that agency action more limitations on judicial review if it chooses to do so?

Mr. STRICKLAND. Yes, Mr. Braley, that is correct.

Mr. BRALEY. So the mere fact that there is not specific language giving further direction on what should be considered as part of that judicial review of NHTSA's act does not mean that there is not a formal process for judicial review subject to the baseline arbitrary and capricious standard?

Mr. STRICKLAND. Mr. Braley, you are correct in that analysis.

Mr. BRALEY. All right. Now one of the concerns that I had and many people had during the period of the Bush Administration and its operation of NHTSA was that the agency during that period, specifically from 2005 to 2008, seemed to many of us to usurp its own regulatory authority and take on the role of Congress by including in many of its preambles issued in response to regulations language pre-empting state law claims. Are you familiar with that practice?

Mr. STRICKLAND. Yes, sir, I am.

Mr. BRALEY. And I know that the President himself at the beginning of his Administration took a strong position rolling back some of those statements made by agency representatives in those preambles and in the regulations themselves. Are you able here today as a representative of the Administration in your capacity able to assure us that those practices will not continue while you are Administrator?

Mr. STRICKLAND. I can make that obligation, absolutely. There is a notion that states' rights are incredibly important and those preambles that were placed not only in NHTSA's rules but there were several rules throughout executive branch agencies and safety agencies which undermine safety, and I know the Obama Administration felt very strongly that those should not be used to undercut

the notion of safety whether by the federal government or in the states.

Mr. BRALEY. Thank you. One of the things that this Motor Vehicle Safety Act calls on your agency to do is to improve public accessibility of information posted to its web site, and that includes a requirement that you make sure that all data is searchable and can be aggregated and downloaded. As it exists now, does NHTSA have the capability to ensure that this information is posted in an easily accessible and searchable fashion that any member of the general public can use?

Mr. STRICKLAND. At this point we—I have sort of two things to say about that, Mr. Braley. Even in the current state of NHTSA's database, it is clearly one of the most usable and transparent databases in government. We found that consumers and the press and members of Congress to be able to go through all work, been able to analyze it independently of what we have done, so I think that speaks to the level of transparency. So we do recognize that it could be more user friendly and more accessible, and we have efforts underway right now to deal with some of those issues including creating a VIN-based identifier system to ensure uniformity in usage of vehicle configuration details. The vehicle owners questionnaire, the VOQ, is very difficult. I know our goal is to make sure that we can make it simpler and that drivers and consumers use less time in filling out the VOQs so that we can get more information from more consumers.

We have a significant abandonment rate. We get over 30,000 complaints a year, but there is a lot of people that begin the process that give up because it is such a difficult form to fill out. We need to be better. There are lots of other things that we are currently undertaking. I know the draft legislation makes mandates and suggestions for us to undertake that opportunity. We will continue our own work independent of legislation. If this legislation becomes law, we will happily work on making the database more consumer friendly and more usable.

Mr. BRALEY. Well, I am very glad to hear that. I am shuttling back and forth between two hearings, one on transparency in pricing in health care, and this hearing, which also has placed a huge emphasis on transparency, and transparency is great, but unless you are communicating with your intended users in language they can understand all that you do is create more frustration and you keep people from getting access to the information they need to rely upon to make informed decisions. That is why I am proud in both the 110th and 111th Congress we in the House have passed my Plain Language in Government Communications Act requiring all federal agencies to communicate in their publications and their web-based services with constituents in the language that they can understand, and I would be happy to work with you and your agency as they try to adopt some of those best practices.

Mr. STRICKLAND. Mr. Braley, that will be a great opportunity for us, and also I would like to take this opportunity to promote the new NHTSA web site at nhtsa.gov. We have simplified the web site, made it much more user friendly, and I would hope that you and the other members of the staff would take an opportunity to go on nhtsa.gov and to please give comments on what we have

done. We are very proud of the work in terms of making it better for the American consumer.

Mr. BRALEY. Thank you. I yield back the balance of my time.

Mr. RUSH. The chair thanks the gentleman. The gentleman from Michigan, Mr. Stupak, is recognized for 5 minutes.

Mr. STUPAK. Thank you, Mr. Chairman. Mr. Strickland, when a consumer buys a car and it has an EDR in it should the consumer or the owner of that vehicle have access to that information?

Mr. STRICKLAND. At this point, we are reviewing several issues about EDRs and we will have to get back to you on the record, Mr. Stupak, but in terms of the privacy issues there are several considerations that should be undertaken and NHTSA and the Administration are looking at those things very closely.

Mr. STUPAK. Was there anything like proprietary information that would be revealed if the consumer had an opportunity to look at what was happening with their vehicle at the time?

Mr. STRICKLAND. I wouldn't be familiar in terms of the accessibility of a consumer and what data may be—what may be considered proprietary. At this point right now, EDRs only track acceleration and braking. I know that there are other considerations in the discussion draft which may include more information on the EDRs. I will have to get back to you on the record for that consideration as well.

Mr. DINGELL. Would the gentleman yield?

Mr. STUPAK. Yes.

Mr. DINGELL. Could you cite any provisions of the discussion draft that protect either proprietary information, trade secrets or data which is important to the company as a competitive matter?

Mr. STRICKLAND. There is no language in the draft that does any of that, Mr. Dingell.

Mr. DINGELL. Thank you, and I thank the gentleman for yielding.

Mr. STUPAK. If you go these EDRs, what is the difference if I turn on my Sirius radio and I listen to certain music, and that is mine, right? I can put in any station I want on my Sirius radio and listen to it, so my EDR, if I want to know how fast I was going or accelerating or things like that, why wouldn't I be entitled to that information being the consumer, the owner of the vehicle, if you will?

Mr. STRICKLAND. The owner of the vehicle should have access to all aspects of the vehicle in terms of information provided. I think that in terms of transparency and clarity, I think that for a consumer to have that ability to access actually the consumer does have the right to access that information. They may not have the tools to get the information, but I believe the consumer always has that right at this point if I am not mistaken.

Mr. STUPAK. So if there is an accident like sudden unintended acceleration, what right does Toyota have to come in and remove that information or withhold that information from a consumer?

Mr. STRICKLAND. Well, in terms with how that interplays, I know the manufacturer has access to data. I know that NHTSA has the ability to access the data once we get an OK from the consumer. But in terms of preventing a consumer from getting the data him or herself or Toyota preventing or any manufacturer limiting access

to that data, I am not as familiar with that process so I will have to get back to you on the record.

Mr. STUPAK. Have you demanded the information from these recorders on the accidents of a sudden unintended acceleration from Toyota?

Mr. STRICKLAND. Yes, we have.

Mr. STUPAK. Have you received it?

Mr. STRICKLAND. Yes, we have received it and actually in addition to getting that information Toyota has also provided several readers. One of the issues that we are facing, Mr. Stupak, and I believe those were explained to you in the hearing that you held a few weeks back, that there was an issue where NHTSA did not have the ability to independently read a Toyota EDR. Toyota has since supplied us several of their readers so that we can access the data on site, and they have been much more proactive in that area.

Mr. STUPAK. Have you shared this information with the victims' families of these sudden unintended acceleration of these vehicles? I am thinking especially of the one up in New York, the case up in New York.

Mr. STRICKLAND. The Harrison, New York case, sir?

Mr. STUPAK. Right.

Mr. STRICKLAND. At this point right now, my understanding is that we have that data. We are analyzing it for our own investigations. I don't know if there has been a request made to NHSTA to release that information. I will get back to you, sir. I will ask the question of the staff.

Mr. STUPAK. All right. These new EDR standards, do you believe they are sufficient in the proposed bill Section 107?

Mr. STRICKLAND. We are actually taking our own independent research on EDR systems, sir. The staff will be producing a white paper that hopefully should be available by June of this year, which will take a look at several issues regarding the sufficiency of the data, the robustness of the EDR, and several other considerations, and we will be happy to share that with you and the rest of the members of the committee, but at this time we are not prepared to make an evaluation of the discussion draft mandates regarding——

Mr. STUPAK. Will you be looking at what other data may be useful to you like torquing and arcing on braking in vehicles on the roadway?

Mr. STRICKLAND. It is a comprehensive review and this white paper will take those other considerations into account.

Mr. STUPAK. So on the Toyota, how many pieces of data do you receive? You said two, speed and——

Mr. STRICKLAND. Speed and braking is whether the acceleration was depressed and when the brake was depressed, that is correct. There is other information available in the vehicle as well, Mr. Stupak. The electronic control mechanism, ECM, which is independent of the EDR, which can also be a very rich trove of information which Toyota has shared with us as well, but the actual EDR itself, it is only braking and acceleration.

Mr. STUPAK. Doesn't that seem inadequate? I mean these standards were put out some time ago. There were more than just two standards in the proposed EDRs that we wanted. What, 2013 they

were supposed to take effect or, I am sorry, 2011 and it was pushed back to 2013, is that correct?

Mr. STRICKLAND. Actually I think 2012 is actually when the voluntary—if you do have an EDR you have certain, you know, certain information you have to provide and make sure that NHSTA makes it readable.

Mr. STUPAK. But in that 2012 reader it had to be more than just speed and braking?

Mr. STRICKLAND. Yes, sir, that is correct.

Mr. STUPAK. So we should make sure that there are more aspects that would be helpful to you and to the consumer in these EDRs?

Mr. STRICKLAND. We are looking forward to working with you and the rest of the committee on this issue, Mr. Stupak.

Mr. STUPAK. Thanks.

Mr. STRICKLAND. Thank you, sir.

Mr. RUSH. That concludes the testimony of the Administrator. The ranking member has requested some additional time so if the Administrator would agree, we will have a second round of questioning for 1 minute, and the ranking member is recognized for 1 minute for an additional question.

Mr. WHITFIELD. Mr. Strickland, would you please tell us when you expect you would be able to give us a section by section analysis of this bill?

Mr. STRICKLAND. At this point, I know it is currently in process within the department and with the Administration. My expectation is that hopefully—I will be away on travel, I would hope that I would a more specific time frame and answer when I return from Asia, so I will be more than happy to communicate when we expect to have that review to you, but at this time I don't have a specific date when we will have the review done.

Mr. WHITFIELD. Well, I urge you all to speed it up and provide us with it as soon as possible.

Mr. STRICKLAND. Understood, Mr. Whitfield.

Mr. WHITFIELD. One other question. I know that you can evaluate each rulemaking and calculate the cost of that rulemaking or that estimated cost and lives saved. Would you be able to do that with this legislation?

Mr. STRICKLAND. In terms of doing our normal cost benefit analysis of the rule, one thing that we would have to make sure that we go through regular order and process in any of these rulemakings and find the proper amount of time to execute all of the things we need to do for a rule, we are evaluating the time frames that are present in the discussion draft along with our current rulemaking load. We have other rulemakings that are in the queue from other pieces of legislation and work we already have done independently so, yes, we will need to be able to do that work in order for us to justify the rule and we will definitely do so in that fashion.

Mr. WHITFIELD. Thank you.

Mr. RUSH. Are there any other—Mr. Space, do you have any additional questions? Mr. Braley, do you have—that concludes your time. You have been most gracious with your time.

Mr. STRICKLAND. Mr. Rush, it is my pleasure and the men and women in NHTSA really do thank you for this effort.

Mr. RUSH. Thank you so much. And the chair now will ask the second panel please be seated at the table. The chair wants to thank each and every one of you for your gracious sacrifice of your time. You have been very patient with us, and the chair wants to recognize you and thank you for it. I want to introduce the panel right now. Beginning from my left, a former member of the House of Representatives the esteemed Honorable David McCurdy, who now serves as the President and CEO for the Alliance of Automobile Manufacturers. David, it is good to see you, and welcome back to the subcommittee. Next to Mr. McCurdy is Mr. Michael J. Stanton. He is the President and CEO of the Association of International Automobile Manufacturers. Welcome, Mr. Stanton. Seated next to Mr. Stanton is our friend who was here before this subcommittee on many occasions, the Honorable Joan Claybrook. She is the former administrator for the National Highway Traffic Safety Administration. Welcome back, Ms. Claybrook. And then seated next to Ms. Claybrook is Mr. Clarence Ditlow. He is the Executive Director of the Center for Auto Safety. And seated next to Mr. Ditlow is Mr. Jim Harper. He is the Director of Information Policy Studies for the Cato Institute. Again, welcome to each and every one of you. And it is the practice of this subcommittee to swear in the witnesses. Will you please rise and raise your right hand?

[Witnesses sworn.]

Mr. RUSH. Please let the record reflect that the witnesses have all responded in the affirmative. And now we will recognize Mr. McCurdy for 5 minutes for the purposes of opening statement.

TESTIMONY OF THE HONORABLE DAVE MCCURDY, PRESIDENT AND CEO, ALLIANCE OF AUTOMOBILE MANUFACTURERS; MICHAEL J. STANTON, PRESIDENT AND CEO, ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS; THE HONORABLE JOAN CLAYBROOK, FORMER ADMINISTRATOR, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION; CLARENCE DITLOW, EXECUTIVE DIRECTOR, CENTER FOR AUTO SAFETY; AND JIM HARPER, DIRECTOR OF INFORMATION POLICY STUDIES, CATO INSTITUTE

TESTIMONY OF DAVE MCCURDY

Mr. MCCURDY. Thank you, Mr. Chairman, and Ranking Member Whitfield, and members of the subcommittee for inviting me back to discuss this draft of the Motor Vehicle Safety Act of 2010. In the interest of time, I am going to request my full statement be admitted in the record, and I am going to briefly go through some highlights, if I may. And since this is a discussion draft, I hope that this can also be a frank discussion because I think we need to get to the root of some of these issues. There has been a lot of discussion on auto recalls in recent months, so let me start by reassuring the American consumer that we are in a historic period of auto safety in the U.S., and I think Mr. Whitfield mentioned some of the statistics about the declining rate of traffic fatalities and that our roads are safer today, lowest level since 1949.

Consumers are benefitting from many innovative life-saving technologies that assist the driver, including the electronic stability control, lane department warning system, blind spot monitors, and

adaptive cruise control. We also, if you look at safety in another way, today we see more frequent recalls but fewer vehicles are recalled compared to a decade ago. That fact suggests that both NHTSA and automakers are effectively spotting early warning signs and taking faster action. If Congress wants to reassure consumers quickly about auto safety, lawmakers should focus on three or four of these measures that enhance safety the most, and if I may, I will make some recommendations.

First, the Alliance supports a vehicle brake override standard that will ensure consumers that they can count on their automobiles. Brake override technology is a comprehensive solution to unintended acceleration whether it is caused by faulty electronics or pedal getting caught in a floor mat. Therefore, a pedal placement rulemaking, however, would not provide additional safety benefits so brake override, yes, pedal safety, redundant. The Alliance supports the intent of the keyless ignition system standard to ensure a consistent means of shutting off an engine during an emergency. However, brake override is a preferable solution to unintended acceleration. If rulemaking is necessary, it should focus on standardizing engine shut off procedures and not on design features like the appearance or location of the button.

The Alliance supports requiring event data recorders in new vehicles, but we are concerned about provisions that suggest they should be like black boxes in airplanes. The typical airplane black box costs roughly $22,000, which is close to the average price of a new car. In my opinion, Representative Green's legislation, H.R. 5169, a member of this subcommittee, is a better approach. A proposed transmission configuration standard is not necessary because such a standard already exists, FMVSS No. 102. The Alliance urges Congress to adopt legislation that enhances our knowledge and expertise. We support a center for vehicle electronics and emerging technologies with NHTSA. Even in this partisan environment, this is something we can all agree on.

We urge Congress to fund the National Automobile Sampling System or NASS, which has shrunk to a third of its intended size, important data collection. We also urge Congress to fund the Driver Alcohol Detection System for Safety or DADSS to help identify vehicle technologies that can stop drunks from turning on a car and hopefully saving many thousands of lives each year. There are always trade-offs and competing demands when you are writing legislation. Congress will need to balance some of the proposals with consumer concerns and marketplace concerns. For example, Congress will need to balance the desire for more data with privacy protection for consumers. NHTSA spent many years assessing the data to be collected by EDRs and we are in the middle of a phase-in period for that standard, so we need time to assess the impact of the first rule before we start writing the next rule.

Congress must also balance the desire for public information with valuable product information. The purpose of early warning data is to enable NHTSA to identify trends and take action sooner, not to create an eBay or Amazon.com where competitors can surf for company trade secrets or lawyers can shop for clients. Citizens are better served when safety legislation empowers engineers, not trial lawyers. Congress will need to avoid the possibility of creating

a system of regulation by litigation. Congress should not enact measures that will have the unintended effect of slowing and not accelerating action on safety matters. If every petition denial is subject to judicial review, NHTSA will be forced to spend substantial resources and time responding to every petition regardless of its merit in anticipation of judicial review. This will not serve the agency, the industry or the public well.

Finally, Congress will need to preserve basic fairness and due process under the law. The Alliance does not oppose an increase in civil penalties but penalties must be capped at some reasonable level. The proposed 5-fold increase is surprising since 2 years ago this committee set a cap at $15 million per offense on penalties that could be assessed to manufacturers of other types of consumer products. Regarding granting NHTSA imminent hazard authority, all I can say is, Mr. Chairman, the proposed provisions need further work. They are so lacking in standards, and the opportunity to be heard before a neutral decision maker as in our opinion to violate the due process clause of the U.S. Constitution.

Furthermore, if Congress in my experience has a stick it will always want a club. Regarding corporate responsibility for NHTSA reports, the proposed personal liability for auto executives would be $250 million. That is 50 times higher than for executives under Sarbanes-Oxley, which resulted from the Enron scandal where executives went to prison. In closing, I know the challenge of getting a consensus. I have chaired several subcommittees and a full committee. This bill can be made stronger by focusing on what is most important, and we look forward to working with you to identify the key provisions that will actually improve safety and benefit consumers. Thank you.

[The prepared statement of Mr. McCurdy follows:]



STATEMENT

OF

THE ALLIANCE OF AUTOMOBILE MANUFACTURERS

BEFORE THE:

SUBCOMMITTEE ON
COMMERCE, TRADE, AND CONSUMER PROTECTION

MAY6, 2010

PRESENTED BY:

The Honorable Dave McCurdy
President & CEO

Thank you Chairman Rush, Ranking Member Whitfield, and members of the subcommittee for inviting me back to offer the Alliance's views on the discussion draft of the *Motor Vehicle Safety Act of 2010*. The last time I was in front of you, I committed that Alliance members would work constructively with the Congress on legislation that promotes the National Highway Traffic Safety Administration's (NHTSA) mission to "save lives, prevent injuries and reduce economic costs due to road traffic crashes." We appreciate the opportunity to share our views on how the discussion draft contributes to the overall safety of the driving public, as well as areas in which we believe the legislation could be improved.

Reassuring Consumers

There's been a lot of discussion on auto recalls in the past few months, so let me start by reassuring the American consumer.

Government data shows many advances in road safety. According to NHTSA, overall traffic fatalities reported at the end of 2009 reached the lowest level in 49 years, declining for the 15th consecutive quarter. This fact is remarkable given that the number of licensed drivers has more than doubled and annual vehicle miles travelled (VMT) have more than quadrupled since 1954.

Consumers are benefitting from a range of innovative new safety technologies. Because consumers want more safety features, automakers have developed many of today's significant safety innovations without a government mandate, including anti-lock brakes, electronic stability control (ESC), adaptive headlights, side airbags and curtains, front passenger safety belt reminder systems and advanced collision avoidance features like lane departure warning, blind spot monitors and adaptive cruise control.

Automobiles are complex, integrated systems that undergo years of rigorous testing and certification before they ever go on sale. Every auto innovation begins with an idea, but the real work is years of research, computer simulations, product development, laboratory testing, road testing, certification and more. Through the Society of Automotive Engineers (SAE), 14,000

mobility experts in 100+ countries have worked together to develop more than 2,600 globally recognized standards for motor vehicle transport.

Real-World Benefits

The industry continues to work to advance the state of the art in real world safety. Our engineers are always testing and developing new safety technologies, then evaluating their performance in real-world situations. Proposed legislation needs to meet the same test. Congress and all stakeholders should be focused first and foremost on passing a bill that will result in real-world safety benefits for Americans. This includes carefully weighing the potential costs of any regulation with the real world benefits consumers might expect. We believe that this legislation can advance safety through:

- Enhancing real-world expertise on the advanced technologies that enhance safety.
- Adopting consumer confidence measures, including more education on how cars work.
- Balancing proposals with consumer concerns and marketplace concerns.
- Adopting measures to help engineers, not trial lawyers.
- Fully funding data collection programs (e.g., NASS, FARS, NMVCCS, etc.,) to enable improved identification of real-world safety trends.

TITLE I. VEHICLE ELECTRONICS AND SAFETY STANDARDS

A number of rulemakings are mandated, many of them to be conducted concurrently according to unrealistic timelines. Some are overly prescriptive. Other rulemakings are simply unnecessary because they mandate standards already adopted by NHTSA. Still other mandates are premature.

To ensure that motor vehicle safety is enhanced, the Alliance has the following recommendations. In all instances, however, more reasonable timelines for rulemaking and especially for implementation are needed.

Rulemakings or Actions that should be pursued on a Priority Basis

Section 101. Electronics and Engineering Expertise. The Alliance supports Section 101 that establishes a Center for Vehicle Electronics and Emerging Technologies within NHTSA. We note that concerns over NHTSA's alleged lack of expertise with advanced vehicle technologies are in part unjustified considering the complex rulemakings the agency has completed in the last decade on numerous advanced vehicle technologies, including advanced airbags, electronic stability control, event data recorders and others. As the industry works to reinvent the automobile to make it safer, cleaner and more efficient, highlighting and promoting this area of expertise within the agency is welcomed.

