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Petition for Reconsideration of Final Rule by Public Citizen and Center for Auto Safety Regarding Defect and Notification Responsibility and Reports, Defect and Noncompliance Notification, 69 FR 34954 *et seq.*

Introduction

With this submission, Public Citizen and the Center for Auto Safety hereby petition the National Highway Traffic Safety Administration (NHTSA) to reconsider its final rule on defect and noncompliance notification to dealers and distributors (hereinafter, “dealers”) and to adopt a new rule more consistent with the Safety Act, Congressional intent, and the agency’s mission to protect public safety. The final rule undercuts hard-won consumer protections in the area of safety-related recalls, and dilutes lifesaving time-pressure on manufacturers to quickly produce a remedy for identified defects.

Indeed, with this rule NHTSA has gone out of its way to sanction a policy in which dealers are allowed to turn a blind eye to safety by continuing to sell defective vehicles out of their showrooms even after the manufacturer of those vehicles has informed NHTSA that they are in fact defective. In turn, the manufacturers also receive a boon, as they will be relieved of the considerable pressure from members of the public and dealerships to produce a timely and expedient remedy to safety defects. All the while, consumers are kept in the dark about known safety defects afflicting the new vehicle in their driveway.

This result is contrary to good public policy and NHTSA’s mission, and places short-term economic gain by industry above the interests of consumers who will purchase new vehicles unaware of already-identified safety defects. As in the agency’s decision to maintain the secrecy of early warning data contrary to the Freedom of Information Act, the risk and potentially heavy consequences of these communiqués between the industry and agency falls entirely on the unsuspecting public.

This result is particularly unconscionable given that Congressional intent as manifested both by the original Safety Act and in more recent legislation has been to markedly improve safety protections available to consumers upon the manufacturers’ or NHTSA’s discovery of a defect. Under 49 U.S.C. § 30120(i), enacted as part of the Intermodal Surface Transportation Efficiency Act of 1991, once notified of a defect or noncompliance, dealers may or sell or lease the defective vehicle only if the defect or noncompliance has been remedied. This protection for consumers was extended to cover

sales by equipment dealers in TEA-21 in 1998 (*see* § 7106(a), Transportation Equity Act for the 21st Century, Pub. L. 105-178).

Moreover, the Transportation, Recall Enhancement, Accountability and Documentation (TREAD) Act, enacted in 2001, contained several substantial new protections for consumers, including a section later codified at 49 U.S.C. § 30120(j), which prohibits the sale or lease of all motor vehicle equipment, including tires, which have been determined to contain a defect or noncompliance unless the defect or noncompliance has been remedied under the sale or lease.¹ The TREAD Act also contained new reimbursement rights for consumers in event that a defective vehicle is fixed prior to announcement of a formal recall by the manufacturer, a rule which NHTSA has also subsequently substantially undermined in rulemaking, but which is nonetheless indicative of an expanding, rather than contracting, view of consumer safety with relation to vehicle defects.

NHTSA has responded to these repeated enactments of a duty by Congress by undermining it utterly in the nitty-gritty of implementation. While these provisions are exceedingly strong indications of a reasonable Congressional intent that defective vehicles should not be sold until they are actually fixed, NHTSA's final rule on dealer notification permits precisely the inverse result.

As NHTSA is certainly aware, a high proportion of recalls affect new vehicles, which under this policy will be sold and remain unfixed for an undetermined amount of time. The new rule will most significantly affect new buyers, who will be required to return their new vehicles to dealerships for the necessary repairs. Because the return rate for repairs in response to letters from the manufacturers is substantially less than the 100 percent repairs achievable prior to sale of a vehicle, NHTSA's rule means that a much higher number of consumers will be at risk from unremedied defects.

