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RECALLING THE LAWYERS: THE NHTSA, GM, AND THE CHEVROLET COBALT

*Bernard W. Bell**

INTRODUCTION

The legal community has debated lawyers' roles and responsibilities in the criminal and civil litigation context, but devoted considerably less attention to such issues in administrative practice. Agency adjudication often resembles civil litigation, suggesting a similar role for lawyers in those agency processes. But many lawyers advise corporations on regulatory compliance issues.

Financial scandals have ignited a vibrant debate over lawyers' role as gatekeepers securing regulatory compliance. The Securities and Exchange Commission (SEC) has long emphasized transactional attorneys' critical compliance role.¹ Section 307 of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley") addressed the SEC's authority over lawyers.² One sponsor observed that when "executives and/or accountants are breaking the law, you can be sure that" their counsel "are not doing their jobs";³ "[o]ne of the most critical responsibilities that those lawyers have is, when they see something occurring or about to occur that violates the law, . . . they must act as an advocate for the shareholders, for the company itself, for the investors."⁴

Section 307 directed the SEC to issue rules "for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the [SEC] in any way in the representation of issuers."⁵ The rules were to require attorneys to "report up" securities infractions or breaches of fiduciary duty to the company's

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1. See Emanuel Fields, Securities Act Release No. 5404, 45 SEC Docket 262, 266 n.20 (June 18, 1973); accord *SEC v. Spectrum, Ltd.*, 489 F.2d 535, 541–42 (2d Cir. 1973).

2. 15 U.S.C. § 7245 (2012).

3. 148 CONG. REC. S6551 (July 10, 2002) (statement of Sen. Edwards).

4. *Id.* at S6552.

5. 15 U.S.C. § 7245.

General Counsel or Chief Executive Officer (CEO) and, if necessary, its audit committee or board of directors.⁶

The SEC promulgated rules giving content to section 307's "reporting up" requirement⁷ ("Sarbox rules"), asserting jurisdiction over a sizable swath of legal practice through its broad definition of the phrase "appearing and practicing" before the SEC.⁸ It also proposed a "reporting out" requirement, namely the "noisy withdrawal" rule.⁹ If responsible corporate officers failed to take reasonable remedial steps, the lawyer had to (a) withdraw from the representation, indicating that the withdrawal was due to "professional considerations," and (b) advise the SEC of any materially false or misleading statement in any SEC filing the attorney had assisted in preparing.¹⁰ After receiving unfavorable comments,¹¹ the SEC revised its proposal to provide that upon an attorney's withdrawal for "professional considerations," *the company* would have to report the withdrawal.¹²

Imposing compliance obligations on securities lawyers is somewhat consistent with ensuring proper representation of their "clients." The client, the corporate entity, includes several groups of "constituents," one of which is the shareholders.¹³ Obligations to ensure that companies do not make material misstatements in SEC submissions do not necessarily conflict with counsel's obligations to the corporation in general, or the shareholders in particular. Indeed, section 307 counteracts the pressure on corporate counsel to pursue management's interests at other constituencies' expense.¹⁴ However, Sarbox rules provide protections to at least one group—investors—not conventionally recognized as constituents of the corporate client.

6. *Id.*

7. 17 C.F.R. §§ 205.1–7 (2016); *see* Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296, 6296 (Feb. 6, 2003) (codified at 17 C.F.R. pt. 205 (2014)).

8. 17 C.F.R. § 205.2(a); *see* Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. at 6297–98.

9. Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. 71,670, 71,688–91 (Dec. 2, 2002) (codified at 17 C.F.R. pt. 205 (2014)); *see* Roger C. Cramton et al., *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILL. L. REV. 725, 810–14 (2004).

10. Implementation of Standards of Professional Conduct for Attorneys, 67 Fed. Reg. at 71688–91.

11. Implementation of Professional Standards for Attorneys, 68 Fed. Reg. at 6324–25 (noting that many commenters argued that the rule exceeded the SEC's authority, conflicted with long-standing state ethics rules, and would cause clients to keep information from their lawyers).

12. *Id.* at 6324, 6326 & n.40 (discussing proposed section 205.3(e)).

13. MODEL RULES OF PROF'L CONDUCT r. 1.13 (AM. BAR ASS'N 2013). Indeed, a "corporation" is merely a proxy for its constituent groups' collective interests. William H. Simon, *Whom (Or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 CAL. L. REV. 57, 89 (2003).

14. Am. Bar Ass'n, *Report of the New York City Bar Association Task Force on the Lawyer's Role in Corporate Governance*, 62 BUS. LAW. 427, 434 (2007).