Section 102. Vehicle Stopping Distance and Brake Override Standard. The Alliance supports the intent of Section 102, which would direct NHTSA to develop a rule requiring "brake override" technology for vehicles equipped with electronic throttle controls. As noted in my previous testimony, a number of Alliance members already incorporate this technology into their vehicles and the others are moving in that direction. Alliance members recognize that safety is at the top of consumers' minds, and brake override technology will reassure them that they can count on their brakes in difficult situations. The Alliance does not agree, however, that this standard should prescribe brake stopping distances which are already regulated in FMVSS 135. This is not an issue of prescribing new braking technology, it is an issue of the brakes being able to override the throttle pedal position and bring the vehicle to a stop. As such, this should be a straight forward standard that does not involve all the difficult real world issues of what is an appropriate stopping distance under every real world situation.

The Alliance also notes that Section 102 (and Section 103) calls for the creation of standards that would "prevent" certain outcomes from happening. Such a requirement for the standard is beyond anything reasonable – or even possible in the real world. The Alliance recommends that the use of the word "prevent" in these two Sections be changed to the more typical requirement such as "reduce" or "mitigate."

Section 105. Keyless Ignition Systems Standard. The Alliance supports the intent of Section 105, which would require NHTSA to promulgate a standard that requires that passenger vehicles with keyless ignition systems have a consistent means to shut off an engine during an emergency. The Alliance recommends that this rule focus on standardizing shut off procedures for keyless and push-button ignition systems. Although we expect the benefits of such requirements to be very low, the costs of implementing such a standard are also likely to be low unlike the redesigns that pedal placement standards would likely entail. It is worth noting, however, that like pedal placement specifications, the use of shut off procedures for keyless systems is a much less desirable "solution" to unintended acceleration than brake override systems. Turning off a moving vehicle is not the action recommended by most manufacturers.

Section 107. Vehicle Event Data Recorders (EDR). The Alliance supports the intention of Section 107, which would require NHTSA to mandate installation of event data recorders on new vehicles; however, the Alliance is very concerned about and would oppose certain aspects of this provision. In 2006, NHTSA published a rule setting the parameters for EDRs voluntarily installed in vehicles. That comprehensive rule, in which certain technical details submitted by petition for reconsideration are still not resolved, was the result of a lengthy and complicated deliberation with substantial public comments.

Given that the existing rule has been scheduled for implementation in 2012, the Alliance recommends that the first phase of mandatory implementation should be consistent with the existing rule being implemented by NHTSA, including the resolution of pending petitions relating to technical issues and the effective date, to enable manufacturers who have implemented EDRs on parts of their fleet to come into full compliance. Equally important is the fact that manufacturers who opted not to install EDRs previously will need sufficient lead time, and certainly more than 2 years, to develop and implement this technology in their fleets. The law should not mandate lead times that may be unrealistic and NHTSA should have the authority to establish the lead time, including any phase-in schedule, after consultation with the manufacturers.

Specifications and requirements for EDRs, including those for data storage time, require analysis and consideration of available technology, feasibility, safety benefit and cost, should be left to NHTSA to study and decide whether to undertake further rulemaking and not specified in this legislation.

The Alliance also supports strong privacy protections for consumers. The Alliance believes that information stored on an EDR is the property of the vehicle owner and should not be accessed by anyone without the owner's permission or as required by law. Additionally, even with the owner's permission, data that is retrieved for the purpose of including in a publicly available database should be rendered anonymous by excluding at minimum the last six digits of the vehicle identification number (VIN) associated with the data. The bill should contain an exception for the transmission of EDR data to 9-1-1 call centers for purposes of emergency response.

With respect to the second phase of the EDR requirements, the Alliance believes that the provisions are extreme and would cost consumers thousands of dollars for the devices that would be required. For automakers to develop a device that is resistant to temperature, water and crashes and capable of continuously recording various pieces of data for 75+ seconds, we would need to create the equivalent of an airline "black box" for vehicles. Since the airline black boxes cost in excess of $20,000 per unit, it is likely that a comparable vehicle recording device would add several thousand dollars to the cost of each vehicle. Any additional data that might be obtained by adopting this extreme approach would be far outweighed by these costs. And the extraordinary dampening effects on sales of increasing vehicle prices by these amounts are clear.

Unnecessary Rulemakings

Section 103. Pedal Placement Standard. The Alliance recommends deleting Section 103, which would direct NHTSA to develop a rule specifying minimum clearances for passenger vehicle foot pedals with respect to other pedals, the vehicle floor, and any other potential obstruction to pedal movement. While perhaps well-intentioned, Section 103 would require NHTSA and auto manufacturers to spend valuable resources focusing on one aspect of a limited,

past design problem that is unlikely to reoccur in the future given the recent attention. Implementing brake override technology as the discussion draft would accomplish is a better, more comprehensive solution to address concerns about unintended acceleration caused by pedal entrapment.

Section 106. Transmission Configuration. Section 106, which would direct NHTSA to prescribe a federal motor vehicle safety standard for passenger vehicles requiring an intuitive configuration and labeling of gear shifting controls that makes the neutral position conspicuous is unnecessary. Such a standard already exists. Federal Motor Vehicle Safety Standard No. 102, *"Transmission shift position sequence, starter interlock, and transmission braking effect,"* currently specifies the transmission shift position sequence to reduce the likelihood of shifting errors. The standard was among the first group of early standards issued by the agency and was last amended in 2005. Changing the shift configuration (as is suggested) potentially involves transmission re-designs that are very costly and require substantial lead time. As a result, any changes in shifting configuration will require far more than the one model year of lead time that is provided. Given that this standard has been in effect for a long time, changing the shift position sequence is unnecessary and ill-advised.

Rulemakings that Require Additional Study

Section 104. Electronic Systems Performance Standard. As the Committee is no doubt aware, NHTSA has contracted with the National Academy of Sciences (NAS) to examine the broad subject of unintended acceleration and electronic vehicle controls across the entire industry over the course of 15 months. The NAS study will be peer reviewed by scientific experts. The NAS will make recommendations to NHTSA on how its rulemaking, research, and defect investigations activities can help ensure the safety of electronic control systems in motor vehicles. Section 104 would require NHTSA to require electronic systems in passenger vehicles to meet minimum performance standards within 3 years of enactment. In this regard, the Discussion Draft presupposes the outcome of the expert panel review.

As my previous testimony noted, auto manufacturers subject electronics systems in our vehicles to rigorous testing that is unparalleled in the consumer electronics sector. Auto systems are designed to last at least three to four times as long as standard consumer electronics and are subjected to much harsher extremes in testing. The Alliance supports the work on electromagnetic interference that is ongoing at NHTSA and the National Academy of Sciences. The results of the NAS study should inform any future rulemaking that considers standards for electronic vehicle controls.

TITLE II. ENHANCED SAFETY AUTHORITIES

Section 201. Civil Penalties. The Alliance does not oppose an increase in the civil penalties, but the penalties must be capped at some reasonable level. Furthermore, the Alliance questions whether a five-fold increase in penalties is necessary. Only two years ago, this same committee visited this issue and set a $15 million-per-offense cap on penalties that could be assessed to manufacturers of other types of consumer products. Many of these manufacturers are as large as auto manufacturers, and auto manufacturers are already subject to civil penalties of up to $16.4 million per series of related violations. It is not clear to the Alliance why auto manufacturers should be singled out for disproportionate penalties relative to other consumer products manufacturers.

Section 202. Imminent Hazard Authority. Although Section 202 is captioned "Imminent Hazard Authority," it contains two separate provisions: the new imminent hazard authority in Section 202(a) and substantial changes to existing judicial review provisions in Section 202(b). If Congress concludes that an "imminent hazard" authority at NHTSA is desirable, both of these provisions must be rewritten to protect manufacturers' due process rights under the U.S. Constitution.

While there might be justification for expedited action on situations that create an "imminent hazard" to safety, the provision in Section 202(a) provides for no standard for judging what an "imminent hazard" might be. Current law provides for recalls when a defect presents an "immediate and substantial threat to motor vehicle safety," but those terms are not used in the

bill, and the new terminology is not defined. Neither the Secretary nor the manufacturer would have the kind of guidance required under the U.S. Constitution on what situations might be subject to this authority. Worse yet, Section 202(a) provides no administrative hearing on an Imminent Hazard Order by the Secretary in a reasonable—or any—time, nor does it provide the manufacturer with the opportunity for a hearing before a fact-finding judge. General principles of due process require a hearing of some sort within a reasonable time on such an administrative order or alternatively, a limitation on the duration of the order. For instance, the Consumer Products Safety Commission cannot get an imminent hazard order without first going to court; under the Federal Railroad Act, an order can only last 30 days before an administrative review hearing. Section 202(a) has no timeline for an administrative hearing. Under this legislation, the Secretary can order a stop sale of unlimited duration and the manufacturer is left with the sole remedy of going to the U.S. Court of Appeals, a process that can take up to two years. There is no administrative hearing, no judicial hearing before a fact-finding judge, and no expedited review. This and the lack of standards are serious due process concerns.

Due process generally requires that an aggrieved party be given notice and an opportunity for a hearing *before* the party is deprived of property. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." (internal quotation omitted)).

"The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement." *Loudermill*, 470 U.S. at 546. It is a "'root requirement' of the Due Process Clause" that the entity "'be given an opportunity for a hearing *before* [it] is deprived of any significant property interest.'" *Id.*, 470 U.S. at 542 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)); *see also Zinermon v. Burch*, 494 U.S. 113, 127 (1990). The lack of adequate process is particularly troubling where there exist no "additional procedural safeguards" to protect the interests of aggrieved parties. *Matthews v. Eldridge*, 424 U.S. 319, 343 (1976).

Section 202(b) goes beyond the section's caption and also amends the existing statutory process by which a manufacturer obtains judicial review of an order to recall vehicles (without regard to imminent hazards). Under current law, a manufacturer contesting a mandatory recall order is entitled to a de novo trial in district court in which NHTSA has the burden of proof to establish the presence of a safety-related defect. *U.S. v. General Motors Corp.*, 518 F.2d 420, 438 (D.C. Cir. 1975). The draft bill would appear to substitute appellate review of any recall order for district court review. Appellate review, which is usually deferential to the finder of fact—whether a district court or an agency that has held an enforcement hearing—is inappropriate where, as under Section 202(b), there has been no hearing on the facts and no provision for a fact-finding judge to make an initial decision. Under this scenario, the manufacturer would never get due process of law to establish the record in a neutral forum. Either the manufacturer should have the opportunity to develop a record and defend itself in District Court (the status quo) or the manufacturer should be able to develop a record and defend itself before an ALJ (CPSC model), but this draft has neither option, thereby depriving the manufacturers of due process.

Finally, the imminent hazard provisions, as currently drafted, significantly expand the powers of the Secretary to affect manufacturers' businesses without actually offering any additional safety benefits. NHTSA may order the manufacturer to stop production, sale, offer for sale, lease, offer for lease, distribution, the introduction or delivery for introduction in interstate commerce, or importation into the United States. The current "stop sale" provision in the Safety Act already prohibits the delivery to a customer of any vehicle until the safety defect has been remedied. As long as the defect is remedied prior to the vehicle getting into customers' hands, there is no added safety benefit gained by stopping production, importation or halting distribution to dealerships. Halting distribution unnecessarily prevents manufacturers from utilizing the most efficient method for fixing defects in vehicles – the dealer body.

TITLE III. TRANSPARENCY AND ACCOUNTABILITY

Section 301. Public Availability of Early Warning Data. Section 301 expands the coverage of the "early warning reporting" program to include several categories of data that are already

being collected by NHTSA under the "early warning reporting" regulations. For example, NHTSA's rule already requires manufacturers to report on customer complaints, warranty claims, and field reports under the "early warning reporting" program, and NHTSA found that it had ample authority to require this information under the existing law. Accordingly, it is unclear why this provision is needed.

Section 301 would replace the current "disclosure" provision of Section 30166 of Title 49 with a new provision that appears to compel release of all early warning information "provided to the Secretary pursuant to this subsection" unless the information is exempt from disclosure under the Freedom of Information Act (FOIA). The legislation directs NHTSA to undertake rulemaking "establishing categories of information provided to the Secretary pursuant to this subsection that must be made available to the public," and authorizes NHTSA to "establish categories of information that may be withheld from public disclosure under paragraphs (4) and (6)" of FOIA. The Section goes on, however, to ***require*** disclosure of consumer complaint aggregated data, without regard to whether it might qualify for exemption from disclosure under the FOIA , and repeals NHTSA's existing regulation establishing categories of early warning information that the agency determined to be eligible for withholding from disclosure under paragraph (4) and (6) of the FOIA.

As NHTSA has already done much of what this provision directs namely, considered which categories of early warning information are entitled to exemption from disclosure under FOIA through an extensive rulemaking proceeding that was reviewed and upheld by the courts it is unclear what benefit is served by repealing the outcome of that effort in its totality and directing NHTSA to do it all over again. A simple direction to NHTSA to review the existing regulation and make appropriate changes resulting from the review would seem to accomplish the same purpose.

As to the new direction to "establish categories" of information "that must be made available to the public," the Alliance respectfully suggests that this provision misunderstands the FOIA process and the protection it affords to trade secrets and confidential business information. While the courts have upheld (and, indeed, encouraged) agencies to establish categories of

exempt information under FOIA to help manage the administrative burdens of FOIA, we know of no such process for creating categories of information that "must be made available to the public," nor do we believe that such direction is authorized under FOIA and the case law that has evolved around the processes for protecting confidential business information (so-called "Reverse FOIA cases"). A submitter of confidential business information to the government is entitled to have that information reviewed and considered for withholding from public disclosure under FOIA standards, and that right cannot be taken away by the administrative creation by NHTSA of "categories" of information that must be disclosed. By contrast, the courts have encouraged agencies to create "categories" of exempt information to ease the practical problems of reviewing and passing on multiple requests for confidential treatment by numerous submitters, when those submissions are likely to be repetitive and where most such requests are likely to be granted.

Since TREAD was enacted in 2000, NHTSA has applied FOIA standards to evaluate the confidentiality of early warning reports, and their evaluations have been upheld by the reviewing courts. As Section 301 continues to provide for the application of FOIA standards to these data, but simultaneously calls for the creation of "categories" of information to be disclosed, the Alliance believes that this provision raises serious questions about the consistency of the provision with the FOIA itself and the rights of submitters of confidential information to the government.

Section 302. Improved NHTSA Vehicle Safety Database. The Alliance supports Section 302, which would provide for improvements in NHTSA's Vehicle Safety Database. We have long advocated for increased funding for NHTSA's National Automotive Sampling Survey. More resources to sample more cases will aid the agency and the manufacturers in developing appropriate vehicle safety countermeasures. In addition, Alliance members think the marketplace and consumers will be well-served by an improved safercar.gov website. There is a bountiful supply of information currently available to the Agency and the public, but unfortunately it is not shared with consumers in a way that can be most helpful to them.

Section 303. Promotion of Vehicle Defect Reporting. The Alliance does not object to Section 303; however, we note that the requirement to affix a notice somewhere inside a vehicle is redundant. Such information is already required to be included in the vehicle's owner's manual. It is not clear why Congress believes that an owner who believes he/she has a defective vehicle would consult his/her glove compartment, but not check his/her owner's manual. One place should be sufficient – the owners' manual is already required, and already instructs consumers how to lodge a complaint.

Section 304. NHTSA Hotline for Manufacturer, Dealer, and Mechanic Personnel. The Alliance does not object to Section 304; however, we note that such a hotline is redundant to the similar hotline NHTSA is required to maintain for the general public. It is unclear what public benefit is served by requiring NHTSA to spend resources to maintain a separate hotline for employees of manufacturers, suppliers, dealers, and other repair facilities.

Section 305. Corporate Responsibility for NHTSA Reports. The Alliance has serious concerns about Section 305, which imposes personal liability up to $250,000,000 on the "principal executive officer" but does not define the term or provide any means for determining who that person may be. The responsibility to review the submission and, based on the officer's knowledge, confirm the detailed accuracy of the submission fails to understand or recognize that many submissions (because of the breadth of the agency's requests and the complexity of many of the investigations) are assembled by dozens of company employees working together who must review thousands and thousands of records. Even if it was feasible to require a single person to have requisite knowledge after review of an entire submission, including the thousands and thousands of records and judgments of the many people assembling the submissions, it would not be possible to make the kind of affirmations required under this proposal. Furthermore, the inequity among manufacturers of who may be impacted by this provision could be substantial. The "principal executive officer residing in the U.S." is likely to be far different for companies headquartered in the U.S. than those that are headquartered in other countries. In addition, this responsibility to certify reports applies to information provided in response to a "preliminary safety investigation, or in response to an official safety investigation." These terms are not currently used by the agency and are also not defined in Section 305. In addition,

$250,000,000 in personal liability is both unreasonable and disproportionate to the matter at hand. Even the Sarbanes-Oxley Act of 2002, upon which this provision seems to be based, caps liability at $5,000,000. This provision needs significant modification to address these issues.

In addition, to the extent that Section 305, or any other provision of new legislation, would establish requirements regarding the review, analysis, or confirmation of data in such a way as to require such work to be performed in the U.S. to allow an official in the U.S. to make a certification, such a requirement would violate important international obligations. Requiring U.S.-based recall decision-making would also encourage other countries around the world to impose the same unnecessary burdens, significantly increasing the cost of doing business for all automakers.

Indeed, since NHTSA statutory and regulatory authority allows a manufacturer to rely on foreign engineering and testing to certify compliance at the time of sale, it is inherently inconsistent not to recognize and allow the same review, analysis, or confirmation to be used for responding to a defect investigation. Particularly at a time when more and more of the auto industry is developing worldwide research, development, sourcing and construction processes for new vehicles, any requirement forcing duplication of activities such in the U.S. is counterproductive.

Section 306. Judicial Review of Defect Petition Rejections. The Alliance opposes Section 306, which would allow for judicial review of defect petition rejections. This section seeks to reverse established law by overturning a twenty-two year old case, *Center for Auto Safety v. Dole*, 846 F.2d 1532 (D.C. Cir. 1988). Here is the important passage from the decision:

> While safety is an indispensable element of the decision not to investigate, NHTSA can and does consider such "non-safety" factors as its available resources, enforcement priorities, the likelihood of uncovering sufficient evidence to establish the existence of a defect, and the prospect of ultimately succeeding in any necessary enforcement litigation. The regulation *sub judice* provides the court no way to second-guess the weight or priority to be assigned these elements.

> In particular, it would be unwise, and inconsistent with the broad mandate of the agency under the governing statute, to infer a mandatory allocation of the agency's limited resources from the regulation at issue. We must thus conclude that NHTSA's decision governed by this regulation is not reviewable.

It is no more appropriate now than it was in 1988 to mandate that the Agency with the greatest expertise to evaluate such decisions and the companies that will be affected by these judicial reviews be forced to defend past decisions rather than to pursue other potentially more safety-promoting activities such as advancing the work on other open investigations. Rather it creates an environment of "regulation by litigation" which will not serve the agency, the industry or the public well. It is inconsistent to assert that the agency needs more resources and more expert staff to undertake its safety mission and in the same breath assert that a non-expert court is better able to make these decisions than NHTSA. This proposal will contribute to clogging the court system and it will waste important agency resources. If every petition denial is subject to judicial review, NHTSA will be forced to spend substantially more resources in responding to each petition, regardless of its merit, and to be prepared for the anticipated judicial review. That, in turn, is likely to lead NHTSA to create much more stringent petitioning thresholds so that the agency must only respond to very well supported petitions with substantial technical analyses of multiple events. Finally, this provision would not have changed the outcome of the unintended acceleration investigations. The results of a successful appeal would simply be for the agency to open an investigation, which it did numerous times in the recent case.

TITLE IV. FUNDING

Section 401. Vehicle Safety User Fee. Alliance members are not in favor of including a new open ended fee on the cost of each new vehicle. Indeed we are sensitive to the cumulative impact of increased vehicle costs on consumers, especially in the current economic downturn. It is important to bear in mind the larger context of regulatory factors impacting vehicle costs. Only last month, the Administration finalized new fuel economy and greenhouse gas standards for automobiles, which the Alliance supported. The new standards will provide significant energy security and environmental benefits, but they will also increase the price of a new car by

hundreds of dollars over the next several years. Additionally, NHTSA recently finished or is still working on – vehicle rulemakings that are projected by the agency to increase the price of a car by an additional $428 to $813. Finally, each of the new technology mandates in this proposal will also have some associated cost for consumers. Vehicle owners are not the only ones who benefit from the efforts of NHTSA. Highway safety is a national priority – promoting reductions in health care costs associated with accidents and protecting pedestrians as well as vehicle owners. This national purpose is particularly well suited to the general appropriations process which is better suited to fund programs providing a general benefit to the public.

Section 402. Authorization of Appropriations. The Alliance supports Section 402, which would increase authorized funding for NHTSA's vehicle safety programs. The Alliance agrees that NHTSA should have resources sufficient to accomplish its important mission. The Alliance further urges Congress to set aside some of the proposed increase to fund the National Automobile Sampling System (NASS) at a level sufficient to provide the statistically valid, nationally representative sample originally intended. The need for quality sources of data continues to grow as automakers reinvent the automobile in response to societal demands for ever safer and cleaner vehicles. Starved for funds, the capability of NASS has been dramatically reduced. Currently, NASS collects in-depth data on approximately 4,500 crashes, less than a third of the intended design size of 15,000 to 20,000 crash cases annually. A $40 million dollar annual investment in NASS equates to 1.73 cents for every $100 of economic loss.

The Alliance also urges Congress to set aside some of the proposed increase to fund the research and development of vehicle technologies to end drunk driving, i.e., the Driver Alcohol Detection System for Safety (DADSS) research program. According to the Insurance Institute for Highway Safety (IIHS), DADSS has the potential to save more than 8,000 lives per year, a substantial portion of the nearly 12,000 fatalities that occur each year because of drunk drivers.

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Mr. RUSH. Thank you very much. The chair now recognizes Mr. Stanton for 5 minutes.