In addition, Public Citizen's work on dealership fraud has made us all too aware that unscrupulous dealers have institutionalized a practice of inflating consumer satisfaction index scores by intentionally falsifying customer addresses when they anticipate a negative response. One indication of the widespread nature of this problem

¹ Interestingly, British consumer protection law contains a nearly identical provision, but provides for far stricter, locally enforceable criminal penalties for a violation:

Where a vehicle is sold with serious defects which might give cause for concern over its safety, the seller may have committed a criminal offence under section 75 of the Road Traffic Act [of] 1988. The Act states that no person shall sell, offer for sale or supply, or expose for sale, a vehicle deemed to be unroadworthy, unless the seller can prove that he had reasonable cause to believe that the vehicle would not be used on the road until it had been made roadworthy. Furthermore, the Road Traffic Act 1991 requires dealers to make safety checks on their vehicles by requiring them to identify any unroadworthy vehicle they are offering for sale. The Act is enforced by local authority trading standards departments who can investigate complaints and, where necessary prosecute. You may, therefore, wish to consider bringing this matter to the attention of your local trading standards at your local Council.

Department of Trade and Industry Web page, <http://www.dti.gov.uk/ccp/topics1/facts/cars.htm> (visited August 9, 2004).

is that there is typically a 30 percentage point gap between Consumers' Union compiled results on customer satisfaction and the industry's reported scores. Articles in *Automotive News* in the past year have addressed this issue repeatedly, describing how the industry itself doubts the validity of the published results. Because the manufacturers are likely to use these records as contact information for new purchasers, a significant number of new purchasers may receive no notice of the defect at all.

The history of the rule compels reconsideration

The Safety Act places significant restrictions on manufacturers and dealers in selling new vehicles with safety defects or a noncompliance, and implies real urgency in remedial action. Upon "learn[ing] of a defect, under 49 U.S.C. § 30116(a), a vehicle manufacturer "immediately shall repurchase" or "immediately shall give...parts" to repair the vehicle. Under § 30121, a manufacturer failing to notify owners and purchasers of a defect or noncompliance is liable for civil penalties.

The schedule for dealer notification is submitted to the agency in the so-called "Part 573 report," when the manufacturer informs NHTSA that it has "learned" of a defect. *See* § 573.6(c)(8)(ii).² When NHTSA issued its initial Notice of Proposed Rulemaking (NPRM) in 1993, the agency proposed that manufacturers notify dealers within five days after notifying NHTSA of any safety defect or noncompliance determination. This ensured that dealers would not unknowingly sell defective vehicles to consumers. But, as proposed in NHTSA's supplemental notice of proposed rulemaking (SNPRM) in 1999, the agency's final rule eliminated a five-day requirement for notification to dealers, replacing it to a system in which dealers must be notified merely "within a reasonable time." *See* 49 CFR § 577.7 (c)(1).

NHTSA's 1993 notice provided a substantial discussion of the need for a rule requiring manufacturers to submit a schedule showing timely action to remedy defects, noting that:

In the past few years, NHTSA has noted an increase in the number of recalls in which there has been a significant delay between the manufacturer's determination of the existence of a defect or noncompliance and the commencement of the manufacturers' remedy campaign. There have also been a limited number of instances in which the duration of the remedy campaign was inordinately extended.

² Contrary to NHTSA's position in its Motion to Dismiss submitted in pending litigation over its regional recalls rule, in which the agency suggests that it has no authority beyond initiating an enforcement action to revise a manufacturer recall plan submitted under Part 573, *see Center for Auto Safety & Public Citizen v. NHTSA*, NHTSA clearly states in this final rule that it reviews and may modify the dealer notification plan submitted as part of the "573 Report" to require a specific date for notification of dealers. *See* § 577.7 (c)(1).

See 58 FR 50314, 50317. The proposal went on to require manufacturers to indicate a justification for any notification and/or recall campaign commenced “more than 30 days” after determination of a defect.