But discussions of lawyers' gatekeeping roles have rarely expanded beyond the securities context.¹⁵ The last fifteen years have produced scandals involving manufacturers' failure to recall defective motor vehicles or equipment, such as the Ford/Firestone rollover problems, the Toyota unintended acceleration problem, the Cobalt ignition switch defect, and the Takata airbag defect.¹⁶ Product safety provides a context outside of securities law in which to consider lawyers' regulatory compliance responsibilities. Because consumers are not "constituents" of the lawyer's organizational client,¹⁷ the congruence between the lawyer's organizational client and regulatory beneficiaries in the securities area does not exist in the field of product safety. Nevertheless, the physical harms that may befall consumers are far more serious than the financial losses shareholders typically suffer.

This Article summarizes product safety and vehicle safety law and recounts General Motors Company's (GM) response to the Cobalt ignition switch defect, paying particular attention to the actions of GM's in-house and outside counsel. This Article then considers the legality and prudence of a regulatory agency's imposition of gatekeeping responsibilities on such counsel.

I. PRODUCT AND MOTOR VEHICLE SAFETY

Product safety lies at the intersection of civil justice and regulation. Products liability law provides a damages remedy to those injured by defective products.¹⁸ Such cases are generally brought against a corporation, almost invariably the product manufacturer, and ordinarily do not turn on identifying the individuals responsible for the defect.¹⁹ Critics have asserted that products liability law imposes excessive and crippling liability on manufacturers.²⁰

Products liability litigation is retrospective, seeking to allocate losses attributable to defective products rather than to remedy defects before they cause injury.²¹ And, like all civil litigation, it is lawyer focused. Lawyers possess the primary responsibility for conducting the litigation;²² the

15. See, e.g., Fred C. Zacharias, *Coercing Clients: Can Lawyer Gatekeeper Rules Work?*, 47 B.C. L. REV. 455 (2006).

16. See 2 RICHARD M. GOODMAN ET AL., *AUTOMOBILE DESIGN LIABILITY* §§ 6:102, 6:104, 6:106.50 (3d ed. 2015).

17. But see Simon, *supra* note 13, at 101 (including customers among corporate constituencies).

18. DAVID G. OWEN, *PRODUCTS LIABILITY LAW* § 1.1, at 3 (2005).

19. "Fault," particularly of specific individuals, is generally irrelevant in strict products liability cases. See, e.g., *id.* § 5.9, at 319.

20. See, e.g., Common Sense Product Liability Legal Reform Act of 1996, H.R. 956, 104th Cong. §§ 2(a)(4)–(7) (2d Sess. 1996) (enacted and vetoed); OWEN, *supra* note 18, § 1.3, at 24–25.

21. OWEN, *supra* note 18, § 10.8, at 726–27.

22. See, e.g., ARIZ. R. PROF'L CONDUCT r. 1.2 cmt. (the litigator controls the means of litigation and "need not pursue objectives or employ means simply because a client may wish that the lawyer do so"); see also MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(3) (AM. BAR ASS'N 2013); Zacharias, *supra* note 15, at 455–56.

lawyer is *the* intermediary through which the client acts. Lawyers' conduct in civil litigation is generally the business of state bar disciplinary authorities or, in the case of federal suits, the federal courts.

Several federal agencies also have jurisdiction over product safety, most notably the Consumer Products Safety Commission (CPSC), the National Highway Transportation Safety Administration (NHTSA), and the Food and Drug Administration²³ (FDA). Regulated entities have reporting requirements designed to enable agencies to detect product defects. The administrative process provides for product recalls and mandated product warnings designed to remedy defects or at least warn users of dangers. Several agencies can order recalls themselves or encourage and monitor manufacturers' voluntary recalls.²⁴ Most recalls are voluntary to some degree with the regulated entity initiating the recall, albeit sometimes at the regulatory agency's suggestion.²⁵

With respect to the reporting and recall requirements, lawyers generally do not operate as litigators, particularly when the regulated entity decides not to raise an issue with regulators. The NHTSA, the CPSC, and the FDA generally regulate corporations engaged in a particular field, but not lawyers' professional conduct in providing regulatory advice.