TESTIMONY OF MICHAEL J. STANTON

Mr. STANTON. Thank you, Mr. Chairman, and thank you, Mr. Whitfield. I am Mike Stanton, President and CEO of the Association of International Automobile Manufacturers. AIAM and its member companies appreciate the subcommittee's efforts to improve motor vehicle safety and understand the intended benefits of the bill. We also fully support the subcommittee's proposal to provide additional engineering and related resources to NHSTA including improving the agency's vehicle safety database to provide greater public accessibility. However, AIAM believes that NHTSA must be given the necessary time and flexibility in its rulemakings so it can make good decisions. Similarly, manufacturers require sufficient lead time to engineer tests and produce v vehicles that will meet the new standards.

We are concerned that the rulemaking mandates in the draft bill pre-determine conclusions as to matters currently under the investigation and not yet fully analyzed by NHTSA. As a general matter, it would be more appropriate to direct NHTSA to complete its investigations as soon as possible and issue rules based upon a full and comprehensive analysis of these important safety issues. Regarding the nine mandated rulemakings in the draft, we defer to NHTSA's judgment as to the feasibility of the deadlines for issuing the numerous final rules as specified in the bill. However, we note that the deadline for many rulemaking mandates appear to be unreasonably short and provide insufficient lead time.

Short deadlines can adversely affect the quality of the final rule and prior to issuance of a final rule, NHTSA often finds it necessary to conduct research to address issues that first arise during the rulemaking process. From our perspective, if the short deadlines adversely affect the quality of the final rules, we all lose. With regard to the effective date specified in the bill, we note that while some of our members already equip their vehicles with several technologies contemplated by this legislation, for example, brake override and EDRs, others do not. For those manufacturers who do not currently employ these technologies, especially some of the small volume manufacturers the effective dates specified in the bill are simply not feasible.

Even those companies that currently have these technologies also need sufficient lead time because there are no assurances that these current technologies will be consistent with the mandates in the final rule. In addition, the draft bill does not provide for the new requirements to be phased in nor does it provide for phase-in incentive to promote early deployment where feasible. It is generally more efficient for manufacturers to implement new technologies at the time of model changes so that the new items can be better integrated than would be the case with the purely add-on approach.

With respect to the proposed corporate responsibility requirement in Section 305, we have concerns that this requirement could significantly chill the speed of the safety investigation practices used by some AIAM members and introduce non-safety experts into

the process. The current practice used by some AIAM members separate safety-related decisions from financial considerations and intentionally excludes these executives. We are concerned that the proposal might have the unintended consequence of introducing financial considerations inherent when highest ranking executives are involved into that safety decision making process. We also note that under existing law manufacturers are already legally responsible and accountable for submitting accurate information to NHTSA. Providing false or misleading statements to the federal government is strictly prohibited.

AIAM does not believe that requiring a senior official to certify responses to safety investigations and other submissions to NHTSA is necessary or practicable. However, if the committee insists on some sort of senior officer certification consideration should be given to limiting the scope of the certification to formal responses to NHTSA's defect determinations. Additional considerations should be given to allowing the corporate officers specifically charged with safety matters to certify submissions. Mr. Chairman, my written testimony provides AIAM comments on most of the sections of the bill. I would be more than happy to answer questions at the appropriate time.

[The prepared statement of Mr. Stanton follows:]

Testimony of Michael J. Stanton
President and Chief Executive Officer
Association of International Automobile Manufacturers, Inc. (AIAM)
before the
Subcommittee on
Commerce, Trade, and Consumer Protection
Committee on Energy and Commerce
United States House of Representatives

May 6, 2010

Chairman Rush, Ranking Member Whitfield, and members of the Subcommittee, thank you for the opportunity to speak with you today regarding the draft Motor Vehicle Safety Act of 2010. My name is Michael Stanton, and I am President and CEO of the Association of International Automobile Manufacturers, or AIAM. AIAM is a trade association representing 15 international motor vehicle manufacturers who account for 40 percent of all passenger cars and light trucks sold annually in the United States. AIAM members have invested over $40 billion in U.S. vehicle plants, component manufacturing facilities and R&D centers and directly employ 90,000 Americans. More than half of all vehicles sold by AIAM members in the United States are made in the United States.

AIAM and its member companies appreciate the Subcommittee's efforts to improve motor vehicle safety and understand the intended benefits of the draft bill. Having NHTSA consider additional Federal Motor Vehicle Safety Standards to address certain issues raised by recent recalls is an important goal. We also fully support the Subcommittee's proposals to provide additional engineering and related resources to NHTSA, including improving the agency's vehicle safety database to provide greater public accessibility. However, AIAM believes that NHTSA also must be given the necessary time and flexibility to study these important safety issues so that it can make analytic, data-based, technology neutral decisions. Similarly, manufacturers require sufficient lead time to engineer, test and produce vehicles that meet any new standards.

We are concerned that the rulemaking mandates in the draft bill pre-determine conclusions as to matters currently under active investigation and not yet fully analyzed by NHTSA. As a general matter, it would be more appropriate to direct NHTSA to complete its investigations as soon as possible and issue rules based upon a full and comprehensive analysis of these important safety issues.

With respect to the proposed Corporate Responsibility requirement (Section 305), we have concerns that this requirement could significantly chill the speed of the safety investigation processes employed by some AIAM members and introduce those who are not safety experts into the process. The current process employed by some AIAM members separates safety related decisions from financial considerations and intentionally excludes these executives. We are

concerned that the proposal might have the unintended consequence of introducing financial considerations (inherent when highest ranking executives are involved) into the safety decision-making process.

We also note that under existing law, manufacturers are already legally responsible and accountable for submitting accurate information to NHTSA. Providing false or misleading statements to the federal government is strictly prohibited (18 U.S.C. Section 1001). AIAM does not believe requiring a senior officer to certify responses to safety investigations and other submissions to NHTSA are necessary or practicable. Consideration should be given to limiting the scope of this certification by restricting it to formal responses to NHTSA's defect determinations. Further, consideration should be given to allowing a corporate officer specifically charged with safety matters to certify submissions.

We defer to NHTSA's judgment as to the feasibility of the deadlines for issuing the numerous final rules, as specified in the bill. However, we note that the deadlines for many rulemaking mandates appear to be unreasonably short and provide for insufficient lead time. Short deadlines can adversely affect the quality of the final rule, potentially placing the agency in the position of having to decide whether to rush completion of a proceeding or miss the statutory deadline and have to explain the delay to Congress. Prior to issuance of a final rule NHTSA often finds it necessary to conduct research to address issues that first arise after publication of a proposed rule, as a result of public comments submitted to the agency. From our perspective, if the short deadlines adversely affect the quality of the final rules, consumer and manufacturer resources used to comply with the rule may be misallocated. Moreover, short deadlines tend to limit opportunities for public comment, potentially impairing the ability of interested stakeholders to assist in the development of an effective final rule.

With regard to the effective dates specified in the bill, we note that while some of our members already equip their vehicles with several technologies contemplated by this legislation (for example, brake override and EDRs), others do not. For those manufacturers who do not currently employ these technologies, especially some of the small volume manufacturers, the effective dates specified in the bill are simply not feasible. Even those companies that currently have these technologies, however, also need sufficient lead-time because there are no assurances that these current technologies, which may vary from company to company, will be employed consistent with the mandates in the anticipated final rule. More often than not, complexities in achieving compliance with a proposed standard first become apparent during the rulemaking proceeding as a result of public comment and further research and analysis by the agency. This new information may demonstrate a need for greater lead-time than was initially anticipated. Without the appropriate lead-time, successful implementation of the rule would be compromised.

In addition, the draft bill does not provide for the new requirements to be phased-in, nor does it provide for phase-in incentives to promote early deployment where feasible. It is generally more efficient for manufacturers to implement new technologies at the time of full model changes, so that the new items can be better integrated than would be the case with a purely "add-on" approach. Phase-in periods for new standards accommodate the integration of new technology as part of the model redesign process, generally resulting in superior compliance measures being implemented at lower cost for consumers and manufacturers. Phase-in periods also provide time for suppliers to design, test, and ramp up production capacity for new or significantly modified components so that all of their customers can meet the requirements of new safety standards within the given lead-time.

AIAM's comments on specific provisions of the draft bill are as follows –

Sec.101. Electronics and engineering expertise. The creation within NHTSA of a "Center for Electronics and Emerging Technologies" is an appropriate response to the rapid movement of the industry toward electrification of vehicle systems (generally, to improve fuel efficiency) and the adoption of a wide range of advanced technologies.

Sec. 102. Vehicle stopping distance and brake over-ride standard. In late March 2010, NHTSA announced a research study with the National Academy of Sciences' National Research Council to examine the broad subject of unintended acceleration and electronic vehicle controls. This work is expected to be completed in about 15 months. Additionally, NHTSA has brought in NASA engineers and other experts in subjects such as electromagnetic compatibility as part of a shorter-term review of the systems used in Toyota vehicles to determine whether they contain any possible flaws that would warrant a defect investigation. The study is expected to last through at least late summer and include NASA experts on computer-controlled electronic systems, electromagnetic interference and software integrity. While it would be inappropriate to pre-judge the outcome of this work, it would be appropriate for Congress to codify the need for expedited study of these matters and to direct the agency to consider rules to address whatever concerns are found, including the ones identified in the draft bill. Since it is premature to judge the precise scope of whatever needs emerge from the study process, it would be inappropriate to establish deadlines for issuing final rules and for achieving compliance. The bill directs NHTSA to issue a safety standard that would "prevent" unintended acceleration in passenger vehicles. Given that the instances and causes of potential unintended acceleration are uncertain, it would be more appropriate to focus legislation on means to address any issues. In addition, some vehicles sold in the U.S. (and elsewhere in the world) use mechanical, rather than electronic, throttle control systems. This section of the ACT should preserve that design option by limiting provisions in Section 102(a)(2)-(4) to those vehicles in which an electronic throttle control system has been installed.

Section 103. Pedal placement standard. The considerations noted with regard to Section 102 apply here as well. The ramifications of changes in pedal placement are more complex than might be initially apparent. NHTSA should be allowed the discretion to determine whether a standard is appropriate or feasible. Challenges include balancing the conflicting demands on pedal placement that, on the one hand, would suggest a larger separation between brake and accelerator to reduce the likelihood of pressing them simultaneously and, on the other hand, would suggest placing the pedals close together which would be expected to reduce braking time in emergency situations. Driver comfort is another issue and will be different for shorter, taller, younger, and older drivers. Currently, the variety of vehicles, as well as the availability on some vehicles of adjustable pedals, lets people select a vehicle that is comfortable for them to drive safely. Pedal placement can also affect the performance of a vehicle in a crash; it will affect the position of the driver relative to the steering wheel and airbag module which in turn could drive changes to the design of a vehicle's airbag system. Pedal placement also has an effect on driver injuries, not only to lower extremities but to other body regions as well since crash forces travel up through the legs to the hips and the rest of the body. In addition to potential changes to vehicles' safety systems, movement of pedal locations in vehicles could involve significant redesign of the floor pan and other vehicle components and should be undertaken at the time of full model changes, if found to be a cost-effective means of addressing the unintended acceleration matter.

Section 104. Electronic systems performance standard. As noted above in Section 102, this matter currently is the focus of the NASA work and will be addressed by NAS as well over the next 15 months. The study process should be allowed to run its course and the need for adoption of rules and the content of such rules should be determined after the completion of the studies.

Section 105. Keyless ignition systems standard. This matter is the subject of ongoing work by the Society of Automotive Engineers (SAE). It was specifically requested by NHTSA in order to develop a consensus standard. The SAE committee, which has set a deadline of August 2010, should be allowed to proceed with its work. If Congress deems it necessary, it would be appropriate to specify a deadline for completion of that work and the adoption by industry of a voluntary agreement consistent with the SAE criteria. Congress could specify that if this process is not completed in a timely fashion and in a manner acceptable to NHTSA, NHTSA would then issue a rule.

Section 106. Transmission configuration standard. Transmission shift lever sequence is currently regulated by Federal Motor Vehicle Safety Standard 102. It would be appropriate for Congress to direct NHTSA to conduct an expedited review of this standard under its existing Regulatory Review Plan and issue rules to address any shortcomings in the current standard that are identified in the review.

Section 107. Vehicle event data recorders. We do not object to making the requirements of the current EDR rule, which is currently scheduled to go into effect beginning September 1, 2012 on an 'as equipped' basis, mandatory for all passenger vehicles. (A petition currently before the Agency requests an additional year lead-time). However, sufficient lead time must be given for implementation since not all manufacturers currently have EDRs in their vehicles and some may not have planned to add EDRs to all of their models. We are concerned that the part of this section directing the Secretary of Transportation to initiate rulemaking to revise the existing requirements for EDRs is excessively prescriptive. We do not object to directing NHTSA to consider the specifications listed in the bill, but the selection of new specifications should follow analysis by the agency and a notice-and-comment rulemaking process. As with the other mandates in the bill, the agency should be given flexibility regarding lead-time that is provided for compliance. This would allow the agency to balance the safety benefits of monitoring and recording additional data elements against the resulting cost and increased complexity. In addition, in the event that information is retrieved by a government safety agency under paragraph (d) (2) (C), the vehicle manufacturer should also receive access to the information., much as is done currently with information derived from on-board diagnostic systems. The section should also include a general prohibition on tampering with EDR information with associated civil penalties.

Section 201. Civil penalties. We understand the desire to increase the amount of civil penalties but object to an excessive increase that creates a system where penalties have little direct relationship to violations. Also, providing a cap on maximum penalties, as is the case under current law for most federal regulatory regimes, provides some degree of assurance that penalties would not reach a level that would risk bankrupting a manufacturer and result in a significant loss of jobs. We urge that a cap be retained and would be pleased to work with the Subcommittee to determine the appropriate penalty amount. It should be noted that civil penalties are not the primary factor in determining the conduct of manufacturers. The harm to a manufacturer's reputation from the publicity, as well as the increase in tort exposure surrounding safety noncompliance or defect events, has a major impact in the marketplace. This provides a greater incentive to avoid these situations. Last, we urge that the bill allow the agency to retain discretionary authority on setting appropriate penalties.

Section 202. Imminent hazard authority. We agree with the concept of providing NHTSA new authority to address "imminent hazards." However, such authority should be carefully circumscribed and defined to assure that this severe remedial approach is reserved for appropriate cases in which there is a high likelihood of imminent death. The draft language extends the authority to situations that "may" involve death or serious bodily harm, a standard that could be met in a wide range of routine enforcement cases, given the nature of automobile crashes. Moreover, unlike the recently amended Consumer Product

Safety Act, it does not require that NHTSA first go to court to obtain an imminent hazard order and there is no timeline for a prompt administrative hearing. The only remedy under the draft bill is for a manufacturer to go to the federal appeals court; a procedure that can take several years. The agency should develop guidelines and procedures, consistent with constitutional due process protections, for invoking the authority, and those guidelines should be subject to notice and comment and appropriate judicial review. In sum, given the severe consequences to a manufacturer, its workers and dealers of closing a production facility, the Subcommittee should reconsider the process and criteria provided in the draft bill for exercising imminent hazard authority to ensure that such authority is reserved only for situations involving a substantial number of vehicles and in which there is a high and imminent likelihood of death or serious bodily harm.[1]

Section 301. Public availability of early warning data. We oppose the expansion of the information categories that could be made public under paragraph (d) of the bill. We note that current confidential early warning information is fundamentally vehicle quality data that often has little relationship to safety but has substantial competitive value. Access to information of this type would assist companies in evaluating the effectiveness of competitors' technology, while potentially avoiding the expense and risk of developing and marketing that technology themselves. The release of any additional categories of early warning information would be harmful to manufacturers and is likely to spawn frivolous lawsuits. In 2008, NHTSA looked at this issue and completed a rulemaking which we believe struck the proper balance between confidentiality and public disclosure. In addition, to the extent that any data is publicly released, provisions must be made to redact consumer identifying information and vehicle VINs.

Section 305. Corporate responsibility for NHTSA reports. Under current law, the vehicle manufacturer or its U.S. agent is legally responsible and accountable for submitting accurate information to NHTSA. Providing false or misleading statements to the federal government is strictly prohibited (18 U.S.C. Section 1001). AIAM does not believe requiring a senior officer of the U.S. company to certify submissions to NHTSA is necessary or practicable, and in fact may be counterproductive to the intended benefits. The safety concerns, analyses, and judgments are extremely complicated. It is an iterative process requiring engineering expertise and judgment as well as the analysis of data from a variety of sources both within and outside the company – including suppliers and affiliates. A senior executive, especially one based in the United States, must rely on the expertise and knowledge of others with the skills required to assess the accuracy and rigor of engineering and complicated data analyses, since such individuals are generally not experts in vehicle safety. Successful

[1] We also note that the notification in paragraph (3) (A) (iii) should go to "owners," not "purchasers," since some vehicles will have been resold by their original purchasers.

approaches to safety ensure the integrity of the decision-making and reporting process by eliminating the presence of senior officers who do not have this expertise and also have fiduciary responsibilities beyond vehicle safety.

In addition, requiring senior executives to have such an intimate role in reporting is likely to have the unintended effect of slowing down safety-related decisions and introducing additional layers to the process. It is not uncommon for NHTSA to make a series of information requests of varying degrees in scope. If each of these responses to the agency, no matter how minor, must be certified and signed by "the principal executive officer or officers residing in the United States," the agency's investigation process could be significantly delayed and it may not have the benefit of the greater knowledge of trained safety executives.

This does not mean that the U.S. company is not legally responsible for the accuracy of its submissions but that responsibility rests on the corporation as a whole not one U.S. senior executive. Requiring the "principal senior executive" to certify a submission, as opposed to requiring the person more directly responsible for handling the company's safety and regulatory affairs, may unintentionally breach the wall between the responsibility for responding to safety issues and the sales/finance responsibility, which many have built to minimize the impact of financial considerations on voluntary recall decisions.

If the Subcommittee nevertheless insists on some sort of senior officer certification, consideration should be given to limiting the scope of this certification by restricting it to certain major submissions and/or allowing other corporate safety officials to sign. In addition, the potential liability cap of $250 million is grossly excessive as applied to an individual corporate officer and presents unduly burdensome practical constraints on a manufacturer. The assessment of penalties for "incomplete" submissions is a vague and highly subjective standard. AIAM would be pleased to work with the Subcommittee to establish a more reasonable and productive scope of individual penalties.

Section 306. Appeal of defect petition rejection. Notwithstanding its title, this section applies to both defect petitions and petitions for new standards. These petitions are numerous and come from a wide range of parties, including inventors seeking to have NHTSA mandate the use of their inventions and non-profit and for-profit organizations affiliated with product liability attorneys. This provision could have a significant impact on agency resources resulting from the need for the agency to defend additional lawsuits. It could also allow manipulation of the process and result in frivolous lawsuits.

Section 307. Deadlines for rulemaking. This section provides helpful flexibility to allow necessary additional time to complete rulemaking proceedings, as conditions warrant. Similar flexibility should be provided to the agency to allow additional compliance lead-time and phase-in schedules as appropriate.

Section 401. Vehicle safety user fee. This section would levy a fee on manufacturers (which most likely would be passed on to consumers) to provide additional funding for NHTSA. The amount of the fee does not appear to be tied to any quantified estimate of additional resource needs by the agency and without any specification of how the additional funding would be used. As such, the fee circumvents safeguards contained in the traditional legislative appropriations and authorization processes. The Department of Transportation's Inspector General has an ongoing study of the resource needs of the NHTSA defects investigation program. Given the lack of any specific estimate of agency need or any limitation on the use of the funding, we oppose the provision as currently drafted.

Thank you for the opportunity to present AIAM's views.

Mr. RUSH. The chair recognizes the Honorable Joan Claybrook. Ms. Claybrook, you are recognized for 5 minutes.

TESTIMONY OF JOAN CLAYBROOK

Ms. CLAYBROOK. Thank you so much, Chairman Rush, and thank you for your work on this bill. I am Joan Claybrook, and I am President Emeritus of Public Citizen, and a former Administrator of NHTSA. And since I left office in 1981, a million people have died in auto crashes and many, many more have suffered horrible injuries, many millions more, and a cost to the nation of about $6 trillion. So this is a huge issue. In the last 18 months, we have seen some huge regulatory failures in this country, whether it has been in the massive failure of regulation in the financial sector, whether it has been in the case of the Toyota Motor Company, whether it has been in the case of the 29 miners who have died because of violations in the mining industry, whether it has been because of the horrific oil leak explosion and the lack of regulation there, and the cost to the nation to individual families, to small businesses, have been unending and will continue for many years to come for all of these families that have been involved.

I say these because of these regulatory failures, this corporate malfeasance, this attitude of profits before safety and extraordinary loss of life in auto crashes set the back drop, it seems to me, for the discussion about the need for this bill. With strong regulation and enforcement regulated companies take fewer risks with the public safety environment and money, and I strongly endorse your bill because I think that it will help to deal and address some of these issues. I do ask that my entire statement be included for the record, but I will summarize our particular concerns.

First, I would like to mention in Section 107 the event data recorders, which we believe need to be vastly improved from those now in practice, and there needs particularly to be a single uniform access tool for downloading them. Even, you know, there is an issue whether the location should be recorded. If you call 911 on your cell phone, they have your location, so I don't see why that is an exception. And I believe that there needs to be an automatic transmission of the data that is collected in the EDR to a NHTSA database with privacy protections obviously taken into account. NHTSA has been excellent at having privacy protections for all the data that is ever used. This feature is important for the essential NHTSA data gathering which is expensive and totally inadequate to date. The industry and we agree completely on improving the NASS system but NHTSA needs real time access to on the road information to conduct its research, rulemaking and enforcement.