The agency’s proposal for dealer notification was similarly focused on timely notice and a clear Congressional intent that defective products not be passed off on unwitting consumers. The agency’s NPRM stated:

Currently, most manufacturers notify their dealers of a defect of noncompliance at or slightly before the commencement of the notification campaign to owner. This practice has successfully advised dealers how to assist consumers who bring their vehicles or equipment to the dealer for remedy. However, in some cases (e.g., where the notification campaign has been delayed because parts and facilities needed for the remedy campaign are not immediately available) *dealers may continue to sell defective or noncompliant vehicles or equipment because they are not aware of the manufacturer’s determination. Concern about such situations led Congress to add a new section 154(d) to the Act, 15 U.S.C. 1414 (d)*, which provides that, with minor exceptions, if notification of a safety-related defect or noncompliance has been furnished by a manufacturer to a motor vehicle dealer with respect to a vehicle or item of equipment in the dealer’s possession, the dealer may sell or lease the vehicle or equipment item only if the defect or failure to comply has been remedied.

See 58 FR 50314, 50320 (*emphasis added*). The agency’s explicitly stated, and highly reasonable, interpretation of Congressional intent in enacting the provision in 15 U.S.C. 1414 (d) would produce exactly the opposite of its decision in the final rule enunciated this past June. In the wake of the agency’s final rule, Congressional intent to assure that dealers not continue to sell defective vehicles is utterly thwarted.

In its 1993 notice, the agency went on to propose a rule that “manufacturers [] provide dealers with notification of safety-related defects within five working days” of submission of the Part 573 report. The agency further observed that:

Section 153(c)(5), which requires manufacturers to notify their dealers of defects or noncompliances by certified mail or other more expeditious means, *clearly reflects a Congressional desire that dealers be notified as soon as possible*. Moreover, this proposed amendment would help to achieve the Congressional intent in new section 154(d) to strictly limit the sale of defective or noncompliant vehicles and equipment by assuring that the notification of the defect or noncompliance *is received by dealers as soon as possible after the manufacturer’s determination*. It should not be difficult for manufacturers to comply with such a requirement, since the information that needs to be included will in almost all cases already have been prepared in connection with the report to NHTSA.

Id. (*emphasis added*).

NHTSA's supplemental notice, published in 1999, said little about these core concerns for timeliness and Congressional intent, although several notorious cases of manufacturer delay in producing a remedy persisted throughout the 1990s. In its supplemental notice, NHTSA offered only two reasons for its "step back from the NPRM," both of which are flimsy and unsupported by the very scant record.

NHTSA stated the agency "now believes that" a five-day notification requirement "could have several perverse effects." *See* 64 FR 27227, 27228. The first "perverse effect" was that a five-day rule "could encourage manufacturers to delay notifying NHTSA of a defect or noncompliance determination until the remedy was developed and a sufficient number of repair parts stockpiled." The agency went on to note, without providing any examples and without logic, that this eventuality would be particularly "prejudicial" should owners be able to take steps to minimize the safety defect while a remedy was being developed. *Id.*

Yet a delay by the manufacturer in notifying NHTSA of a defect is precisely the illegal behavior that so enraged Congress prior to enactment of the TREAD Act, and is illegal under the Safety Act. Indeed, 49 U.S.C. § 30118(c)(1) requires manufacturers to notify NHTSA by certified mail if the manufacturer "learns the vehicle or equipment contains a defect," and criminal penalties are available under § 30170 and 18 U.S.C. § 1001 for intentional violations of this duty.

For obvious reasons, the simplest and safest step for consumers is if *they are never sold a defective vehicle in the first place*. It is also far from obvious that consumers dealing with most, if not all, vehicle defects could do anything at all to reduce the risks or should even try, for safety reasons, to remedy the defect themselves. The agency's reasoning in fact masks the major role of public pressure from both consumers and the public for manufacturers to develop and make available a timely remedy.