The National Highway Transportation Safety Act ("the Highway Safety Act") grants the NHTSA authority to specify safety standards for motor vehicles as well as order recalls. While the NHTSA has promulgated a number of safety standards, the agency primarily relies on the recall process to address vehicle safety issues.²⁶ Manufacturers initiate most vehicle recalls.²⁷ The Highway Safety Act and its implementing regulations require motor vehicle manufacturers to notify the NHTSA within five working days of discovering a safety "defect" in its vehicles,²⁸ i.e., a defect that creates an "unreasonable risk of accidents or injuries," and recall the vehicles to remedy the defect.²⁹

The manufacturer must remedy the defect without charge by either repairing or replacing the vehicle, or refunding the purchase price (less depreciation).³⁰ Thus, if a manufacturer orders a recall without understanding the defect or the means of repair, it incurs an obligation to replace the vehicle or refund the purchase price.³¹ This might well entail extraordinary expense, making recalling a motor vehicle before determining

23. OWEN, *supra* note 18, § 1.1, at 2–3.

24. *See, e.g., id.* § 10.8, at 760 n.35; Andrew S. Krulwich, *Recalls: Legal and Corporate Responses to FDA, CPSC, NHTSA, and Product Liability Considerations*, 39 BUS. LAW. 757 (1984).

25. 2 GOODMAN, *supra* note 16, § 6:3; Anita Bernstein, *Voluntary Recalls*, 2013 U. CHI. LEGAL F. 359, 388.

26. JERRY L. MASHAW & DAVID L. HAREFT, *THE STRUGGLE FOR AUTO SAFETY* 10–19 (1990); 1 GOODMAN, *supra* note 16, § 3:3.

27. *See* Bernstein, *supra* note 25, at 388.

28. 49 U.S.C. § 30118(c)(1) (2012); 49 C.F.R. § 573.6(a)–(b) (2012).

29. 49 U.S.C. § 30102(a)(8).

30. 49 U.S.C. § 30120(a)(1)(A); *Snyder Comput. Sys., Inc. v. U.S. Dep't of Transp.*, 13 F. Supp. 3d 848, 859, 865 (S.D. Ohio 2014).

31. *Snyder Comput. Sys.*, 13 F. Supp. 3d at 865.

a defect's root cause more undesirable than recalling inexpensive products in similar circumstances.³² Indeed, product defects can create a tension between a motor vehicle manufacturer's engineers and lawyers: engineers may wish to either await further testing that will yield a definitive explanation of the defect or characterize the defect as nonsafety related, while the lawyers may be inclined to push for a recall to limit potential civil liability.³³

A general information reporting system requires manufacturers to report information to the NHTSA. Unlike in the securities context, where typically lawyers prepare disclosure statements necessary for access to the securities markets, no all-encompassing disclosure statements need be filed before putting a motor vehicle on the market.³⁴ Information reporting is comprehensive and systematic and appears to entail reporting entities exercising only somewhat modest discretion. Such reporting involves producing original documents rather than drafting statements about the product.

Congress considerably enhanced the requirements for manufacturer reporting after the Ford/Firestone scandal. While some of the enhancements targeted failures to include data on vehicle or tire failures abroad, the reporting requirements were enhanced even for vehicles in use domestically. Under the Transportation Recall Enhancement, Accountability, and Documentation Act³⁵ ("TREAD Act") and its implementing regulations,³⁶ manufacturers must provide a wealth of information, including notice bulletins, consumer advisories, communications regarding consumer satisfaction campaigns, technical services bulletins, and any other safety-related documents provided to dealers.³⁷ Manufacturers must also provide information regarding deaths and injuries, property damage claims, consumer complaints, warranty claims, and field reports. Unlike in civil litigation, and unlike preparation of SEC filings, lawyers do not appear to play a central role in the provision of TREAD Act data or in recall decisions.³⁸

32. See 2 GOODMAN, *supra* note 16, § 6:109; Krulwich, *supra* note 24, at 763.

33. Krulwich, *supra* note 24, at 763–64.

34. Manufacturers must certify to distributors and dealers that the vehicle complies with all federal motor vehicle standards. 49 U.S.C. § 30115 (2012); see MICHAEL J. KEATING & THOMAS H. CASE, CORPORATE COMPLIANCE SERIES: DESIGNING AN EFFECTIVE PRODUCTS LIABILITY COMPLIANCE PROGRAM § 1:30 (2015).

35. 49 U.S.C. §§ 30101–30170. The Act was adopted to address two deficiencies with regard to the Ford/Firestone deaths: first, NHTSA's lack of critical data, and second, its inability to employ available data to spot product defects. H.R. REP. NO. 106-954, at 7 (2000).

36. Reporting of Information and Documents About Potential Defects; Defect and Noncompliance Reports, 68 Fed. Reg. 18136 (Apr. 15, 2003).

37. 49 U.S.C. § 30166(m)(3)(c); 49 C.F.R. § 579.5 (2014); see ANTON R. VALUKAS, REPORT TO THE BOARD OF DIRECTORS OF GENERAL MOTORS COMPANY REGARDING IGNITION SWITCH RECALLS 32 (2014).