It needs robust and statistically valuable data and this can be accomplished as a part of the new EDR requirements. As to enforcement authority, I strongly support the new penalty provisions and the imminent hazard authority, but I urge the inclusion of criminal penalties in this legislation. I know there has been some objection and resistance to having criminal penalties, but I would just like to point out that statutes covering motor carriers, hazardous materials, aircraft, oil pipeline, waterfront safety, railroad safety, clean water, food, drugs, cosmetics, solid waste, clean air, mine safety, occupational safety and health, consumer product safety and con-

sumer product hazardous substances, securities, antitrust and vehicular homicide all have criminal provisions in them, and I don't understand why anyone suggests that NHTSA should not as well.

These prosecutions would have to go through the Justice Department, which has a very high standard for intent and there would have to be knowing and willful, so I think it ought to be included in this legislation. We support the transparency provisions in the legislation because the encourage and assist the public in reporting safety problems, and we support the judicial review for a public petition for recall. The industry talks about wanting due process for itself. We want due process for consumers. Without the opportunity for oversight, the agency can ignore its obligations and it indeed has in the past. It is unlikely that this provision would be used often because it is expensive to bring such suits, but it is important.

And I do endorse adjustments to this section in addition clarifying that lawsuits—in the transparency section that lawsuits should be separately reported from vague claims of letters under early warning, that categories of defective elements of a vehicle should be vastly enlarged so the public knows what we are talking about, that we should make public reports that manufacturers have of deaths under early warning, and that collecting the names and addresses of after market tire purchasers should be included that they can be notified about recalls which they cannot be now, and to require NHTSA to fully document meetings with interested parties when they have them, which they haven't been doing. As to funding, we think the agency is starving to death. The whole budget is $132 million. It needs to be vastly increased, and it should be $500 million a year, and so we hope that that will happen under your jurisdiction.

And, finally, I do have in my statement, I won't mention them specifically, but I think there are three things that are included for the integrity of the agency, and that is not having a facility that is owned by an auto manufacturer having whistleblower protection and having revolving door protection. Thank you very much, Mr. Chairman.

[The prepared statement of Ms. Claybrook follows:]

PREPARED STATEMENT OF

JOAN CLAYBROOK
PRESIDENT EMERITUS, PUBLIC CITIZEN
FORMER ADMINISTRATOR, THE NATIONAL HIGHWAY
TRAFFIC SAFETY ADMINISTRATION

On

THE PROPOSED MOTOR VEHICLE SAFETY ACT

Before the

HOUSE SUBCOMMITTEE ON COMMERCE, TRADE AND CONSUMER PROTECTION

Washington, D.C.
May 6, 2010

Mr. Chairman, members of the Subcommittee, my name is Joan Claybrook and I am pleased to be asked to testify today concerning proposed legislation to enhance the authority and capacity of the National Highway Traffic Safety Administration in the U.S. Department of Transportation. I am President Emeritus of Public Citizen and a former Administrator of the National Highway Traffic Safety Administration.

In the last eighteen months we have witnessed corporate executives take huge financial risks with investors money and a massive failure of regulation in the financial sector that has upended our economy, caused people to loose their savings, their jobs, their homes and forced many into bankruptcy. The effects will be tearing at the fabric of our society for years to come.

In the past few months the American public has witnessed more spectacular examples of corporate excesses and of the failure of regulation to moderate corporate misbehavior, resulting in unnecessary deaths, injuries, and environmental and economic harm. The year 2010 began with the shutdown of Toyota production until repairs for a sticky accelerator could be made after Toyota notified Canadian and European authorities about the problem last year but failed to notify the U.S. Department of Transportation. The company was recently fined $16.4 million, the maximum under current law.

This revelation followed a horrible crash of a runaway Toyota built Lexus last August while the occupants were on a cell phone begging the 911 operator for help. They crashed at almost 100 mph, killing all four occupants. Shortly thereafter Toyota recalled over 5 million vehicles for the so-called floor mat problem (which many believe is an electronic problem that is still being investigated by the Department of Transportation). Toyota officials boasted in an internal memo last summer that in 2007 it had avoided a major recall for its runaway vehicles and saved the company $100 million. Over 50 people are dead because of runaway Toyotas and many others injured.

Then in early April a horrible coal mine explosion at the Massey Energy Upper Big Branch coal mine in Montcoal, West Virginia killed 29 miners. This mine had been cited just weeks before the disaster for numerous safety violations, including problems in ventilating the mine and failure to prevent a buildup of deadly methane gas. The mine company denied there were any ventilation problems shortly before the blast. The mine owner, Don Blankenship, is a well known opponent of mine regulation. In 2006 a subsidiary of Massey pleaded guilty to 10 criminal charges at the Sago mine that killed two miners and the company paid a $2.5 million criminal fine. As the families and the nation mourned the most recent mine deaths, the FBI has begun an investigation of criminal offenses under the Federal Mine Safety and Health Act. According to the Washington Post, "More than 200 former Congressional staff members, federal regulators and lawmakers are employed by the mining industry as lobbyists, consultants, or senior executives, including dozens who work for coal companies with the worst safety records in the nation." Regulation of mining operations and enforcement of violations has been weak for years.

Then on April 20, a British Petroleum (BP) oil rig exploded in the Gulf of Mexico, off shore from New Orleans and its fragile wetlands, marshes and estuaries. Eleven workers were killed, others injured, fire ensued, the rig collapsed, and oil started leaking at 40,000 gallons a day. It is now estimated by the Coast Guard to be a raging torrent of oil pouring out of the drilled hole a mile deep in the water at a rate of more than 200,000 gallons a day and BP cannot stop it. The blowout preventer designed to seal the well was activated by workers but did not work nor did the failsafe switch. The huge oil slick will exceed the spill of the Exxon Valdez oil tanker in Alaska. It threatens wildlife all along the Gulf Coast, where some 30 percent of U.S. fish and shell fish are harvested. The rest of the nation will feel the impact of higher prices for these products. But thousands of workers and small business owners along the Coast are now being shutdown, who knows for how long, because their products are awash in oil. The Coast Guard is responsible for supervising the clean up but regulation of oil drilling by the Interior Department is minimal as the Wall Street Journal recently reported. Also, in federal legislation passed after the Exxon Valdez debacle, oil industry lobbyists secured very low limits on company liability (economic liability is capped at $75 million).

Mr. Chairman, enactment of your vehicle safety legislation in the next months before Congress adjourns is crucial. Since I left the NHTSA in 1980, more than one million Americans have lost their lives in motor vehicle crashes and many more have suffered serious injuries. Applying the DOT cost value of $5.8 million per fatality, the cost to the nation of this loss of life over 30 years amounts to nearly $6 trillion dollars, not adjusted for inflation. While the number of annual deaths has dropped in the last few years because of the recession, if history is our guide, they will rapidly climb back as the economy recovers. These numbers do not include the cost of the horrible injuries in car crashes, from amputations, brain injury, quadriplegia, paraplegia, epilepsy, burns, and the resulting bankruptcies, orphaned children, divorces, and increased government health care, unemployment and other social assistance costs. The most recent figure for the total annual cost of crash injuries in 2000 was $230 billion a year.

These examples of regulatory failures, corporate malfeasance and profits before safety, and the extraordinary loss of life in auto crashes every day set the backdrop for our discussion of the need for amendments to the National Traffic and Motor Vehicle Safety Act. With strong

regulation and enforcement, regulated companies take fewer risks with the public's safety, environment or money. NHTSA has been far less effective that it can and should be. Your legislation reflects the importance of reenergizing the agency, and helping it achieve its primary goal of securing public safety on the highways. We deeply appreciate your effort in preparing this legislation. I will focus my comments on the four main sections of this important bill to give NHTSA the regulatory heft and direction it needs to do its job, and then comment on a few issues related to the agency's integrity that are not covered by the draft bill:

I. **To require the issuance of key safety standards that update and enlarge the agency's oversight of electronic systems in motor vehicles;**

II. **To enhance the authority of the National Highway Traffic Safety Administration to enforce the law;**

III. **To increase transparency at the agency so that the public can play a greater role in overseeing what the agency is and is not doing and to assist the public in protecting themselves;**

IV. **To provide greater resources for an agency that is responsible for 95 percent of the nation's transportation deaths but that receives only one percent of the U.S. transportation budget. It's motor vehicle safety budget [FY 2011 request] is a paltry $132 million; and**

V. **Ensuring the integrity of the safety regulatory agency from industry influence.**

Mr. Chairman, I will not comment on every provision in the proposed legislation, but will highlight those that I believe need the most support or adjustment and submit technical amendments to the staff on minor suggestions.

Title I. Vehicle Electronics and Safety Standards.

I support the provisions in this title but urge that the bill include deadlines for issuance of proposed rules as well as final rules as did the 2005 NHTSA legislation on rollover safety standards. This is needed to be sure that the agency does not wait to act until the last minute, missing the deadline for the final rule.

I particularly want to discuss vehicle Event Data Recorders (EDRs), Section 107. I have a few suggestions I think are critical to the viability and utility of this provision. I also commend to the committee the EDR legislation developed by Representative Jackie Speier (D-CA) which is more comprehensive and supported by consumer groups. In particular with regard to Section 107, I recommend the following:

First, the time to accomplish these two rulemakings (subsections (a) and (b)) is too long and unnecessary given the current state of technology development and installation by the

industry. The bill requires one rulemaking to mandate installation of minimal EDRs and a second to upgrade the requirements. Both objectives can be achieved with a single rulemaking in three years, 18 months to issue a final rule and 18 months lead time, rather than a total of five years, three years to issue the rule and two for lead time.

Second, at a minimum, I also urge that NHTSA be required to mandate recording of all the data elements listed now in its voluntary standard unless there is a strong reason not to do so. Also, collection of rollover data should be required after the initial crash or air bag deployment, and even after the second event, for a full 15 seconds as proposed in the bill. Recording this data should not be optional. Rollover crashes are a major source of auto crash deaths, with some 10,000 deaths and almost 20,000 severe injuries resulting each year. It is essential such data are collected.

Third, the language in Sec. 107(b)(5) and (b)(6) should require a single, universal or uniform access tool that is reasonable in cost for downloading all EDR, not merely restate the current requirement that access tools be commercially available. Relying on the current requirement means that the system of having a different tool for each EDR will continue a very expensive and confusing proposition for police agencies and others.

Fourth, I also urge that Section 107(c)(4) be deleted. Recording the crash location is essential for getting medical care immediately to crash victims, as OnStar and the BMW system now do. Also, for future research using the crash data from EDRs, location can be a critical factor. At present, if you call 911, your location can be identified. On balance, identifying the location of the crash is far more important than keeping it secret.

Fifth, the bill should require that the data collected by the EDR be automatically transmitted electronically to a NHTSA data base (with privacy protections for those involved in the crash as NHTSA routinely requires now in its data collection). On Star and BMW now routinely collect this data electronically for its vehicles for their own purposes. Electronic transmission of EDR data would be faster and would ensure more timely medical care for those injured in crashes by providing additional information on the crash event to emergency responders. Electronic collection of EDR data by NHTSA would expedite the speed and reduce the cost of collecting this data, and allow the agency to obtain the data without waiting for the physical examination of the vehicle. EDRs can lose data due to tampering and inept physical downloading. Handling by intermediaries increases the chances that EDR data will be corrupted. It will be far less expensive and far more reliable for NHTSA to receive real-time data electronically and directly from actual crashes at about the same time as the crash notification systems alert medical help.

Currently, NHTSA spends over $15 million a year to investigate crashes weeks after they occur for the National Automotive Sampling System, but the number of crashes investigated is only about 4,000, far fewer than needed for statistically robust data. NHTSA's crash data program is too small for the agency to conduct its mission. Specifically, the agency requires detailed data on a large, representative number of crashes that occur on U.S. roads to diagnose safety problems, to identify safety defects and noncompliance with safety standards, and to evaluate the degree to which its standards and programs are achieving their goals.

Crash investigations do collect far more data per crash than a real time EDR system would, but the EDR data would provide a high quality basis for selecting which crashes to investigate and would reveal the state of highway safety in this country. EDR data and crash investigations would complement each other, giving NHTSA more robust and statistically valuable data. Getting such data will also assist the agency to oversee the EDR program and improve it because it will be constantly looking at the data collected. In short, the agency is totally thwarted and cannot do its job with inadequate and outdated data. Any more band aids are a waste of lives, time and money. The agency needs to enter the 21st Century and be able to collect and analyze real time crash data received electronically. The agency should be directed to undertake immediately a complete review and redesign of its crash data systems by 2011 showing how it could collect and use real-time electronic crash data by 2015.

NHTSA should require such electronic collection systems either as part of the EDR rule, or as a separate requirement. Since some manufacturers now collect such data for themselves, it should not be difficult to make sure such data is routinely transmitted to a NHTSA data base.

Title II. Enhanced Safety Authorities

1. Civil Penalties:

I heartily support the increase in civil penalties of $25,000 per violation (as at the Environmental Protection Agency (EPA) emissions program) without any mandated maximum. One of the NHTSA's serious problems is that the auto industry has not felt any pressure to comply with safety standards or recall vehicles because the agency had no real tools to punish them if they disobey the law. The agency's penalties for violation of fuel economy standards have no maximums, and there is no maximum on EPA's vehicle emissions penalties. With NHTSA's maximum of $5,000 per violation ($1,000 until the 2000 TREAD Act) and maximum for any case of $16.4 million ($1 million in the law prior to TREAD), the agency until the recent Toyota $16.4 million fine had imposed a total of only $8,273,496 in fines from 1966 through 2009. No wonder the auto companies view NHTSA as a toothless tiger.

By comparison, California last week fined Sempra Energy $410 million for gouging the state on energy contracts signed during the energy crisis there a decade ago. Last week the Justice Department announced Johnson and Johnson has agreed to pay more than $81 million in a case accusing them of illegally promoting the epilepsy drug Topamax for psychiatric uses. And in February BAE Systems, a large defense contractor, agreed to pay $400 million to resolve allegations it misled the Defense and State departments in its activities in relation to the Foreign Corrupt Practices Act a decade ago.

2. Imminent Hazard Authority:

I also strongly support the imminent hazard authority. However, allowing a violator 59 days to seek judicial review after being required to stop the hazard is a very long time where there is an imminent hazard. I recommend making the time to file a maximum of 20 to 30 days,

requiring the agency to immediately hold a hearing on the matter before issuing an imminent hazard order so any challenge would appropriately go to the Court of Appeals. The court should be required to conduct an expedited review.

3. Criminal Penalties:

Finally, I strongly urge the committee to include criminal penalties for knowing and willful violations of the Act. Criminal penalties are standard in many consumer protection and other regulatory statutes for knowing and willful acts. In the transportation regulatory agencies there are numerous authorities for criminal penalties. For example:

- Motor carriers who knowingly and willfully violate certain motor carrier laws are subject to up to one year of imprisonment.
- Persons, who misrepresent the contents of a container with hazardous material, or tamper with the labeling of hazardous materials, are subject to five years of imprisonment.
- Persons operating certain aircraft may receive up to three years of imprisonment for knowingly and willfully forging, altering, displaying or selling fraudulent registrations or certificates.
- Persons who damage an oil pipeline sign or marker are subject to up to one year of imprisonment.
- Persons who knowingly and willfully violate vessel operation and waterfront safety requirements commit a felony punishable with up to six years of imprisonment.
- A person who knowingly and willfully falsifies a report required under the Railroad Safety Act is subject to up to 2 years imprisonment.

In addition, environmental, worker and consumer protection laws regularly authorize criminal penalties, including the Consumer Product Safety Act that this committee amended in 2008 to make its criminal penalty provisions effective. For example,

- The Clean Water Act provides that anyone who knowingly violates provisions regarding disposal or discharge of effluents or knowingly introduces a hazardous substance into a sewer system or public treatment facility is subject to up to three years of imprisonment.
- The Food, Drug, and Cosmetic Act provides that anyone who introduces adulterated or misbranded foods, drugs, devices or cosmetics into interstate commerce can receive up to one year of imprisonment.
- The Solid Waste Disposal Act provides that anyone who knowingly transports or disposes of hazardous waste without a permit can be sentenced to up to five years of imprisonment.
- The Clean Air Act provides that anyone who knowingly releases any hazardous air pollutant into the air can receive up to fifteen years of imprisonment.

- The Mine Safety Act provides that any operator, including corporate officers, who knowingly violates or fails to comply with mandatory health and safety standards, is subject to up to one year of imprisonment.
- The Occupational Health and Safety Act provides that willful violations of any standard that cause the death of an employee are punishable by up to six months of imprisonment.
- The Consumer Product Safety Act provides that anyone who manufactures, sells, distributes or imports a consumer product that does not conform to the applicable product safety standard can receive up to one year of imprisonment.
- The Consumer Product Hazardous Substances Act provides that anyone who, with intent to defraud or mislead, introduces misbranded or banned hazardous substances into interstate commerce can receive up to one year of imprisonment.

In addition, a driver who participated in an illegal street race that killed eight people is subject to criminal penalties. Goldman Sachs is subject to criminal penalties for securities fraud by the Securities and Exchange Commission. Antitrust violations can be criminally prosecuted. Why not NHTSA?

There is no reason why NHTSA should not also have the authority to seek criminal penalties for persons who knowingly and willfully violate the Act, especially because these actions result in death and injuries and so many lives are at stake. Such prosecutions would have to be brought by the Justice Department after a thorough review of the evidence in the case. The Justice Department does not bring many such cases each year. But the fact that it could is a strong deterrent to auto companies knowingly and willfully violating the law. And it would change the way the top brass views the company's regulatory obligations.

Title III. Transparency and Accountability

I support all of the provisions in Title III of the bill. They make excellent improvements to help the public learn about NHTSA's programs with greater transparency and accessibility, encourages the public and manufacturers, dealers and mechanics to report safety problems to the agency, and authorizes judicial review when a public petition is rejected. Giving the public the authority to challenge an agency rejection of a defect petition is essential. As we now know, NHTSA on a number of occasions turned down safety defect petitions from Toyota owners for an investigation of their runaway vehicle. The owner had no recourse and NHTSA did nothing to protect the public. It is now clear that greater public involvement would improve NHTSA's attention to consumer complaints and concerns. It is unlikely that this provision will be used often because it is costly to bring such suits, but it is available for the times when citizens have done their homework and are ready to press the case. It is not unlike the provision in the Federal Election Commission law that authorizes a challenge of the dismissal by the Commission of a complaint or failure to act on it. The court can provide relief if it finds the dismissal was "contrary to law". The U. S. Supreme Court has upheld that specific authorization for review of the dismissal of a complaint. A precedent for the provision in the bill is found in two

antidiscrimination statutes concerning particular actions that shall not be deemed committed to unreviewable agency discretion.

In addition to the provisions in the bill, we would urge the Committee to adopt the following new items.

1. Reporting Law Suits under Early Warning.

Require NHTSA to distinguish claims and complaints made to manufacturers by the public, and which the manufacturers are required to disclose to the agency (under the TREAD Act Early Warning Reporting requirements) from lawsuits filed in court. Currently, manufacturers are not required to report filed lawsuits that assert a product defect even thought these documents are public records in our courts. Manufacturers should be required to report both types of claims but to report them separately because lawsuits are an order of magnitude more substantial and important than general consumer letters that suggest a claim against a manufacturer. In terms of early warning, both the agency and the public should know whether the claims are full-fledged lawsuits or a general consumer request for compensation.

2. Fix Vehicle Defect Categories under Early Warning.

As a part of the Early Warning Reporting rulemaking required under Sec. 301(b), the bill should require the agency to either eliminate the potential defect vehicle categories now in effect, or vastly expand the number of categories so that the public can distinguish what specific part of the vehicle is a potential problem. The existing 24 categories are too vague and generalized and do not inform the public about what problem is being reported. Also, because the categories are vague, manufacturers can use one category in one report and another category in another report to undermine the whole purpose of the Early Warning Reporting system. For example, in the Toyota runaway vehicles, the early warning report can reference either a transmissions or an engine. Such game-playing should be not possible. Also there is a need for instructions on how to report a category. Perhaps the best remedy is to have the manufacturer report the exact problem without any broad categories.

3. Make Public Manufacturer Reports of Deaths

We also urge that the underlying reports of deaths from manufacturers be required to be public. As it now stands, it is impossible for the public to exercise any real oversight of NHTSA decision-making without access to this crucial information. To be useful, the numbers of deaths and injuries should also be aggregated by make and model and alleged defect.

4. Collect Names and Addresses of Aftermarket Tire Purchasers

Since 1982 sellers of aftermarket tires have not been required to record the names and addresses of buyers and report them to the manufacturer so that owners can be notified by mail or internet if there is a recall involving their tires. This provision was eliminated because

independent aftermarket tire sellers did not want the manufacturers to have access to information about their purchasers because company stores competed with them. But this of course undermines the ability to provide notice to the owners about a defective tire. With the internet and electronic record keeping so readily available now, this requirement should be reinstated and the data and recall notices managed by an independent operator just as R.L. Polk does this for auto purchaser names that it secures from state motor vehicle administrators.

5. Fully Document Ex Parte NHTSA Meetings with Interested Parties

A major problem with transparency at NHTSA has been private ex parte meetings manufacturers have with the agency about particular defects or pending rulemaking. Too often NHTSA writes only cursory notes about the meeting, mentioning the attendees but rarely stating the substance of the meeting or attaching the materials used at the meetings, including power point presentations, hand outs etc. Thus the public is essentially kept in the dark. In addition, these notes are often not put in the docket until months after the meeting occurs.

The Center for Auto Safety has discovered summaries of such meetings at NHTSA prepared by manufacturers and revealed later in litigation that bear no resemblance to NHTSA so-called notes of the same meeting. The purpose of the ex parte rule at regulatory agencies is transparency but it has been completely undermined. We ask that the bill require that detailed minutes of the entire discussion at ex parte meetings be prepared with all materials used attached and put into the docket within two weeks of a meeting. Incidentally, when consumer organizations take part in such meetings we make our materials fully available for the agency docket and have no objection to complete written minutes of our discussions being placed in the public docket.