Consumers are rightly concerned for their safety when they learn of an unremedied defect, and they should be. NHTSA's solution in its supplemental notice is to fail to inform them of the risks, rather than to take their reaction as reasonable and move to quickly address the cause, as it had proposed in 1993.

Furthermore, NHTSA's proposed "solution" exacerbates the very problem it identifies. Because the manufacturers will now submit plans for notifying dealers "within a reasonable time," that projected time-frame will explicitly turn on such factors as the availability of a remedy, rather than safety considerations. Therefore, the manufacturer's game is obvious – industry will notify dealers when and only when a remedy is readily available for the vehicles awaiting sale. In the meantime, thousands of the defective vehicles will have moved from showroom lots into driveways. Only some of those vehicles will ever be remedied, a factor which creates a genuinely "perverse" incentive: delay as a cost-cutter for manufacturers.

NHTSA's second "perverse result" is that the NPRM could "encourage dealers to create their own inspection and remedy procedures in order to be able to sell otherwise embargoed vehicles quickly if the manufacturer's remedy were not available." The agency notes that such an extreme step would be unlikely "because of the obvious safety risk and potential financial liability." *Id.*

NHTSA again provides no historical examples of this obvious and patently implausible phenomenon, supported only by the purest conjecture in submissions to the docket by dealer groups. We know of no cases in which dealers have acted to independently remedy defects, nor would they ever be likely to, for exactly the reasons NHTSA notes. In fact, in its final rule in a response to a comment by Meritor, NHTSA utterly discounts such a possibility, stating that:

Meritor's fourth comment is that dealers may create their own home-made recall remedies to correct recalled vehicles in dealer inventory in order to be able to deliver these vehicles to a purchaser or lessee. We believe that this is highly unlikely. In general, dealers are not able to design remedies or to fabricate the necessary parts. And, if a dealer were [sic] to follow this course of action, it would face the possibility of manufacturer sanctions, as well as potential tort liability of the "remedy" did not function properly. 69 FR 34954, 34957.

In addition, dealers are compensated for manufacturer's remedy repairs plus a one percent payment under 49 U.S.C. § 30116, compensation that would totally unavailable for such dealer-initiated recall "remedies." All of these factors make a dealer-made remedy a fabrication rather than a reality. Moreover, were NHTSA truly concerned about this possibility, it could of course regulatorily prohibit ginned-up remedies by dealers pursuant to its overall mandate to improve highway safety.

NHTSA's final rule is notably bereft of additional rationales for rejection of the five-day notification rule, relying instead on the supplemental rule, incorporated "by reference." *Id.* at 34955. While its discussion of Executive Order 12866 requirements is exceedingly brief, the analysis does indicate that it considers the costs of an accelerated notification negligible, because notice to dealers must be given at some point, regardless:

...an agency directive requiring a manufacturer to accelerate its dealer notification will not impose any additional costs directly on the manufacturer, since the notification would eventually have to be made anyway. *Id.* at 34958.

NHTSA also observes that the costs of an "embargoed" vehicle (a vehicle unable to be sold to an unremedied defect on noncompliance) are outweighed by the reduction in safety hazards for consumers:

To the extent that agency action pursuant to this rule impose additional costs, those costs would be outweighed by the safety benefit of ensuring that dealers do not deliver new motor vehicles or items of replacement equipment containing safety-related defects or noncompliances before the defect or noncompliance has

been remedied, as required by 49 U.S.C. 30120(i) and (j). Moreover, any impacts are likely to be minimal, because manufacturers will have an incentive to develop and provide a remedy as soon as possible. *Id.*

It is truly stunning that NHTSA acknowledges both of these salutary, and indeed, legally and Congressionally mandated, effects of timely dealer notification, while in the previous breath it weakens that very requirement by limiting notification timetables to the vague phrase “a reasonable time” in place of a specific deadline.