38. For example, at GM the TREAD Act responses were signed by Gay Kent, Director of Product Investigations during much of the period relevant to the Cobalt defect. See, e.g., Letter from Gay P. Kent, Dir. of Prod. Investigations, Gen. Motors Corp., to Christina Morgan, Chief, Early Warning Division, Office of Defects Investigation Enforcement,

II. THE COBALT IGNITION SWITCH AND GM'S RESPONSE

On February 7, 2014, GM recalled approximately 780,000 Chevrolet Cobalts and Saturn Ions due to a defective ignition switch. Drivers could inadvertently turn the car's ignition from "run" to "accessory," killing the engine and deactivating the car's airbags. The announcement capped an eleven-year odyssey in which GM engineers failed to identify and remedy the defect. Approximately 124 deaths and 274 injuries have been attributed to the defect.³⁹

GM's in-house lawyers have been harshly criticized for their role in GM's deficient response from several quarters,⁴⁰ including Anton Valukas, who investigated GM's actions on behalf of GM's Board of Directors. At least five in-house lawyers were ultimately asked to leave the company, including William Kemp, GM's chief in-house regulatory compliance lawyer.⁴¹ GM's outside counsels for products litigation have received little, if any, criticism.

GM's legal department contained separate groups responsible for products liability litigation and safety compliance.⁴² Products liability claims were handled by in-house products liability attorneys until litigation commenced, at which point GM retained outside counsel.⁴³ GM required outside counsel to provide a preliminary report on potential liability and subsequent updates.⁴⁴ GM's in-house lawyers held "roundtable" discussions at which settlements up to \$2 million could be approved.⁴⁵ Claims between \$2 million and \$5 million could be approved by the Settlement Review Committee⁴⁶ (SRC). Only settlements greater than \$5 million required General Counsel approval.⁴⁷

In an August 3, 2004, memo, GM's then-General Counsel advised the legal staff to elevate certain issues to superiors.⁴⁸ In deciding upon the

NHTSA (Apr. 6, 2006) (on file with author). No in-house counsel served on GM's three-person committee that decided on recalls.

39. GM IGNITION COMPENSATION CLAIMS RESOLUTION FACILITY, DETAILED OVERALL PROGRAM STATISTICS—REVISED (2015), http://www.gmignitioncompensation.com/docs/Program_Statistics_8162015.pdf [<https://perma.cc/84ZL-HQTY>].

40. The critics include members of Congress. See, e.g., *Examining Accountability and Corporate Culture in Wake of the GM Recalls: Hearing Before the Subcomm. on Consumer Prot., Prod. Safety, & Ins. of the S. Comm. on Commerce, Sci. & Transp.*, 113th Cong. 22–23 (2014) (statement of Sen. Blumenthal); Rena Steinzor, (Still) "Unsafe at Any Speed": Why Not Jail For Auto Executives?, 9 HARV. L. & POL'Y REV. 443, 460–61 (2015); Peter J. Henning, *How G.M.'s Lawyers Failed in Their Duties*, N.Y. TIMES: DEALB%K (June 9, 2014), http://dealbook.nytimes.com/2014/06/09/how-g-m-s-lawyers-failed-in-their-duties/?_r=0 [<https://perma.cc/X8G8-96CG>].

41. Bill Vlasic, *In Surprise, Top Lawyer at G.M. Sets Retirement*, N.Y. TIMES (Oct. 17, 2014), <http://www.nytimes.com/2014/10/18/business/michael-millikin-gms-top-lawyer-is-retiring.html> [<https://perma.cc/ZHS5-WDHJ>].

42. VALUKAS, *supra* note 37, at 104–05.

43. *Id.* at 105.

44. *Id.*

45. *Id.* at 107.

46. *Id.*

47. *Id.*

48. *Id.* at 109–10.

appropriate response to a regulatory violation, the attorney was to consider the violation's seriousness, the danger to others, and his own degree of knowledge, level of experience, and position at GM.⁴⁹ Attorneys were advised to report to the General Counsel if their superiors were not appropriately addressing the issue.⁵⁰

GM began developing a new ignition switch in the late 1990's.⁵¹ GM had specifications for the torque needed to turn the key in the ignition.⁵² If the key turned too easily, drivers could inadvertently turn the car's ignition from "run" to "accessory," causing a loss of power, i.e., a "moving stall."⁵³ Even more seriously, accidentally turning off the car would disable the car's airbags. Though the new switch failed GM's specifications, engineer Raymond DeGiorgio approved it nevertheless.⁵⁴ The switch was used starting with 2003 Ions and 2005 Cobalts. DeGiorgio approved a switch modification that increased the torque needed to turn the key in 2006.⁵⁵ The modified switch was installed in some 2007 Cobalts and all later model Cobalts.⁵⁶ However, DeGiorgio neither created a unique part number for the modified switch nor advised others of the change.⁵⁷ As a result, investigators dismissed the ignition switch as the source of seemingly anomalous air bag nondeployments because later model year Cobalts did not suffer such nondeployments.