IV. Funding

For years the NHTSA motor vehicle safety program has been on a starvation diet. Its current budget is a paltry $132 million dollars, less than the cost of minor government programs. It needs to be built up to at least $500 million annually. Beginning with this Fiscal Year (F.Y.) 2011, it should be doubled. We are very pleased the bill allocates $200 million for F.Y. 2011, but the increases for F.Y. 2012 and F.Y. 2013 are far too small, amounting to only $40 million in each year.

I realize that the vehicle safety user fee will bring in new money beginning in 2012, and more in subsequent years, and that such a user fee is in operation at the Food and Drug Administration (FDA). I do have concerns about it in that it might cause manufacturers to exercise even more ownership over the agency than they do now. And I believe the small amounts of funding we are discussing for this crucial agency can more than be met in the federal budget.

My major concern is that the agency budget reaches $500 million in funding in the next four years, either with federal appropriations and the user fee or through federal appropriations alone. My preference would be solely through federal appropriations.

V. Ensuring the Integrity of the Safety Regulatory Agency from Industry Influence

There are three other provisions I recommend that are not now in the draft legislation but should be included to eliminate any actual or perceived industry influence.

1. Vehicle Test Facility

In 1978, as NHTSA Administrator, I agreed to lease space at a then new vehicle test facility built by the State of Ohio in East Liberty for NHTSA testing programs. At the time NHTSA conducted minimal testing at a building in Riverdale Maryland. There was no crash test capacity or test track. With no money allocated by Congress to build a facility we agreed to what was then our only option.

In the 1990's Honda Motor Co. bought the Ohio test facility and ever since NHTSA has been leasing the space from an auto manufacturer. I believe this is a total conflict of interest. If the Toyota cases that have been under scrutiny this year had been Honda cases, this arrangement would have been untenable. But every year the agency tests Honda as well as other vehicles at the Honda test facility which is also rented by other manufacturers and used by Honda.

Honda disagrees that there is a conflict because, it claims, it has hired a third party to manage the facility and the finances. This use of an intermediary company does not eradicate the fact that Honda is the owner that completely controls the facility, benefits from owning it, and along with other vehicle manufacturers makes use of the same facility as the agency. Honda's argument is like saying money laundering is clean. This is not a particular criticism of Honda. NHTSA is a government motor vehicle regulatory agency that must operate independently.

This spring NHTSA was approached with information that George Washington University(GWU) has a shovel ready vehicle test facility ready to be built on land it owns near Dulles Airport and which can be jointly built by GWU and NHTSA. GWU estimates it would cost $28 million and it has offered to pay half the cost, or $14 million. This is an offer I don't think the Department of Transportation should refuse. It would create a state of the art facility with the only university in America that has PhD students in auto safety who could supplement agency staff at the facility. GWU already manages NHTSA's film library of crash tests, and does testing and other work for the Federal Highway Administration at the Dulles location where it owns a major office building housing its expanding auto safety library that could serve as the administrative headquarters for the test facility.

In addition, this location is much more convenient for the agency which now must send engineers who need to work with the test facility staff to Ohio. Creating the test facility in

Virginia would facilitate communication between the testing staff and other agency personnel, it would have far more favorable weather conditions than Ohio during the winter months (part of the Ohio test facility extends outdoors), it would reduce costly and time consuming travel, and it would update the equipment to state of the art for the agency's test programs. Failures of effective coordination with the Ohio facility are legion at NHTSA. Also, its remote location makes it more difficult to hire personnel than would be the case for a facility in this region. There are about 30 NHTSA personnel at the Ohio facility.

NHTSA's contribution to the cost could be paid by allocating the $16.4 million penalty paid by Toyota this year. That is new money not in the President's budget. I urge the Committee to include in the legislation the transfer of NHTSA's test facility to the GWU location funded by the Toyota penalty.

2. Revolving Door

Last week Senator Barbara Boxer (D-CA) introduced legislation, S. 3268, the Motor Vehicle Safety Integrity Employment Act, to limit the revolving door between NHTSA staff and the auto industry. It requires a three year cooling off period before an agency employee could work for or represent a motor vehicle company on NHTSA matters. It is a very reasonable bill and should be added to the House Committee draft legislation. As the press revealed several months ago, a large number of former NHTSA officials, including Administrators, the top presidential appointee, deputy administrators, general counsels, and chiefs of the enforcement, rulemaking and research divisions, as well as technical staff have left NHTSA over the years to be employed by vehicle and equipment manufactures as consultants, lobbyists, attorneys or on staff. Obviously this is a real problem and needs to be addressed.

3. Whistleblower Protections

The Congress has recognized the need to provide whistleblower protections for employees working in public transportation, commercial vehicle employees, and selling products regulated by the Consumer Product Safety Commission. We urge the Committee to consider Whistleblower Protection as is being considered in the Senate bill.

Conclusion:

Thank you very much Mr. Chairman and members of the Committee for this opportunity to testify. This important legislation needs to be enacted into law. A decade ago, after the Ford/Firestone debacle, the Congress passed legislation and thought it had fixed the problems at NHTSA. But time has revealed that the TREAD Act and the underlying statute need major improvements to upgrade the agency's regulatory authority, to increase transparency, to enhance enforcement powers, to add much needed resources and to protect its integrity. Recent months have shown how important these powers are to prevent massive numbers of preventable deaths and gruesome injuries. The public is fed up with regulatory failures that harm so many citizens and communities. Let's do it right this time and set an example. When regulation works well, the companies as well as the public benefit. We look forward to swift movement of the legislation.

Mr. RUSH. Thank you very much. The chair now recognizes Mr. Ditlow for 5 minutes.

TESTIMONY OF CLARENCE DITLOW

Mr. DITLOW. Thank you, Mr. Chairman, and members of the committee. I am Clarence Ditlow, Executive Director of the Center for Auto Safety, a small group that has watch dogged the National Highway Traffic Safety Administration for 40 years now. We deeply appreciate the effort that went into drafting the proposed Motor Vehicle Safety Act of 2010 and both consumers and auto companies alike will benefit from fundamental reforms to the National Traffic and Motor Vehicle Safety Act. Indeed, when you look at NHTSA it is a wonderful agency. It has a vital mission but it is woefully underfunded, woefully 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.

Unlike other public health and safety agencies NHTSA doesn't even have its own research facility. Instead, it must rent space at a facility owned by Honda. Now when we go back and look at the original agency, it was much better equipped to handle regulating the auto industry than today's agency. Today, there are twice as many vehicles. There are twice as many vehicle manufacturers. And the motor vehicles themselves are probably four times as complex as the motor vehicles that were on the roads in the 1960s and 1970s when the agency was formed.

The original agency had a research program that did things like research on advanced air bags, a research safety vehicle. It did more research on electronic controls in vehicles in the '70s than it did in the '80s or '90s. That budget, those resources, they led to advanced safety standards like the air bag standard. The auto industry went from a company that couldn't dislike air bags more than—an industry that today they want to sell as many cars as they can with air bags and use those air bags to promote the sale of motor vehicles. It is an example safety does sell. What has happened though is that the safety system at the agency has significantly broken down, if we look just at the defects and recalls division, it used to be that the whole process was open. You could go in and look at citizen complaints. You could go in and look at warranty data. You could look at the files and rebut what the manufacturers were saying. Recalls and investigations took place in a much shorter period of time.

We had the General Motors sudden acceleration problem due to failing engine mounts. From the time the investigation was open to 6.7 million vehicles were recalled was less than a year. GM didn't suffer in sales like Toyota did. And today what we have is investigations that go forward go on forever almost, and we have multiple recalls. The consumer is dismayed, the manufacturer loses sales. And when we look at the early warning system, the early warning system has actually made the investigatory process worse. Things that used to be public are not public anymore. You can't tell how many deaths and injuries that there are on Toyotas. There were 301 death and injury summary reports filed to NHTSA but only 15 were requested. All death reports should be made public.

I have concentrated primarily on some of the openness and transparency. I want to say to Mr. McCurdy in the history of the agency we have 23 years when there was judicial review of agency decisions on defects, and in 23 years there were only two court challenges, scarcely a burden, and what you will find is a check and balance that is needed. When we go forward with rulemakings under this, we are going to have a situation where we are correcting the catch-up. The agency is behind. The agency needs more research, more funds. Just looking at the accident investigations alone, there is only $15 million. We need $60 million for accident investigations in this country, and they can catch defects like Toyota.

So when I look forward to the future, this legislation provides a unique opportunity to not only reduce the unacceptable tolls of deaths and injuries on the nation roads but also to provide stability to the auto industry which suffers from lack of public confidence and sales when preventable defects such as Toyota's sudden acceleration occur. The federal government through NHTSA should lead the way to vehicle safety, not come on after the fact and try to clean up on this. So I thank you for your time.

[The prepared statement of Mr. Ditlow follows:]

Summary Statement of Clarence M. Ditlow
Executive Director, Center for Auto Safety
On Proposed Motor Vehicle Safety Act of 2010
Before the Subcommittee on Commerce, Trade, and Consumer Protection
House Energy and Commerce Committee
May 6, 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 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 cumulating 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.

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 petition 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 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.

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.

Mr. RUSH. The chair now recognizes Mr. Harper. Mr. Harper, you are recognized for 5 minutes.

TESTIMONY OF JIM HARPER

Mr. HARPER. Thank you, Mr. Chairman, Ranking Member Whitfield, and members of the committee, I am very pleased to be here. My name is Jim Harper. I am Director of Information Policy Studies at the Cato Institute. I am delighted for the opportunity to testify about the Motor Vehicle Safety Act draft, and particularly Section 107. Until a decade ago when I left the Hill, I was a Judiciary Committee guy. I hope you won't hold that against me. I do believe maybe the substance of my testimony will be what you hold against me. Before I turn——

Mr. RUSH. We will try not to hold that against you.

Mr. HARPER. I appreciate that. Before we turn to the privacy issues at play with EDRs, I will make two observations that are really straight out of the skunk at the garden party file. Across the country today, Americans are re-reading the Constitution and they are trying to square what it says with the activities of Congress. I fully acknowledge the good intentions, of course, of everybody involved in auto safety issues, but I have a hard time finding that to be a federal government responsibility. The Constitution's grant of authority in the commerce clause was aimed at making commerce among states regular, ending the trade wars that had broken out among the states in the Articles of Confederation.

Framers did not intend for the Congress to regulate the quality and caliber of goods and services traded in the United States. My quick study, necessarily quick study, of the economics of Section 107 dealing with EDRs draws me to doubt whether installing event data recorders in all cars sold in the United States is a cost effective auto safety measure. Driving the cost of new cars higher raises the cost of used cars because it limits the market of used cars as people don't trade up. Under the, I think, entirely plausible assumption that newer cars are safer than older ones raising the prices of cars with EDR technology keeps poorer people in older, less safe cars. Now, of course, that is not to say that analyzing data is a mistake. Good data will improve auto safety but almost certainly sampling auto crash data using EDRs in a cross section of cars would provide safety benefits without the cost of mandating EDRs for all cars sold in the United States.

My analysis of the economics is worth the money you are paying for it, of course, but I want to highlight that there are trade-offs here and it would be regrettable if large societal investments in EDRs and EDR data drove up costs and kept the company's poorer drivers from trading up endangering their lives for the benefit of the wealthy drivers who buy new cars. I will turn to privacy, and there is no issue more complicated than privacy, of course. Privacy in its strongest sense, the word privacy means the ability to control information about one's self. I believe the protections for EDR data stated in Section 107 may help clarify the privacy issues around EDR data and still provide a small benefit in terms of privacy protection, but control also comes from having a say in the information infrastructure around you and what data collection happens in your car, in your home when you use your computer, and so on.

Consumers today have no control and little awareness of EDRs in their cars. They can't control the presence of EDRs or their functioning. There are shades, unfortunately, in Section 107 of too little, too late in terms of protecting consumer privacy. Consumers should have a say in the first instance of whether data is collected. Society wide data collection and use will continue to grow. In our society down the road the capacity of EDRs will grow undoubtedly. EDR data will integrate with other data collected and used by the automobile, and EDR data will regularly be used in litigation and for many other purposes. Your car is a computer, but if you have almost no control of what that computer does your privacy is very much threatened.

Think of EDRs in the near future as an ankle bracelet that all drivers will have to wear just for getting behind the wheel. We are talking about a loss of privacy and autonomy in developing this kind of data infrastructure without consumer input or control. Without doubt, there is no doubt in my mind, of course, everyone is trying to do the best for auto safety and consumer welfare over all, but consumer welfare involves the freedom to live as you want unmonitored. I will brag slightly that I rebuilt a few engines when I was in high school. I am proud to report both of them ran when I was done with the process. There is no reason on God's green earth why a 429 4-barrel and 1973 Mercury Montego should have a double roller timing chain but mine did, and I was proud of it.

I miss the day, frankly, when people could tinker with their cars, make their cars an expression of themselves. It may be computer geeks in the future that want to tinker with their cars and with the data in computing power in their vehicles make those cars something special. But I think that freedom consistent with safety should continue to exist. Thank you very much for hearing me out.

[The prepared statement of Mr. Harper follows:]

Testimony of Jim Harper
Director of Information Policy Studies
The Cato Institute
to the House Energy and Commerce Committee's Subcommittee on Commerce, Trade, and Consumer Protection at a legislative hearing on "H.R. ____, the Motor Vehicle Safety Act"

May 6, 2010

Chairman Rush, Ranking Member Whitfield, and members of the subcommittee, thank you for inviting me to address this hearing on H.R. ____, the Motor Vehicle Safety Act of 2010.

My name is Jim Harper, and I am director of information policy studies at the Cato Institute. In that role, I study and write about the difficult problems of adapting law and policy to the challenges of the information age. I have maintained a web site called Privacilla.org since 2000, cataloguing many dimensions of the privacy issue, and I also maintain an online federal legislative resource called WashingtonWatch.com. It had over 1.6 million visitors in 2009.

Cato is a market liberal, or libertarian, think-tank, and I pay special attention to preserving and restoring our nation's founding, constitutional traditions of individual liberty, limited government, free markets, peace, and the rule of law.

I serve as an advisor to the Department of Homeland Security on its Data Integrity and Privacy Advisory Committee, and my primary focus in general is on privacy and civil liberties. I am not a technologist, but a lawyer familiar with technology issues. As a former committee counsel in both the House and Senate, I understand lawmaking and regulatory processes related to technology and privacy.

After sharing two prefatory observations about the constitution and risk management, I will turn to the privacy issues involved with the mandate for event data recorders authorized by section 107 of the legislation. My conclusions are that most of the Motor Vehicle Safety Act exceed the proper role of the federal government, that collective over-spending on collection of accident data may undermine the goal of preserving drivers' lives, and that mandatory EDRs are another move toward constructing surveillance infrastructure that threatens the privacy and liberty of the American citizen.

What's a Constitution When Lives Are at Stake?

My analysis of federal legislation always begins with the Constitution. Which grant of power in the Constitution allows Congress to act? And what impediments on federal power may limit Congress' action?

The Motor Vehicle Safety Act shares a constitutional infirmity with much of the legislation Congress considers today. There is no source of authority for it in the Constitution.

Likely, if your committee advances this legislation, your report will cite the commerce clause (article I, section 8, clause 3) as the specific power granted to Congress in the Constitution to enact it as law. That clause gives Congress power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The preface to the Cato Institute's pocket constitution—more than three million copies in print—discusses the meaning of this provision. Since the New Deal,[1] the Supreme Court has abandoned the meaning and purpose of the commerce clause, allowing Congress to regulate based merely on activity having effects on interstate commerce.[2]

You may regard the constitution's limited, enumerated grants of power, as quaint. But they are not. You swore an oath to bear true faith and allegiance to the constitution at the beginning of this Congress, as the Constitution requires you to do.

This is not just ceremony, and the Constitution is not just a symbol. The results of continuing nonchalance about the Constitution's limits are plain to many observers.

With reason, many people regard the federal government as overly large, remote, and imperious. Your good intentions notwithstanding, many view Congress negatively, as a body that cannot hew to any principle.

It is not just principle. There are consequences to disregarding the Constitution. Campaign finance law "reformers" believe that too much money is spent on politics and influence at the federal level. But people and organizations will always try to influence the government's influence over them. Money follows power. Huge expenditures on political influence follow directly from the hugeness of federal power.

As you press the federal government into involvement in every segment of the economy—including auto safety, automobile design, and auto safety research—you

[1] *E.g.* Wickard v. Filburn, 317 U.S. 111 (1942) (approving the regulation of wheat grown for personal use and not for sale under the Commerce Clause).

[2] The Court discovered the commerce power's present outer limits in United States v. Lopez, 514 U.S. 549 (1995), which found that gun possession near a school was too attenuated from effects on commerce to be within the commerce power.

should not be surprised to find that every segment of the economy spends money on lobbying and campaigning to push for its interests. If you want campaign finance reform, follow the Constitution and move authority back to the states and people where it belongs.

The good intentions that animate your auto safety efforts do not overcome constitutional limits on the government.

Is Auto Safety for Rich People?

Everybody shares the goal of maximizing the welfare of Americans, including by making auto travel safe. Better data about the operation of cars in the moments before collisions would almost certainly improve knowledge of how to make auto travel safer. Important questions remain about using event data recorders to generate statistical research that would improve the design of the nation's cars, however.

Risk management and benefit-cost analysis can enlighten efforts to maximize welfare by improving auto safety. As a member of the Department of Homeland Security's Data Privacy and Integrity Advisory Committee, I helped design a framework for analyzing programs that generalizes to the problem of auto safety. In fact, we used the "security" of cars against common threats to illustrate risk management.

In the DHS Privacy Committee's "framework document,"[3] we defined the risk management problem as determining how, and how well, a program addresses threats to the public. With benefit information in hand, the costs of the program can be compared to determine whether it cost-effectively lowers risk. (Making auto travel safer for people is easier than securing against terrorism. Both the threats to car occupants and the costs of steps to counter such threats are easier to measure.)

Responses to health threats like automobile collisions can be categorized four ways:

- Acceptance—a rational alternative that is often chosen when the threat has low probability, low consequence, or both. Low-speed "fender benders" occur often, but are acceptable in terms of human safety because they have only the rarest impacts on life and health.

- Prevention—alteration of the target or its circumstances to diminish the risk of the bad thing happening. This is the main goal of data collection, to learn how cars might be altered to protect life in the event of serious collisions.

[3] Report of the Data Privacy and Integrity Advisory Committee, No. 2006-01 (March 29, 2006) http://www.dhs.gov/xlibrary/assets/privacy/privacy_advcom_03-2006_framework.pdf.

- Interdiction—confrontation with, or influence exerted on, an attacker to eliminate or limit its movement toward causing harm. The Privacy Committee report cited "flashing your lights to warn another car about the fact that you are passing" as a "mild interdiction." Discovering new interdiction techniques may be a goal of data collection.

- Mitigation—preparation so that, in the event of the bad thing happening, its consequences are reduced. It is unlikely, but the inclusion of first aid materials, for example, may be a mitigation of the effects of collisions on human health.

More data might contribute to each type of response to threats to human health from auto collisions. Continuing with the risk management framework:

> The final step in analyzing the program's efficacy is to be aware of new risks created by the prevention, mitigation, or interdiction of the threats under consideration. Installing heavy iron siding to a car may mitigate the risk to the car from accidents. At the same time, the reinforced car may pose new risks to other cars and pedestrians.

I do not worry that NHTSA will propose iron siding that sends cars careening into bike paths and playgrounds. But the costs of the data collection program may have risk transfer effects that are important to consider.

According to the Research and Innovative Technology Administration's Bureau of Transportation Statistics there were 6,813,369 new retail sales of passenger cars in the United States in 2008.[4] This is the lowest number of new car sales since at least 1990, given economic conditions 2009 was probably not a good year, and the only year for which BTS reports lower sales is 1960. The number of vehicles on American roads, meanwhile, continues to rise, to a whopping 254,403,082 as of 2007.[5]

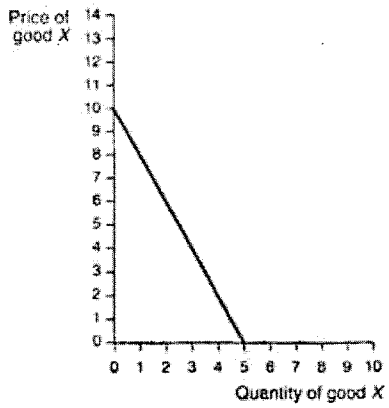
A demand curve is a graph illustrating the willingness of consumers to buy at a certain price. A downward sloping demand curve reflects the common circumstance in most markets: people buy less of things that cost more. In the demand curve pictured on the next page, an increase in price of two units will cause sales to drop by one unit.

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[4] U.S. Department of Transportation, Research and Innovative Technology Administration, Bureau of Transportation Statistics, Table 1-12: U.S. Sales or Deliveries of New Aircraft, Vehicles, Vessels, and Other Conveyances
http://www.bts.gov/publications/national_transportation_statistics/html/table_01_12.html

[5] U.S. Department of Transportation, Research and Innovative Technology Administration, Bureau of Transportation Statistics, Table 1-11: Number of U.S. Aircraft, Vehicles, Vessels, and Other Conveyances
http://www.bts.gov/publications/national_transportation_statistics/html/table_01_11.html

This is not the demand curve for automobiles in the United States, but the U.S. automobile demand curve almost certainly slopes the same direction. When automobiles are more expensive, people buy fewer automobiles.



I do not know how steep the U.S. demand curve for automobiles is, and I do not know the cost of installing electronic data recorders in cars. But it is a near certainty that putting EDRs in cars raises their costs and lowers sales.[6] It lowers sales more for poor people than for rich people. New car sales affect the availability of used cars, of course, and the cost of trading up from an older used car to a newer used car.

This has negative effects for the automobile industry, of course, and unemployment has negative effects on the health and well-being of people. But lower auto sales probably also have negative effects on the safety of drivers and passengers.