NHTSA’s final rule also takes extraordinary measures to adopt three new serious limitations, proposed by auto industry trade groups, on the agency’s own discretion to insist on a particular timetable for notification. In a radical departure from both the solicitous attitude towards safety and language of its 1993 proposal, NHTSA’s final rule requires that the agency surmount several brand new hurdles. If making a determination to require dealer notification by a date certain, the agency must now: 1) “consider the views of the manufacturer;” 2) consider the availability of an interim remedial action by the owner; and 3) consider the time frame in which the defect may manifest itself.

Omitting any explicit consideration of the risks to the public, NHTSA totally fails to explain what is meant by either the first or second decision criterion, loaded as they appear for the manufacturer. The first is undoubtedly a catch-all for whatever the industry will say it means. The second is a real mystery — if dealers are unable to remedy defects on their own, then surely consumers are truly helpless. Why any burden should rest upon consumers to act “remedial[ly]” to address a manufacturing defect is completely unexplained, and whether they could do so safely is unexplored. The third factor is also 180 degrees from the agency’s initial position in 1993, in which manufacturers were required to provide justification for any requests for delay or “staggered” remedies, in order for NHTSA to determine “whether the manufacturer’s proposed schedule [for a remedy] should be disapproved.” *See* 58 FR 50314, 50317.

Adding a final insult to the grave injury already inflicted on the public, NHTSA’s final rule provides no incentive or requirement that a dealer notification plan always be required as part of manufacturers’ Part 573 reports. To the contrary, without explanation, and without noting that the agency’s economic evaluation found such notice essentially costless, NHTSA stated that “[a]s with other information required to be reported under Part 573, if the manufacturer has not determined a schedule for dealer notification at the time that it submits its initial part 573 report, it must provide the information as soon as its available.”

This ho-hum statement, and the final rule generally, conveys none of the urgency required by Congress in addressing motor vehicle defects and providing prompt consumer notification and remedy. Indeed, the public frequently will face a substantial delay in being informed of the defect because the agency does not routinely place Part 573 reports on its Web site until weeks or months after the manufacturer’s submission.

There is no showing in the final rule of any adverse economic impact on manufacturers of a prompt notification of dealers regarding a defect. Indeed, as the agency notes at 69 FR 34954, 34958, there is no adverse economic impact on dealers because the Safety Act requires that these costs would “ultimately be borne by manufacturers,” because manufacturers must buy back defective vehicles from dealers and reimburse them for costs associated with holding the vehicles on their lots.

Conclusion

NHTSA’s final rule elevates the interests of manufacturers and dealers in selling new vehicles over the interests of consumers in buying safe cars without concealed and unremedied defects. This is contrary to the intent and requirements of the Vehicle Safety Act, as well as subsequent acts of Congress, which consistently value the interests of consumers in buying safe vehicles over those of the auto industry.

Maintaining a five-day notification rule, as proposed, would have created a system of appropriate incentives for manufacturers and comported with repeated legislative enactments of consumer rights and protections by Congress: to sell or lease a vehicle, all known defects or noncompliances must first be remedied.

If this final rule is not reconsidered and reissued as originally proposed with a five-day notification requirement, consumers will continue to drive in vehicles at risk of death and serious injuries in crashes due to concealed and unremedied defects. Congress intended for this agency to do far better. Indeed, those severely injured by defective vehicles in the time period between the manufacturers’ notifications to NHTSA and their notifications to the dealer will uniquely be able to blame NHTSA for its collusion in concealment of the defect. Rather than upholding its mission to protect consumers, NHTSA will be a partner with industry in hiding the existence of an acknowledged defect from the at-risk public.

That will be a sad day for the agency, but is the inevitable result of a final rule that would deny consumers the lifesaving information which Congress wished for them to have as expeditiously as possible. Because it is contrary to the clear direction from Congress and the agency’s mission to safeguard the public, the Center for Auto Safety and Public Citizen petition NHTSA to reconsider its dangerous final rule on dealer notification.

Respectfully submitted,

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