When people forgo new car purchases or trade-ups to newer used cars, they remain in older cars that are likely to be involved in more collisions due to wear and tear and design problems that have been rectified in newer models. When they are in collisions, occupants of older cars may suffer more injury and death than they would in newer cars which are better designed to protect them.

Because the poor are in older cars, the bulk of these effects—greater numbers of collisions and greater morbidity and mortality in collisions—will fall on poor people.

I do not have the cost data or the economic training to determine the amount of injury and death produced by including EDRs in automobiles, but it is almost certainly above zero, and it probably falls more heavily on the poor.

It would be a mistake to conclude that EDRs should not be put in automobiles. The data they collect can improve auto safety so that the dynamic I have described—newer cars being safer—will continue.

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[6] I focus here on the policy of putting EDRs in all cars as a whole, not the incremental advance of that policy in this bill. By requiring all makes to build EDRs into their cars, the bill would prevent any one manufacturer from gaining a cost advantage by not doing so.

The idea of trade-offs merely sharpens the auto safety risk management question to: *How much data do you need to make cars safer?*

It seems plain that statistically relevant evidence about auto safety could be produced using sampling, by drawing on a cross-section of collisions from which EDR data is available. Putting EDR functionality in every car is overkill that has costs.

Perhaps 50% of the cars produced should have EDRs. Maybe it's 30%, or 60%. If there is to be a mandate, why not place it on more expensive models?[7] If EDRs were offered as a public safety option, perhaps the wealthier cohort of auto consumers would choose them, avoiding cost impositions that endanger the poor.

Analyzing EDR data from 100% of accidents is not required to produce valid auto safety research. An across-the-board mandate serves some other end, which I speculate about below. The auto industry's general "voluntary" inclusion of EDRs in automobiles is not strong evidence to the contrary. The industry may not have considered these trade-offs, or it may be pursuing ends beyond or distinct from safety.

EDRs and Privacy

Privacy is a complex and vexing issue, and the interaction between EDRs and privacy is a challenge to describe or calculate. But the installation of EDRs in U.S.-sold vehicles to date has been a challenge to privacy. Making EDRs mandatory in new U.S. vehicles will erode privacy further, the privacy protections in the Motor Vehicle Safety Act notwithstanding.

The word "privacy" is used casually to describe many concerns in the modern world, including fairness, personal security, seclusion, and autonomy or liberty. Few concepts have been discussed so much without ever being solidly defined.

The strongest sense of the word "privacy" is its control sense: having control over personal information about oneself. In his seminal 1967 book *Privacy and Freedom*, Alan Westin characterized privacy as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."

I use and promote a more precise, legalistic definition of privacy: as the subjective condition people experience when they have power to control information about themselves and when they have exercised that power consistent with their interests and

[7] That rule could be adjusted where less expensive models do not share all the relevant design characteristics with the more expensive models.

values.[8] The "control" dimension of privacy alone has many nuances, and I will parse them here briefly.

A Personal, Subjective Condition

Importantly, privacy is a subjective condition. It is individual and personal. One person cannot decide for another what his or her sense of privacy is or should be.

To illustrate this, one has only to make a few comparisons: Some Americans are very reluctant to share their political beliefs, refusing to divulge any of their leanings or the votes they have cast. They keep their politics private. Their neighbors may post yard signs, wear brightly colored pins, and go door-to-door to show affiliation with a political party or candidate. The latter have a sense of privacy that does not require withholding information about their politics.

Health information is often deemed intensely private. Many people closely guard it, sharing it only with doctors, close relatives, and loved ones. Others consent to have their conditions, surgeries, and treatments broadcast on national television and the Internet to help others in the same situation. More commonly, they relish the attention, flowers, and cards they receive when an illness or injury is publicized. Privacy varies in thousands of ways from individual to individual and from circumstance to circumstance.

An important conclusion flows from the observation that privacy is subjective: government regulation in the name of privacy is based only on politicians' and bureaucrats' guesses about what "privacy" should look like. Such rules can only ape the privacy-protecting decisions that millions of consumers make in billions of daily actions, inactions, transactions, and refusals. Americans make their highly individual privacy judgments based on culture, upbringing, experience, and the individualized costs and benefits of interacting and sharing information.

The best way to protect true privacy is to leave decisions about how personal information is used to the people affected. Political approaches take privacy decision-making power away from the people. At its heart, privacy is a product of autonomy and personal responsibility. Only empowered, knowledgeable citizens can formulate and protect true privacy for themselves, just as they individually pursue other subjective conditions, like happiness, piety, or success.

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[8] *See generally*, Jim Harper, "Understanding Privacy—and the Real Threats to It," Cato Policy Analysis No. 520 (Aug. 4, 2004) http://www.cato.org/pub_display.php?pub_id=1652

The Role of Law

The legal environment determines whether people have the power to control information about themselves. Law has dual, conflicting effects on privacy: Much law protects the privacy-enhancing decisions people make. Other laws undermine individuals' power to control information.

Various laws foster privacy by enforcing individuals' privacy-protecting decisions. Contract law, for example, allows consumers to enter into enforceable agreements that restrict the sharing of information involved in, or derived from, transactions. Thanks to contract, one person may buy foot powder from another and elicit as part of the deal an enforceable promise never to tell another soul about the purchase. In addition to explicit terms, privacy-protecting confidentiality has long been an implied term in many contracts for professional and fiduciary services, like law, medicine, and financial services. Alas, legislation and regulation of recent vintage have undermined those protections.[9]

Many laws protect privacy in other areas. Real property law and the law of trespass mean that people have legal backing when they retreat into their homes, close their doors, and pull their curtains to prevent others from seeing what goes on within. The law of battery means that people may put on clothes and have all the assurance law can give that others will not remove their clothing and reveal the appearance of their bodies without permission.

Whereas most laws protect privacy indirectly, a body of U.S. state law protects privacy directly. The privacy torts provide baseline protection for privacy by giving a cause of action to anyone whose privacy is invaded in any of four ways.[10] The four privacy causes of action, available in nearly every state, are:

- Intrusion upon seclusion or solitude, or into private affairs;
- Public disclosure of embarrassing private facts;
- Publicity that places a person in a false light in the public eye; and
- Appropriation of one's name or likeness.

While those torts do not mesh cleanly with privacy as defined here, they are established, baseline, privacy-protecting law.

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[9] The Gramm-Leach-Bliley Act and federal regulations under the Health Insurance Portability and Accountability Act institutionalized sharing of personal information with government authorities and various "approved" institutions. See 15 U.S.C. §§ 6802(e)(5)&(8); various subsections of 45 C.F.R. 164.512.

[10] Privacilla.org, "The Privacy Torts: How U.S. State Law Quietly Leads the Way in Privacy Protection," (July 2002) http://www.privacilla.org/releases/Torts_Report.html.

Law is essential for protecting privacy, but much legislation plays a significant role in undermining privacy. Dozens of regulatory, tax, and entitlement programs deprive citizens of the ability to shield information from others. Mandated EDRs undermine privacy, despite the protections outlined in the Motor Vehicle Safety Act, as I will discuss below.

Consumer Knowledge and Choice

Perhaps the most important, but elusive, part of privacy protection is consumers' exercise of power over information about themselves consistent with their interests and values. This requires consumers and citizens to be aware of the effects their behavior will have on exposure of information about them.

Technology and the world of commerce are rapidly changing, and personal information is both ubiquitous and mercurial. Unfortunately, there is no horn that sounds when consumers are sufficiently aware, or when their preferences are being honored. But study of other, more familiar, circumstances reveals how individuals have traditionally protected privacy.

Consider privacy protection in the physical world. For millennia, humans have accommodated themselves to the fact that personal information travels through space and air. Without understanding how photons work, people know that hiding the appearance of their bodies requires them to put on clothes. Without understanding sound waves, people know that keeping what they say from others requires them to lower their voices.

From birth, humans train to protect privacy. Over millions of years, humans, animals, and even plants have developed elaborate rules and rituals of information sharing and information hiding based on the media of light and sound.

Tinkering with these rules and rituals today would be absurd. Imagine, for instance, a privacy law that made it illegal to observe and talk about a person who appeared naked in public without giving the nudist a privacy notice to that effect and the opportunity to object. People who lacked the responsibility to put on clothes might be able to sue people careless enough to look at them and to recount what they saw. A rule like that would be ridiculous, but legislation of precisely this character has been a staple of privacy proposals in Congress for at least a decade.

The correct approach is for consumers to be educated about what they reveal when they interact online and in business so that they know to wear the electronic and commercial equivalents of clothing.

No, Really: EDRs and Privacy

If you needed any proof that privacy is complex, witness the fact that my introduction of the concept has consumed three written pages. I now turn to how EDR policy currently threatens privacy by depriving consumers of control over personal information.

There are at least three ways that EDRs undermine privacy: In the current market environment, consumers generally cannot control whether or not their vehicles have EDRs; they do not control what their EDRs do; and they have limited ability to control what happens with the data. The Motor Vehicle Safety Act makes the problem worse with regard to the first two, while providing some protection with regard to the third.

Control of Whether or Not Vehicles Have EDRs

As I noted earlier, giving consumers choice with regard to EDRs could improve auto safety by allowing price-sensitive consumers—the poor—to decline having them. The margin of cost savings could move these consumers into safer vehicles, saving their lives and the lives of others.

This would also protect privacy. If EDRs were a choice, auto manufacturers, marketers, dealers, and resellers would give consumers at least some information about EDRs and what they do. There would be greater public discussion of their safety merits, privacy consequences, and value per dollar because car buyers could do something with that information.[11]

Consumers motivated by privacy could opt out of having EDRs entirely. Consumers motivated by personal and public safety could opt to have EDRs in their vehicles. Giving consumers control over the choice whether to have EDRs in their cars would improve their privacy by improving their control over their personal information infrastructure.

Control of What EDRs Do

I note that some states have proposed to give consumers control of whether their EDRs are activated.[12] This would shore up consumers' control of personal information and thus

[11] It is important not to be fooled by today's public ignorance of EDRs. Consumers are able to make choices about EDRs. In the present market environment, with EDRs standard on most vehicles, consumers exercise rational ignorance: There is no plausible benefit from learning about EDRs, so they invest no time or energy in learning about them or their consequences. They are disempowered objects of government and industry policy.

[12] I have not investigated the status of state laws, but a 2006 article cites proposed legislation in Montana, New Hampshire, and New Jersey. Aleecia M. McDonald and Lorrie Faith Cranor, How Technology Drives Vehicular Privacy," I/S: A Journal of Law and Policy for the Information Society, Volume 2, Issue 3 (2006) http://lorrie.cranor.org/pubs/vehicular-privacy-authorsVersion.pdf.

their privacy. Consumers could decide based on their particular circumstances whether they want their vehicle collecting data about their use of it.

Given all the technology built into it, it is not a stretch to say the car is a computer. But consumers do not get to control this computer. Consumers should have more choice and control. At a minimum, government policy should not deprive them of it or channel the market away from consumer control.

Of course, EDRs today are closely integrated with basic vehicle operations and safety features like air bags. This is a historical accident, not something inherent to EDRs. The data recording function could be logically separated from vehicle maneuvering and operated by drivers from the console.

An extension of this thinking would be to give consumers the ability to access and control much of the software that runs inside their vehicles. Red Hat CEO Jim Whitehurst recently made a pitch for automakers to adopt open source principles in a recent, very interesting *Business Week* commentary.[13]

Open source has its place, and I would not recommend open source for the functions integral to stopping, starting, and turning, but the many other computing and communications features in automobiles would benefit from open source software development. A feature of this approach would be that consumers could gain control over the functioning of much of the computing their automobiles do.

This control would improve their privacy by allowing them to select what data is recorded, how long it is kept, where and how it is stored, and so on. Given the opportunity, some drivers might create extensive personal records of their driving, perhaps offering researchers greater insight into driver behavior than the mandatory, one-size-fits-all EDRs envisioned by the Motor Vehicle Safety Act.[14]

One can only guess at why government and corporate policy is converging on requiring EDRs in cars and denying consumers control of the EDRs' functioning. My best guess is that their use in litigation is regarded by industry as an important protection and by litigators as important evidence.

EDR data is being used in litigation today, and its use will increase. Giving consumers control of the data would protect privacy, but it would frustrate the interests of

[13] Jim Whitehurst, "Why Toyota Should Go Open Source," Bloomberg Businessweek (Apr. 1, 2010) http://www.businessweek.com/innovate/content/mar2010/id20100329_064567.htm.

[14] Researchers might pay for it, opening up a new market in which some drivers cleverly capitalize on personal information about themselves to subsidize their mobility.

government, industry, and the trial bar. When all these interests unite in Washington, D.C., it is no surprise that consumer privacy loses.

Control of EDR Data

With consumers substantially deprived of control over EDRs' existence and functioning, protections going to the use of EDR-produced data cannot be entirely satisfying. The rules about data proposed in the Motor Vehicle Safety Act provide some privacy protection, but far less than the full array of controls consumer should have.

Section 107(d)(1) would make any data in an EDR the property of the owner or lessee of the vehicle in which it is installed. This restates the appropriate and probable legal status of such data. It is some benefit to privacy to have a restatement because the law in this "new" area is unclear.

The privacy subsection (107(d)(2)) bars collection of the data by anyone other than the owner or lessee except in certain circumstances: when there's a court order, with the data owner's permission, and when a government agency has certain beneficent purposes.

The first two are appropriate restatements of the appropriate legal rules around data, and I take it that the court order provision is not meant either to expand or to contract the circumstances in which courts can authorize or require the acquisition of EDR data.

The third is interesting, though, because it illustrates how the bill giveth with one hand and taketh away with the other. It creates (or affirms) an intellectual property right in EDR data, but prescribes an unrestricted, royalty-free license to that data benefiting government researchers. The license is limited to data that will not reveal the identity of the driver, owner, or lessee—a privacy protection—but on balance this provision reduces the consumer's control by carving another exception from consumer control of data produced by the EDR.

There is little question that the data in someone's computer is their property. So it is with the data in people's cars. But the Motor Vehicle Safety Act would reduce people's property rights in EDR data by a small margin.

Overall the disability on consumers to control the existence of EDRs in their cars and to control the functioning of EDRs in their cars threatens privacy. And it threatens privacy more than the modest protections of EDR data in the bill, which restate, then slightly derogate from, the better view of existing law about who "owns" data.

There is no privacy apocalypse that occurs should EDRs be mandatory nationwide in all new cars. This is but a small step in the continuing erosion of privacy that has been going on for years—and that will continue.

The future trajectory of EDR policy is deeply concerning. As they have in the past, EDRs will probably continue to add new functions and capabilities.

I note with dismay that the bill would allow NHTSA to require EDRs to capture "certain events such as rapid deceleration, full-throttle acceleration lasting more than 15 seconds, and full braking lasting more than 10 seconds, even if there is not a crash or airbag deployment." This is an open-ended grant of authority that could allow recording of travel at 90+ miles per hour or 85 miles per hour, or maybe 70.

Future changes to policy may further erode the weak privacy protections in the bill. Perhaps reasonable suspicion will allow law enforcement officers to access EDR data and issue speeding tickets based on it. The existing ban on location data may fall, or EDR data might be correlated with location data collected by other functions in the car.

The mandatory EDR is surveillance infrastructure. There are no two ways about it. At some point in the future, a day will come when it is "switched on," and drivers across the country may be subject to government monitoring of their comings and goings.

Government and industry appear largely to agree on having EDRs in all our automobiles, with consumers prevented from controlling those EDRs. Because the data collected by EDRs will be available to government and litigators, the Motor Vehicle Safety Act puts a sort of ankle bracelet on every American driver when he or she gets behind the wheel.

These things are not happening because of an evil plot hatched at NHTSA or because of a cabal between NHTSA and the auto manufacturers. They are happening because so few people are looking down the road. You should be aware that the good intentions behind this bill help build "Big Brother infrastructure."

To avoid this, to protect privacy, and to limit the injury and loss of life that I think comes from an overbroad mandate for EDR use, federal policy should prefer EDRs to be optional, or at least not make them mandatory. Consumers should have control over the functioning of EDRs in their cars. And if they choose them, consumers should have full ownership of the data their EDRs produce, being free to barter or trade that data to anyone who wants to access it.

Mr. RUSH. That concludes the opening statements of the witnesses. And I have a question that I want to ask all the witnesses to respond, if you will. A lot of ink has flown on this topic of automobile safety. There has been additionally several informative oversight hearings held in light of the Toyota incident. We have all come to the conclusion that NHTSA needs to be recalibrated, needs to be remade. We need a new model for NHTSA, an upgraded model for NHTSA, and it needs to be energized, it needs to be equipped to achieve its primary goal of securing public safety on the highways. And I just have a question, a general question for each and every one of you. In an immediate sense in a nutshell what is the best possible piece of legislation that you would envision? In other words, what in your words and your viewpoints, what is the provision that must exist in any kind of refurbishing of NHTSA and what provisions must not exist? Each one of you, would you—David wants me to start with you, Mr. Harper. Would you please be so kind?

Mr. HARPER. I am not a NHTSA expert, and I apologize for that, but I think two laws that are very important in this area that relate to some of what I said are the Regulatory Flexibility Act, which requires economic analysis of major rules, rules of having a consequence of more than $100 million, and I think the analysis should include what the potential costs of all mandates in the bill are, regulatory mandates, so that we can understand that if car prices are rising so high that it prevents a used car market from emerging. There are kids today driving around in cars from the '70s, and when they get in an accident those cars are more likely to get in accidents because of age and design flaws from the past.

When they are in accidents they are likely to suffer more injuries just because newer cars have better safety features in them, so we have got to consider getting people out of older cars into newer cars and that is done by making sure that cars are relatively inexpensive, so there are trade-offs here. The reg flex act would be involved in that. Another is the Government Performance and Results Act. The Results Act was just getting started when I was on the Hill, and I recall NHTSA being an example of an agency that did a pretty good job of measuring results per dollar. It is a lot easier than rating components of the Justice Department where you are trying to measure justice in terms of per dollar. You can't do it. But traffic statistics you can do per dollar and I think continuing that would be important.

Mr. RUSH. Mr. Ditlow, do you have any concise comments?

Mr. DITLOW. Mr. Chairman, I think that the transparency and oversight provisions are the most important because you can—when you look at issuing new standards, we need them. There is no question about it. But I am looking at the past 40 years of this agency and there needs to be a public oversight to hold the agency accountable to enforce the laws that are there. And, unfortunately, we don't have the access today that we once had so creating the transparency of how the agency functions, the data that should be public but is not public, and then the right to judicially challenge the decisions of the agency, that is what will make the agency work for the future. It is the age old story, you can tell the agency to

do something but how do you tell them to do a good job. It is the citizen that is going to make the agency do a good job.

Mr. RUSH. Thank you. Ms. Claybrook, I can't wait for your answer.

Ms. CLAYBROOK. Thank you so much, Mr. Chairman, for asking the question. I would say that the resources for the agency are totally essential, that this agency is starving to death, as I mentioned. $132 million is ridiculous to expect it to do its job. And so I think this bill should not be passed without a goal of $500 million a year annual budget for the agency in the next 4 years. So I would say an increase each year of $100 million on top of the prior year. That is the only way this agency is going to have the capacity to do the job that you and I expect it to do. What it shouldn't have, in my view, is a situation where it has conflicts of interest. I think that it should not have a test facility owned by a manufacturer. I think it is a terrible conflict of interest so that that is something that is not in the bill. I think it should be added to the bill. I think that there should be criminal penalties.

Mr. RUSH. Thank you. Mr. Stanton.

Mr. STANTON. Yes. Thank you for the question. I think I have been in the industry almost as long as most of the people up here, maybe not quite as long, but I remember very vividly when years ago when seat belt use was 12 percent and now we are up to over 90 percent, so we have made tremendous, tremendous progress in this whole area. And cars have gotten so much more complicated over the last 30 years, and we have argued and have lobbied not as successfully as I would like to say for additional funds for NHTSA when it comes to NASS, the NASS system and the FARR system. NHSTA needs to be a data-driven organization, and to the degree that we can get them a greater amount of better data the better off we all are going to be. And then the final point is that the rulemakings that NHTSA undertakes, they really have to be an open process and they really cannot have the final rule in sight when you start the process. You are not being data driven if you do that.

So the degree that they can go through the rulemaking process, have it open, have the record dictate what the final rule looks like and when it ought to be implemented given into consideration the implementation schedules required by automobile manufacturers we end up with a better product.

Mr. RUSH. Mr. McCurdy, do you want to answer this?

Mr. MCCURDY. Yes, Mr. Chair. I wasn't completely deferring. I was just suggesting an order here. Mr. Chairman, the rule of thumb I have always used on legislation is if you have had hearing and you identify the problem then address the problem very clearly and simply. And we made some recommendations in our testimony those areas that address the particular problem that this committee and Congress has identified. We are not into re-litigating and going back to decisions on judicial review that was made in 1988 by courts. What we would like to do is work with you to see how we can make this a bipartisan approach that uses common sense to really address the underlying problems. And I think you have the basis there. Again, there are some key elements that—some real makings at NHTSA.

And my last comment on this, I do not believe that NHTSA is broken. You used a car metaphor when you talked about a new model. It takes about 5 to 7 years for the industry to create a new drive train or a new model. You don't need to go through that. I think there are some tweaks here that you can address, and I think that—and we agree that it needs to be adequately resourced. The center is a good idea. There are some very important studies that are going to take place that we are anxious to see what those results are which provide data. The National Academy of Sciences and even NASA's recommendations I think will have real impact and help this committee do its work as well.

Mr. RUSH. Thank you. The chair now recognizes the gentleman from Kentucky for 5 minutes.

Mr. WHITFIELD. Thank you all for your testimony. In reading your testimony and also in your verbal response to questions, there has been a number of references to these studies that are ongoing by NASA and by the National Academy of Sciences. Are those ongoing because of a contract with NHTSA or are these being conducted by contracts with the automobile manufacturers?

Mr. STANTON. It is through NHTSA. It came about as a requirement from the Toyota investigations and the need for additional knowledge and DOT then contracted with NASS and NASA.

Mr. WHITFIELD. Because as someone who really doesn't understand cars, it seems like this pedal placement standard and transmission configuration standard when you think about the vast variety of vehicles it would be difficult to come up with a uniform standard very quickly, and I think that the Administrator of NHTSA indicated that he did not think that they could meet the time frames in here. Do you all—how many of you believe that NHTSA could meet the time frames for the regulations called for in this legislation?

Mr. MCCURDY. As my colleague, Mr. Stanton, mentioned there are nine mandates in different rulemakings and we believe—and the Administrator admitted this was too compressed. Again, I don't think you have to have that many rulemakings. I don't think you have to—those will not address the problem that really was with Toyota. Brake override will address that. It is preferable to have a placement or the other approach which again there is a certain overreach in the drafting. And I understand positional negotiation and obviously the Administrator was asked the question what all he would like to see in this bill or did he cover, and he said it captures the universe. Well, it really does capture the universe. It is very broad. I think you need to narrow it now in order to get those real problems addressed. I think a very straight rulemaking on one or two items can address it.

Mr. WHITFIELD. Ms. Claybrook, what do you think? Do you think that NHTSA can meet these deadlines?

Ms. CLAYBROOK. Well, they are certainly going to need a lot more resources in order to do so. I would say that. I think they are very tough deadlines. I think that they are important though. I don't think that the brake override solves the problem. The brake override is like a safety protection if you have a problem, but it doesn't solve the problem. What you need to solve the problem is to change the electronics and improve the electronics in the vehicles them-

selves. And so I think that these standards are really important for the agency to address. The reason they have deadlines in them is because the agency has taken years and years and years in the past to do its job, and so there is a lot of frustration with that and with the endangerment of the public that occurs when they don't act.

Mr. WHITFIELD. I personally—yes, Mr. Stanton.

Mr. STANTON. Just real quickly. There is already a standard FMVSS on the transmission and it has to be intuitively correct, so there is some work that has already been done on that. But I don't think that there is any way in the world that you could anticipate what the requirements are going to be, what the rulemaking outcome should be. Take, for example, your pedal and brake interface. What does that mean? How are they going to deal with that? Are they going to move the break pedal further away from the gasoline pedal? And then what is the implication of that on safety and what does it mean to the floor plan of the vehicle? And then how do you do that in 2 years? That is not good government.

Mr. WHITFIELD. Do you have those concerns, Mr. Harper?

Mr. HARPER. I do. If you look at some of these, there is a great deal of information the agency already has. There was a year long study done through the Volpe Center on the brake pedal placement. There are certain recommendations that they have made. And then when you look at all nine standards there is provision for the agency that if they can't meet the deadlines to come back to the Hill and inform the Hill of that. And that happened with the roof standard that was just here last year and we got a much better standard out of it.

Mr. WHITFIELD. Mr. Harper, do you want to comment? OK. Let me ask one other question, and I see my time is about to run out. The judicial review for a defect petition rejection and trying to stay in imminent hazard order the judicial reviews are different. In one you go to U.S. District Court and the other you go to the U.S. Court of Appeals. Does the fact that these judicial review procedures are different, is that of concern to any of you?

Mr. STANTON. I guess I would say that the way that they are handled is problematic in both cases for different reasons. Certainly the judicial review on imminent hazard is a deviation from what is under the CPSC and the other area where the agency would have to go to court to get the teeth and ability to do it. But the judicial review on the other side is for both defects, rejections, and also for new standards. Now we are concerned that you could have a lot of people that would like to see a new standard that NHTSA would really not for good reason not want to promulgate and yet they have now devoted to the court, and we think it ties up the agency, will tie up the lawyers and not get the job done.

Mr. WHITFIELD. Thank you, Mr. Chairman.

Ms. CLAYBROOK. If I could just comment on that. I would just comment not on the need for them but on just the procedure which is that I think under the imminent hazard provision you would have to have some kind of a mandatory agency hearing of some sort so that there would be a record before they would go to the Court of Appeals so I just comment on that.

Mr. DITLOW. The provision for review of defect petition is limited to that defect petition. We have 23 years of experience where there was judicial review until the court in 1988 said there was no law to apply, and yet we only had two lawsuits, and one of those lawsuits actually resulted in the Kelsey-Hayes landmark decision where instead of recalling 50,000 GM pickups with a camper body, they recalled 200,000 because all the wheels on any of the GM pickups could fail. So it has worked, and what we would like to do is just reinstate it.

Mr. RUSH. Mr. Braley, you are recognized for 5 minutes.

Mr. BRALEY. Thank you, Mr. Chairman. Mr. Harper, I took note of your testimony talking about people who are foregoing new purchases, remaining in older cars which in many cases are more hazardous to operate on the roadways of this country, and the effect of that in terms of greater morbidity and mortality. This came up during the Cash for Clunkers debate because as one of the original co-sponsors of that bill a lot of us felt like we could have done more in terms of giving incentives for people to get older cars, used cars, off the road and replacing them with higher quality used cars in addition to new cars. And one of the things that Consumer Reports mentioned was that a benefit that few people talk about from that Cash for Clunkers program was a dramatic improvement in vehicle safety from those older cars that were being taken off the road and replaced with some that had some of the safety components that Mr. McCurdy referred to in his opening statement, that consumers are benefitting from a range of innovative new safety technologies. So I think one of the things we have to be doing as we set policy outside the scope of NHTSA is also looking at ways to provide incentives to people who because of their economic circumstances are stuck in these older vehicles. We see this in the real world environment.

And I think that is something that goes beyond partisan politics and get to the root cause of how we provide people with a better occupant compartment. But I would like Ms. Claybrook to comment on the privacy concerns that Mr. Harper raised because my understanding of privacy is that it goes to an expectation of privacy that in order to have a basic right to assert a claim based on privacy you have to have an expectation in that time, manner, and place that there is a privacy concern to protect. In order to be in one of these vehicles with an EDR device in it, you have to be licensed and given the privilege of operating a motor vehicle. So I would like you to respond because in one of the points you raised you talked about the necessity for mandating recording of these incidents, and I would like you to respond to that.

Ms. CLAYBROOK. Well, I can tell you that NHTSA has incredible privacy protections built into all of its operations and particularly for any investigation that is done of any crash. They have been doing this for 45 years, and as far as I know there has never been any disclosure in all that time of the thousands and thousands of crashes they have investigated of any problem, and that is not something that necessarily people would even have an expectation about because they don't necessarily know that their crash is going to be investigated. With regard to EDRs, every consumer should have in the owner's manual and I believe even more prominently

in the vehicle when they buy it an indication that they have an EDR so that they know they have one that they have the right to have that information. They own that information, in fact.

What I have suggested in addition is that there be an electronic transmission of just the data, not the private information of who owns the car or the name of anybody to the agency so that it can have real time data to do its job, and this where Mr. Stanton and I completely agree. We think that the agency needs much more data, and if we can send a satellite up and we can download data from that satellite or if we can send people to the moon and talk to them from NASA while they are up there, it seems to me we can download data from an EDR. So the technology is certainly available. It is just a matter of the will to do it and to do it in a way that does not harm any person.

Mr. BRALEY. And that goes to one of your related recommendations in that the third item you mentioned was the access tools be commercially available, which is a current standard. We have to have a uniform system for recording and extrapolating the information. This is the same problem we faced, by the way, with electronic health care records and the problem we are having with the ability to share information that can help us transform the way we learn from the health care that is being delivered in this country. One of the other questions I wanted to ask you about has to do with the reporting of lawsuits of part of the early warning system, which is not currently required. The reason I don't understand why that was not part of the original requirement is if you look at the parallel problem of reporting incidents of preventable medical errors under the national practitioner's database they are required to report both claims that are reported under any system as well as lawsuits are filed, and that is part of a comprehensive effort to improve patient safety. Wouldn't that same logic apply in this setting?

Ms. CLAYBROOK. Absolutely, and, in fact, we ask the agency to include a separate listing of when lawsuits are filed because if someone just writes a letter to an auto company and says, well, I am thinking about making a claim against you because I have been harmed from a defect in your vehicle, it is an entirely different thing than if a lawsuit has actually been filed because these lawsuits are complicated, difficult, expensive, and people don't file them unless they have a real view that they could win these lawsuits because they are taken on a contingent fee basis by the lawyer who doesn't want to have to end up paying a lot of money to do it and then not winning the lawsuit.

It is entirely different in terms of the seriousness of that issue, and so I think that separately reported from just claims ought to be lawsuits filed on any particular make, model or alleged defect that is reported under the early warning system. And it is just a number of lawsuits. It is not anything else. It is just a number. And so the consumer knows when they go on the database they could look and see here is my make, model. There is an alleged defect. That is the same problem I had. And, by the way, there are two lawsuits that have been filed or there are 20 lawsuits that have been filed, whatever it may be. That is going to inform them a lot more about the seriousness of this issue than just that there is a bunch of claims that have been perhaps discussed.

Mr. BRALEY. Thank you. I yield back the balance of my time.

Mr. RUSH. The chair thanks the gentleman, and the chair thanks all the witnesses. There is a vote occurring on the floor so with that said, we are going to adjourn the panel. And thank you again for your time that you have invested in this hearing and this legislation. Thank you so very much. The committee now stands adjourned.

[Whereupon, at 2:15 p.m., the Subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:

HONDA

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May 12, 2010

The Honorable Bobby Rush
United States Congress
Chairman, Subcommittee on Commerce, Trade, and Consumer Protection
House Committee on Energy and Commerce
2416 Rayburn House Office Building
Washington, DC 20515

The Honorable Ed Whitfield
United States Congress
Ranking Member, Subcommittee on Commerce, Trade, and Consumer Protection
House Committee on Energy and Commerce
2411 Rayburn House Office Building
Washington, DC 20515

Re: Motor Vehicle Safety Act of 2010

Dear Congressman Rush and Congressman Whitfield:

Honda respectfully submits these comments regarding the Transportation Research Center (TRC) in East Liberty, Ohio, and requests that that these comments be made a part of the hearing record on the "Motor Vehicle Safety Act of 2010."

Background on the Transportation Research Center (TRC) in East Liberty, Ohio
Honda of America Manufacturing, Inc. acquired the TRC in 1988, as part of its purchase of land in Ohio on which to build a second automobile manufacturing facility. While Honda owns TRC, the Transportation Research Center, Inc. (TRC Inc.), a not-for-profit corporation established by The Ohio State University, operates the facility pursuant to a management agreement. TRC Inc.'s operating surplus is paid annually to Ohio State's Endowment Fund, and to date, more than $50 million has been contributed. Interest from these funds supports transportation research at the University's College of Engineering. On average, TRC Inc. has spent approximately $5.5 million per year on capital improvements, and in Fiscal Year 2011, TRC Inc. will spend $4.2 million to upgrade and maintain equipment and facilities.

TRC Inc. conducts programs designed to test for safety, energy, fuel economy, emissions, durability, noise, crash, crash simulation, and performance for more than 160 customers annually, including 10 or more auto manufacturers and various government agencies, component manufacturers, and fuel and lubricant companies. TRC serves as the main research, development and test facility for the National Highway Traffic Safety Administration (NHTSA), which accounts for 23% of the TRC Inc.'s work.

Addressing Concerns Related to the Transportation Research Center (TRC)
Concerns have been raised, most notably by Joan Claybrook, that Honda's ownership of TRC compromises the integrity of NHTSA. Ms. Claybrook raises three main concerns, including that: Honda's ownership of TRC creates an inherent conflict of interest with NHTSA's mission; the inconvenience of TRC's location for NHTSA; and the proposed facility near Dulles Airport would be a cost-effective option for NHTSA. I would like to address these three concerns.

Claim: Inherent Conflict of Interest Resulting from Honda's Ownership of TRC
Contrary to assertions made regarding an inherent conflict of interest posed by Honda's ownership of TRC, NHTSA does not have a contractual relationship with Honda. Rather, NHTSA leases its stand-alone facility from TRC Inc. and coordinates its use of the facilities through them. Under its management agreement with Honda, TRC Inc. is the sole and exclusive manager to control, manage, supervise, and direct the operations of TRC. Furthermore, TRC Inc. maintains a confidential testing environment that allows NHTSA, other government agencies, vehicle manufacturers, and component suppliers to use the same facilities without compromising the proprietary nature of their testing. All users of the TRC facilities know and understand that Honda has no direct dealings with TRC Inc. customers and that the proprietary confidential atmosphere of TRC is essential to maintaining TRC Inc.'s independence and credibility.

In over twenty years, there has not been a single claim of impropriety on the part of Honda. Current NHTSA Administrator David Strickland testified during last Thursday's hearing that there has been no indication of an improper relationship as a result of Honda's ownership of TRC and that there have been no complaints from other manufacturers regarding TRC.

Claim: Location of TRC is Inconvenient for NHTSA
Ms. Claybrook contends that relocating the NHTSA testing facility from Ohio to a proposed site near Dulles Airport would provide more favorable weather conditions (since part of TRC extends outdoors), would reduce costs and time consuming travel, and would give NHTSA access to state-of-the-art equipment. Under the current arrangement, NHTSA's Vehicle Research and Test Center has access to state-of-the-art facilities on an as-needed basis. The facility is able to maintain an inventory of diverse and up-to-date equipment precisely because the costs are shared by 160 users, through TRC Inc. A NHTSA-only facility certainly would not have the same access to resources, particularly given the need for funding for NHTSA's other programs. As stated above, TRC Inc. spends approximately $5.5 million per year to maintain, upgrade and add facilities. As to the weather conditions in Ohio, the facility was only closed one day in the past year due to snow because TRC Inc. maintains the necessary equipment and personnel to address winter weather events in a timely fashion.

In addition, the rural setting of TRC has numerous advantages: it adds an extra level of security that protects the confidential nature of the proprietary testing atmosphere; it limits the exposure of testing activities to the public; and its proximity to The Ohio State University attracts qualified graduates from one of the leading land-grant universities in the country and offers access to one of the country's leading research institutions. Access to test activities and results are readily available through high-tech communications equipment which reduces the need for travel. Finally, NHTSA maintains a permanent staff at TRC; any inconvenience that the Ohio location provides is only for a limited number of headquarters staff. NHTSA's reliance on a test facility in the Midwest is no different than the

Environmental Protection Agency (EPA), which operates its National Vehicle and Fuel Emissions Laboratory in Ann Arbor, Michigan.

Claim: Proposed NHTSA Facility Near Dulles Airport Would Be Better Option
Ms. Claybrook reports that the George Washington University has a shovel ready vehicle test facility ready to be built near Dulles Airport with an estimated cost of $28 million, $14 million of which the University would pay. This, according to Ms. Claybrook, is an offer NHTSA cannot afford to refuse. We contend, however, that this $28 million proposal does not recognize the cost of maintaining a top-notch vehicle testing facility. The cost to replace the equipment at TRC, minus the cost of land, would be approximately $125 million. This would include a crash simulator, a crash test facility, a 50-acre vehicle dynamics area, a 7.5-mile high speed test track, a skid pad, a brake slope, a brake soak, a calibration skid pad, a fuel plaza, a dynamic handling course, a basalt tile course, a winding road, a paved and gravel hilly course, an ABS course, an emissions laboratory, and crash/simulator test equipment.

It is difficult to imagine how an investment of less than 20% of the replacement cost of TRC could somehow produce a facility that is more technologically advanced.

Administrator Strickland testified that he has no interest in NHTSA leaving TRC or in building its own facility. If there are specific concerns that need to be addressed, Honda would be happy to work with NHTSA and TRC to see that they are accommodated. Otherwise, this appears to be a proposal to spend limited NHTSA resources to fix a problem that does not exist.

Sincerely,



Edward B. Cohen
Vice President
Government & Industry Relations

QUESTIONS FOR THE RECORD
for Administrator David L. Strickland
Subcommittee on Commerce, Trade, and Consumer Protection
Committee on Energy and Commerce
U.S. House of Representatives
May 6, 2010 Hearing
"H.R.__, the Motor Vehicle Safety Act of 2010"

Questions from Congressman Joe Barton

1. NHTSA can evaluate each rulemaking and calculate how much it will cost and how many lives will be saved – such as the estimate that electronic stability control could save as many as 10,000 lives per year. How many lives will the draft legislation save?

   RESPONSE: NHTSA's estimates of the safety benefits of its rules depend on an assessment of the available data to determine how many deaths and injuries occur from the safety problem. The cost of the rules depends on the specific modifications the manufacturers must make to the vehicles under the proposed or final rule. These assessments are currently not available because the Agency has not initiated rulemaking in these areas yet.

   a. Can you provide an estimate of lives that will be saved by each of these rules?

      RESPONSE: As explained above, we are not able to make such estimates because we have not yet initiated rulemaking.

   b. Which of these rulemakings is most likely to save the most lives?

      RESPONSE: As explained above, we are not able to make such estimates because we have not yet initiated rulemaking.

   c. Are the multiple rulemakings required to address unintended acceleration the most efficient way to address the problem? Could the brake over ride alone achieve the desired result?

      RESPONSE: As explained above, we are not able to make such an evaluation because we have not yet initiated rulemaking.

2. You testified you have not had time to provide the Administration's full views on the legislation. When can we expect your technical analysis?

   RESPONSE: NHTSA has been evaluating the draft legislation and is now re-evaluating the bill as introduced and the adopted amendments. NHTSA expects to complete the Administration's technical analysis after both House and Senate bills are reported out of their respective committees.

3. You stated at the Subcommittee hearing in March that you believe you already have the needed expertise to carry out NHTSA's mission, stating, **"there is not a notion that we don't have the proper expertise to handle today's automobiles."** You also said: **"Is it my confidence that we can handle the current marketplace with our expertise? Yes, we can."** You have also taken steps to use available government resources through the help of NASA and the National Academy of Sciences.

   a. Have you identified any areas you believe where NHTSA is fundamentally lacking?

      RESPONSE: We do not believe that there are areas where NHTSA is fundamentally lacking. However, we do see the need to add to our expertise in all areas related to electronic systems that may affect vehicle safety because today's vehicles are increasingly reliant on electronic control systems. Although we currently have significant experience in that area, we are recruiting more electrical and software engineers to increase our expertise.

   b. Does your agency need another $80 million to effectively do its job?

      RESPONSE: The President's FY 2011 budget request provides additional resources to NHTSA to assist in carrying out our mission and mandates.

   c. Does NHTSA have the expertise to develop the pedal placement rule required under this legislation?

      RESPONSE: Yes, NHTSA has the expertise to develop a pedal placement rule. The Agency needs to conduct additional work to gather the necessary information to develop the rule, and this may affect the timetable for issuing a pedal placement rule.

   d. Given that NHTSA has issued rules on very complex subjects such as Electronic Stability Control, is there any reason to believe you need a new Division of expert staff to address advanced technology issues?

      RESPONSE: The use of electronics to implement advanced technologies continues to increase in the motor vehicle industry. It would be beneficial for NHTSA to strengthen its expertise to address advanced technology issues. However, we believe that creating a new organization of expert staff may not be the most effective means of ensuring that the expertise is provided throughout the various organizations of NHTSA where they are needed. Rather, increased expertise throughout the existing organizations would better ensure an integrated use of the additional technical resources.

   e. If NHTSA, NASA, and the National Academy of Sciences can't find answers to the sudden acceleration problem, what expectations should we have for a new Center for Vehicle Electronics and Advanced Technology?

RESPONSE: NHTSA believes that the findings of the NASA and NAS efforts should guide the efforts and expectations of a new organization with regard to sudden acceleration.

f. Has NHTSA conducted an independent analysis of what level of resources are needed to implement this bill? Does NHTSA plan to do so? Please explain.

RESPONSE: NHTSA reviewed the working draft of the motor vehicle bill that was provided to the Department in late April and determined that additional resources would be needed to implement the bill's provisions. However, the introduced bill (H.R. 5381) differs from the earlier working draft. We are evaluating the introduced bill and will develop an estimate of the cost of implementation as part of the Administration's formal review and response to the H.R. 5381.

Rule Making Mandates

4. As we investigated the Toyota case, many of us became convinced that floor mats and sticky pedals were not the real cause of unintended acceleration, and this Committee heard from several witnesses, including Ms. Claybrook, who said the same thing. In fact NHTSA has NASA and the National Academy of Sciences assisting in trying to find an answer.

a. Given that, is it premature to mandate pedal placement and design if most of Congress and the public don't believe that is the real cause of the problem?

RESPONSE: Pedal misapplication and floor mat entrapment have been factors in many unintended acceleration incidents, and we do not object to a mandate to investigate whether pedal placement and design standards can reduce the likelihood of either of those causes. NHTSA expects to be able to identify the appropriate actions to take to address this issue after reviewing the NASA and National Academy of Sciences' reports.

b. Is there a cost benefit analysis NHTSA can provide the Committee for this rule?

RESPONSE: As explained above in the response to Question #1, we are not able to make such estimates because we have not yet initiated rulemaking.

5. Do you have any concerns about the provisions relating to the public availability of early warning data? If so, what?

RESPONSE: As discussed below, we are concerned with the provision under which the existing rule on the confidentiality of EWR data could lapse before a new rule, pursuant to the new provisions, is in effect. We are also concerned that under the provisions, full VINs would be released, which would make it possible to identify owners of vehicles in death and injury reports. Further, we are concerned that the provisions arguably may apply to EWR data submitted before the new rules take effect.

a. By requiring public disclosure unless the information is exempt under FOIA, does the bill impose unreasonable burdens on manufacturers to justify the non-disclosure of their data? Why or why not? Will requiring the agency to evaluate these justifications impose excessive burdens on the agency?

RESPONSE: In its present form, the proposed amendment could impose unreasonable burdens on manufacturers to justify the non-disclosure of their EWR data.

As the proposed amendment is structured, manufacturers may have to file individual requests for confidentiality with each EWR submission and NHTSA would be called upon to process those requests. The burdens imposed on manufacturers and the Agency would be severe and, in NHTSA's case, overwhelming. Presently, there are approximately 250 manufacturers making quarterly EWR submissions. From NHTSA's perspective, processing quarterly requests for EWR data from 250 manufacturers would be unmanageable.

b. Is NHTSA limited in the type of information it can currently demand from manufacturers? Could this include performance data or videos manufacturers have of road and crash tests? Should NHTSA have access to preliminary data sources such as these?

RESPONSE: To require manufacturers to submit information under the Early Warning Reporting program, NHTSA must satisfy several statutory concerns. In addition to the categories of information enumerated by the TREAD Act (warranty data, claims information and foreign defect-related deaths and injuries), NHTSA is authorized by 49 U.S.C. § 30166(m)(3)(B) to require the submission of information that "may assist in the identification of defects related to motor vehicle safety". The information must be in the possession of the manufacturer, and reporting the information may not be unduly burdensome to the manufacturer, taking into account the manufacturer's cost of complying and the Agency's ability to use the information in a meaningful way to assist in the identification of safety-related defects. Performance data and videos of road and crash tests are not currently required to be submitted under the Agency's EWR reporting regulations, but they are potentially within the scope of the EWR statutory provision. However, before they could be required under the EWR program, NHTSA would have to evaluate whether they should be reported in light of statutory requirements and engage in notice and comment rulemaking.

Apart from the EWR provisions, NHTSA has broad investigative powers under the National Traffic and Motor Vehicle Safety Act of 1966, as amended, and could obtain these materials if warranted.

6. The bill gives the agency two years to issue regulations on categories of information exempt from disclosure.

a. How will this system work in the interim?

RESPONSE: Within that two year period, until new regulations are promulgated and effective, the Agency's current regulations governing the confidentiality of EWR information would apply.

b. How much time will manufacturers have to demonstrate that their data is exempt from disclosure?

RESPONSE: Provided that the existing regulations governing confidential treatment of EWR data continue to govern the confidential treatment of EWR submissions until new rules are issued, manufacturers do not have to demonstrate that data is exempt from disclosure. The existing rules provide that certain EWR data are exempt from disclosure. Manufacturers would be provided an opportunity to comment on proposed new rules under the new provision. The time frame for submitting comments would be stated in the notice of proposed rulemaking.

If the existing rule lapses and manufacturers must submit individualized claims for confidentiality of EWR data to the Agency, the manufacturer must submit supporting information simultaneous to the EWR submission, or a request for an extension of time and after that, the supporting documentation. If the Agency denies the request for confidentiality in whole or in part, a manufacturer has 20 business days to request reconsideration of that adverse decision.

Defect Petition Appeals

7. Section 306 would give anyone whose investigation petition is rejected by NHTSA the right to appeal in court.

a. On average, how many petitions for investigation does NHTSA receive in a year?

RESPONSE: Since 2001, NHTSA has received about six defect and recall petitions per year with three received in 2010 to date. We note that when NHTSA receives a petition, we review all relevant information, interview the petitioner and often inspect the vehicle in question, and make a determination as to whether the information supports further investigation – similar to a preliminary evaluation investigation. After NHTSA completes this examination and if we find no evidence of a possible defect trend, the Agency denies the petition because it is unlikely that further investigation will establish the basis for a safety recall order.

b. How many of those result in investigations being opened?

RESPONSE: Of the 62 petitions received since 2001, 13 were granted (i.e., opened).

c. How many are rejected?

RESPONSE: Of the 62 petitions received since 2001, 43 petitions were denied or rejected (i.e., petition did not result in an investigation being opened for further

examination) after NHTSA completed an examination of all relevant information. Three petitions were rejected because the petition had been previously investigated, a recall had already addressed the issue, or a prior petition on the same subject was already open. Three petitions are currently being evaluated.

d. Does NHTSA have the authority to establish minimum requirements or do you have to look at any petition that comes in?

RESPONSE: Yes, NHTSA has the authority to set requirements for petitions. In 49 CFR Part 552, petitions must meet the following requirements: (1) be written in English language, (2) be labeled as a petition, (3) set forth facts that establish the need for the order, (4) set forth a description of the substance of the requested order, and (5) provide the name and address of the petitioner. If the petition meets these requirements, NHTSA evaluates the petitioner's concern and determines whether a defect investigation is warranted.

e. If this provision were to become law, how many of the rejected petitions do you expect would be appealed?

RESPONSE: NHTSA is unable to make an estimate as to how many petitions would be appealed. However, any appeal would require both NHTSA's Office of Enforcement and the Office of the Chief Counsel to expend considerable resources defending the Agency's exercise of its discretion. Those resources would not be available to pursue active investigations and ensure that recalls occur where the evidence of a defect trend exists. If there were several such appeals, this could significantly divert the Agency's resources from conducting defect and compliance investigations.

8. Under the current language, every defect petition that is denied as unreasonable must be subject to judicial review. Do you anticipate this provision will force NHTSA to hire more lawyers? Do you believe taxpayer money could be better spent on safety?

RESPONSE: Yes, we anticipate this provision will force NHTSA to hire more lawyers. We believe taxpayer money could be better spent on safety, such as hiring additional engineers to investigate potential defects.

Imminent Hazard Authority

9. Would you agree that most, if not all, safety defects could in some circumstances result in death or serious bodily harm? If so, would this provision allow the agency to use this authority in nearly every case? Would this authority end up supplanting the agency's existing authority? Should we amend the bill to narrow the scope of this authority? If so, how?

RESPONSE: Yes, we agree that most, if not all, safety defects could in some circumstances result in death or serious bodily harm. However, we do not believe that this provision would allow the Agency to use this authority in nearly every case. For this reason and in practice,

we do not believe that this authority would supplant the Agency's existing authority. We do not believe that the bill, as reported out of committee, needs to be amended.

10. You testified that adding imminent hazard authority for NHTSA would bring the agency in line with other health and safety agencies. How many of those agencies authorities do not provide for expedited judicial review? Do you agree there should be expedited judicial review? If no, why?

RESPONSE: Whether there should be expedited judicial review depends on how the imminent hazard provision is structured. The Department of Transportation's (DOT) Operating Administrations that have imminent hazard authority do not include provisions for expedited judicial review. We believe that an Agency order issued under an imminent hazard provision should be subject to judicial review under the Administrative Procedure Act and agree that there should be expedited judicial review of such an order.

11. This provision would authorize the agency to issue orders stopping production, importation, and sales offers. Why does the agency need this power? Would the authority to order recalls or stop sales be sufficient to protect consumers? If not, why not?

RESPONSE: As the measure was voted out of committee, it does not provide for stopping production, importation and sales offers. However, other provisions of the statute can implicate these results.

Civil Penalties

12. Toyota faces a $16.4 million civil fine from NHTSA, but also has 327 State and Federal lawsuits. Some estimate that if Toyota settles, it will cost them $3 billion. Is there any reason to believe this isn't the greater deterrent? Does the market work as a deterrent?

RESPONSE: We do not have an estimate on the cost of any settlement to Toyota and therefore cannot answer this question.

13. Should there be civil penalties on manufacturers while the Government [is] both the owner and regulator of the competition? Is there an appearance of a principal-agent problem?

RESPONSE: The government is not managing the operations of any manufacturers. We do not believe there is any reasonable appearance of a conflict of interest.

a. Hypothetically, is it fair if one of the government–owned manufacturers is fined, which is a loss born by taxpayers, not shareholders, for management faults? Because money is fungible, is it fair to the competition if there is a perceived incentive problem where the government owned manufacturers essentially have the taxpayer to backstop any civil fines they may incur?

RESPONSE: We do not believe there is any reasonable appearance of a conflict of interest or the risk of moral hazard.

TSCA Question

14. I understand NHTSA has a program to study alternative materials for auto safety, including the Plastic and Composite Program. A program like this can be beneficial because it provides a potentially valuable lighter weight alternative to metal that can help manufacturers meet the new fuel economy standards that begin in 2012. However some recommend all chemicals in commerce be reevaluated and possibly reregulated by the Federal government. Under this proposal, it is unclear what chemicals or mixtures and end uses would be permitted until they undergo a complete reevaluation and are approved for use by the EPA and that their meaningful uses could be curtailed.

    a. If plastics, and the chemicals that help make plastics, were to become unavailable through a regime like this, would it effectively undo NHTSA's entire research program?

        RESPONSE: NHTSA believes it would be able to adapt its current Plastics and Composites research program to the requirements of a new regime.

    b. Is there any reason to continue to fund the NHTSA program until we resolve how chemicals will be regulated?

        RESPONSE: NHTSA believes it would be able to adapt its current Plastics and Composites research program to the requirements of a new regime. Therefore, we do not anticipate the need for any change in funding.

    c. Would such a provision undo the entire research program currently underway at NHTSA?

        RESPONSE: Please see 14a above.

    d. Is there any reason to continue to fund the program until we resolve how chemicals will be regulated?

        RESPONSE: Please see 14b above.

15. Is there any need to continue the NASS program to visit crash sites around the country if you will have more data and higher quality data available through EDRs if they are mandated? What is the benefit that can't be achieved from EDR data?

    RESPONSE: Yes, we believe that the National Automotive Sampling System (NASS) field data collection is still necessary on crashes with event data recorder (EDR) information available. EDRs provide some useful information to NHTSA's crash data collection programs and are used to verify and supplement crash severity indicators. However, EDRs do not provide all the information needed to do a complete crash reconstruction, but do provide valuable information that aids the investigation.

Crashes are complex events involving human, vehicle and environmental factors. By design, EDRs are intended capture limited information (e.g., vehicle speed, belt status, seat position) from the vehicle in the few short seconds prior to a crash in an attempt to make restraint deployment decisions. Beginning in model year 2013, vehicles that record data in the EDR must report 15 data elements, and other data elements are required separately if recorded (49 CFR Part 563). In contrast, a single vehicle, one occupant NASS case can have over 600 coded data elements that are related to the vehicle, occupant and environment. Specific crash evidence, such as vehicle crush, intrusion, child restraint data, among others, are not captured by EDRs. In addition, EDRs do not capture important crash-related data such as weather, road conditions, tire information, occupant kinematics and injuries, and the specific injury source for all occupant injuries.

While EDR data is used by government, industry and academia to relate vehicle crash velocities to occupant injuries for a myriad of research and rulemaking activities, EDR data alone does not provide the vehicle, occupant and environmental data necessary to accurately assess all crash parameters and outcomes.

HENRY A. WAXMAN, CALIFORNIA
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ONE HUNDRED ELEVENTH CONGRESS

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May 21, 2010

Michael J. Stanton
President and CEO
Association of International Automobile Manufacturers
2111 Wilson Boulevard, Suite 1150
Arlington, VA 22201

Dear Mr. Stanton:

Thank you for appearing before the Subcommittee on Commerce, Trade, and Consumer Protection on May 6, 2010, at the hearing entitled "H.R. _____, the Motor Vehicle Safety Act of 2010."

Pursuant to the Committee's Rules, attached are written questions for the record directed to you from certain Members of the Committee. In preparing your answers, please address your response to the Member who submitted the questions.

Please provide your responses by June 4, 2010, to Earley Green, Chief Clerk, via e-mail to Earley.Green@mail.house.gov. Please contact Earley Green or Jennifer Berenholz at (202) 225-2927 if you have any questions.

Sincerely,

Henry A. Waxman
Chairman

Attachment

The Honorable Joe Barton

1. **How will the proposed fee on new cars affect the cost of cars and your business model? Do your companies seek to save a nickel anywhere they can through better processes and technology? How do the fees affect consumer behavior regarding new purchases?**

   As a trade association comprised of automobile companies that compete against each other in the marketplace, AIAM does not get involved in pricing matters. Each member company has its own cost structure and business model. Certainly, any additional fees or costs that increase the retail price of motor vehicles in the United States impacts consumers in a variety of ways depending on the amount of the increase and the other choices available in the marketplace.

2. **You touched on the hazards of limitless civil penalties. Is there a certain point, where penalties could be so high they drive a business under or force it to lay off workers? Shouldn't there be some cap, at least relative to the size, revenues, or profits of a company?**

   AIAM does not support "limitless" civil penalties which can severely impair the ability of a company to remain in business and provide employment. We believe a fair cap is necessary.

3. **Congress is moving forward with this legislation in response to the tragic acceleration issues experienced by Toyota. Would you call this response premature, considering investigations into the issue are still pending? Would consumers be better served by an informed response?**

   AIAM believes that legislation to address the unintended acceleration issues experienced by drivers of certain Toyota vehicles should be an informed response, be performance not design driven and needs to provide sufficient leadtime to NHTSA and the industry to ensure that the result enhances safety.

4. **You stated in your testimony that some of the effective dates specified are simply not feasible for many small manufactures.**

   a. **What would happen to these manufactures if they were forced to comply with these rules anyway?**

      The manufacturer would not be able to sell vehicles in the U.S. market if they were unable to comply with the new rules by the effective date.

   b. **What is a feasible timeline?**

      This would vary depending on the requirements in the rule.

5. **The draft requires the government to design the pushbutton and specify where it is placed in each vehicle.**

    a. **Aren't some keyed ignitions on steering columns, some on dashboards, and some in the consoles?**

    Yes.

    b. **But if a driver can turn a car on, he or she knows where the button is to turn it off because it is the same device, correct?**

    To the best of our knowledge, manufacturers use the same button to turn the car on and off in vehicles with pushbutton ignition switches.

    c. **In your opinion, where is the "safest" location for a pushbutton ignition? Does the location matter as long as the functionality is standardized?**

    The switch needs to be within the reach of the driver while in the driving position. We are not aware of any studies that identify a particular location as better than others.

6. **Does the imminent hazard provision allow for adequate judicial review? Why or why not?**

AIAM does not believe the imminent hazard provision process prescribed in the House draft bill provides adequate judicial review because this draconian remedy can be imposed without any opportunity for the manufacturers to be heard or for a trial court to evaluate the factual basis for such an order before it is imposed. The only remedy under the draft bill is for a manufacturer to go to the federal appeals court; a procedure that can take several years. The agency should develop guidelines and procedures, consistent with constitutional due process protections, for invoking the authority, and those guidelines should be subject to notice and comment and appropriate judicial review.

    a. **What recourse would a manufacturer have if the court of appeals takes months or even years to decide whether the agency properly ordered a halt to production or sales?**

    The manufacturer would have no recourse while the appellate court considers the issue and by the time the case was decided, even if the court supported the manufacturer, the damage already would have occurred.

    b. **Would the mere threat of using this authority enable the agency to unduly pressure manufacturers or dealers? Why or why not?**

    The threat of using imminent hazard authority would be a very powerful tool for the agency.

c. Should the bill require expedited review or give the court of appeals greater discretion to stay an agency order? Why or why not?

AIAM believes that there needs to be an expedited process before the agency can exercise this authority, as required under the CPSA, such that the agency is required to make a prima facie showing (similar to that required to obtain a temporary restraining order or preliminary injunction) of the factual basis for the order. If there is no requirement for a court order before the agency can exercise its imminent hazard authority, a court of appeals should have discretion, under an expedited process, to stay an agency order and the standard of review should be sufficient to allow the court to consider fully the factual basis and record underlying the agency action. Otherwise, the manufacturer is effectively left without a remedy, if the agency action is arbitrary or otherwise not supported by the facts.

Answers to Questions Posed After the Subcommittee on Commerce, Trade, and Consumer Protection's May 6, 2010 Hearing Entitled "H.R. ____, the Motor Vehicle Safety Act of 2010."

Jim Harper, Director of Information Policy Studies, The Cato Institute May 28, 2010

The Honorable Joe Barton

1. **You have stated that lower car sales have a negative effect on safety of drivers, and this is likely to be the case of economics as the cost of cars increases. If EDRs increase the cost of cars, will that have a negative effect on the safety of drivers?**

The EDR mandate for all new cars is aimed at gathering data to improve driver safety. One must consider the costs of collecting data and the effects of those costs on that goal.

In my testimony, I made the straightforward argument that EDRs and mandated EDRs raise the cost of new cars by some margin, which reduces sales. This in turn reduces the pool of used cars and raises their prices. This causes people to remain in older used cars rather than buying newer used cars. Because of past safety improvements, newer used cars are safer than older used cars. Therefore, the bill will prevent some drivers from buying safer used cars.

I do not have the data to show how pronounced this effect will be, but the goal of protecting drivers is important enough that study of this problem should take place before a mandate goes into place, and any mandate should be limited to minimize the health and safety impacts of increasing the costs of cars.

   a. **How does this cost affect the safety of lower income drivers?**

I believe it is safe to assume that lower income drivers are the most affected by the dynamic I described above. They will tend be in the oldest cars—70s and 80s models that may not even have airbags, or that have aging and less well-designed steering and braking systems. Lower income drivers include younger people who have less experience with driving and poor driving judgment. This group is probably more often involved in accidents and likely to suffer most if auto prices keep them in older vehicles lacking the safety features of newer vehicles.

   b. **You have stated mandate EDRs in every car has costs and that the same data sampling could be achieved by requiring them on more expensive cars. Could you please explain how much data would be sufficient to achieve this goal?**

Not knowing exactly what information is being sought through research using EDR data, I am not in a position to calculate the sample size that would be needed to gather statistically relevant data. Given the costs of EDRs and the effect of those costs on safety, the better policy is to gather only the amount of data needed, not to collect data on every car crash. Any EDR mandate should be aimed at gathering only the amount of data needed, or else the goal of driver safety will be undermined.

2. You have stated that privacy will be eroded by this legislation, the privacy limitations notwithstanding. Are there additional limitations you recommend or is it an impossible exercise?

Imagine if a federal law required American homes to have CCTV cameras installed in them, set to record, but only storing the information on a local server for possible later use. Anticipating uses of information that they couldn't be sure of predicting or controlling, people would rightly object to the presence of cameras they don't want in their homes.

Sometimes it is a good idea to have CCTV cameras in homes, and some people do install them because they perceive benefits from being able to monitor babysitters, record images of intruders, and so on. Having cameras in homes is consistent with privacy in these cases because it is a matter of choice. There is a fundamental loss of privacy when a person is required to maintain technology that makes a record of his or her actions.

The cure here is to give consumers choice about the presence of EDRs in their cars and the functioning of them. If there is a value to having EDRs in cars, consumers should be made aware of it and given a chance to adopt them voluntarily.

There are many ways this could happen: They could get a discount on a new car purchase if they choose an EDR (ideally paid for by automakers or insurers, not the government). Insurers could provide discounts or automakers could offer drivers a yearly stipend for providing data about their driving (perhaps going far beyond the limited information collected by EDRs today). I cannot predict all the ways institutions that want data about auto use might get it voluntarily, but getting that data through volunteer means rather than coercion would improve privacy by improving consumers' control.

3. Can there be any individual choice about privacy regarding EDRs if there is a mandate for their inclusion in some percentage of all cars?

It is possible to maintain choice around EDRs even while meeting a goal of having EDRs in the number of cars needed to capture statistically relevant data. As mentioned above, rewards to consumers for participating in valuable research could persuade them to allow collection of data about their driving.

4. A number of States have enacted laws addressing the use of EDRs in cars. What have been the results from California's privacy law on EDRs? How has the information been used in that State?

In advance of the hearing, I consulted with the Chief of the California Office of Privacy Protection to learn if there had been any notable developments as a result of the law governing EDRs and EDR data there. She reported that nothing significant had come to her attention.

I do not have information about how commonly California EDR data is used in litigation about auto crashes or other matters, in criminal investigations, or in auto safety research.

5. You have stated that a fundamental premise of effective privacy is control. Would safety be diminished if EDRs were mandated to be a safety option, rather than a mandatory requirement?

If EDRs were a mandatory option, safety may or may not be affected. In the extreme case that zero car buyers wanted EDRs, for example, safety research would be hampered and safety would ultimately suffer. This can be remedied with various enticements rather than mandating EDRs in all cars. If the number of car owners needed to produce statistically relevant data can be enticed to use EDRs and share data from them voluntarily, safety would be undiminshed.

6. Does the mandate in the legislation for EDRs deprive consumers of the right to control data collection about them? Is it at odds with other government policies that seek to protect privacy and give consumers greater control over their information, such as a way to "opt-out"?

The EDR mandate and information rules called for in the legislation do undermine consumers' power to control information about themselves. Though EDRs are already standard in many cars, the legal mandate would further deprive consumers of any hope that they may control the information infrastructure of their cars.

The debate about opt-in or opt-out is a quaint luxury compared to the rule proposed here. Consumers would have *no choice whatsoever*. Driving a car sold in the United States would be conditioned on data collection about the driver—no exceptions.

7. You have stated that the legislative draft reduces people's property rights in EDR data by a small margin. Could you please explain?

Though the legal status of information is unclear, it is probably the case that information produced and recorded by one's automobile is the property of the owner or lessee, just like the auto itself. The draft calls for regulation that generally tracks this, but then takes away the property right if "the information is retrieved by a government motor vehicle

safety agency for the purpose of improving motor vehicle safety . . . ." This is a recipe for an unreliable property right: one that is created by federal regulation with a carve-out in that very regulation. Expect the "property right" to shrink and government access to grow as future policies discover new uses for EDR data.

8. You have expressed greater concerns that the future could further erode privacy protections. Is it possible to - or even wise – to permanently restrict the types of data that can be collected to avoid the eventual creep of more data collection? Can better information coupled with real consumer choice mitigate these concerns?

Congress can't pass a federal statute that can't be amended. Regulators can't write a regulation that can't be superseded. So there is no such thing as a "permanent" legislative or regulatory restriction on EDR data collection or use.

The better approach to privacy protection is structural. Giving consumers control of whether EDRs are in their cars and what EDRs do will protect privacy consistent with consumers' interests. The rules called for in this regulation may protect consumers' privacy for a time, but it sets the stage for migration away from consumer privacy toward serving the goals of government and industry related not only to safety but also to general law enforcement, taxation, and surveillance.