GM's response to the ignition switch defect can be divided into phases. In the first, GM became aware that Cobalts were subject to moving stalls due to inadvertent pressure on the ignition key. However, GM officials did not consider the problem safety related.⁵⁸

The moving stall problem was the subject of a 2004 report, which identified the low-torque ignition switch as the source of the problem.⁵⁹ GM's Current Production Improvement Team (CPIT), primarily consisting of business people and engineers, assessed the urgency of the problem. Instead of designating the switch a Level 1 problem, i.e., a safety problem, the CPIT classified it as a Level 3 problem, a "moderate" issue that requires attention on the next dealership visit or entails moderate cost, *inter alia*.⁶⁰ Such matters are considered less urgent, and cost is a factor in crafting an appropriate response.⁶¹

In February 2005, GM issued a preliminary information alert advising its dealers of the issue. The alert urged dealers to notify customers of the

49. *Id.*

50. *Id.*

51. *Id.* at 25, 34.

52. *Id.* at 35–40.

53. *Id.*

54. *Id.* at 39.

55. *Id.* at 98.

56. *See id.* at 99, 102.

57. *Id.* at 100–02. *But see id.* at 102 n.417.

58. *See id.* at 33, 53–54.

59. *See id.* at 62–63.

60. *Id.* at 63–64; *see id.* at 41–42.

61. *Id.* at 64; *see id.* at 69–71.

potential for moving stalls and advise them to “remove unessential items from their key chain[s].”⁶² The CPIT ultimately concluded that there was no “acceptable business case” for fixing the ignition switch problem.⁶³

GM’s Product Investigations Unit, the engineers responsible for safety issues, decided against recalling the ignition switch in late 2005, opting for issuance of a Technical Service Bulletin (TSB), which offered customers plug inserts to ameliorate the ignition switch problem.⁶⁴ However, the TSB was drafted to avoid using the word “stall,” a “hot” word GM avoids using in TSBs, as such “hot” words may create customer concern and draw the NHTSA’s attention.⁶⁵ Though GM produced over 10,000 plug inserts, only 430 customers requested them; Valukas noted the minimal likelihood that a customer would become aware of the need for and availability of the plug.⁶⁶

While “moving stalls” would seem to qualify as a safety defect,⁶⁷ the industry appears to have disagreed.⁶⁸ Indeed, in 2007, the NHTSA set forth a multifactor approach for determining whether stalling constituted a safety issue.⁶⁹ Nevertheless, the conclusion that “moving stalls” are unrelated to safety seems contrary to the standards reflected in the admittedly sparse case law and prior recall practice.⁷⁰

The GM legal department’s receipt of reports regarding airbag nondeployment, beginning in late 2005, began a second phase of the Cobalt story.⁷¹ At the time, neither the engineers nor the lawyers understood the connection between the ignition switch and the airbag failures. However, a Wisconsin state trooper and a team of Indiana University researchers made the connection.⁷² In a February 2007 report regarding a fatal Cobalt

62. *Id.* at 92.

63. *Id.* at 69.

64. *See id.* at 88.

65. *Id.* at 92–93. The initial draft of the bulletin included the word “stall,” but Product Investigations excised the word. A later decision to refer to the engine’s deactivation as a “stall” was inexplicably never implemented. *See id.* at 120.

66. *Id.* at 93–94. Even when Cobalts were brought to dealers in response to a different recall, dealers did not install the “plug inserts.” *Id.* at 139. Ironically, at least one of the Cobalts involved in a fatal airbag nondeployment had been brought to a dealer in response to a power steering recall. *Id.* at 149–50.

67. OFFICE OF INSPECTOR GEN., INADEQUATE DATA AND ANALYSIS UNDERMINE NHTSA’S EFFORTS TO IDENTIFY AND INVESTIGATE VEHICLE SAFETY CONCERNS 12 (2015); VALUKAS, *supra* note 37, at 88; Christopher Jensen, *Salamis, Key Rings and GM’s Ongoing Sense of Humor*, CLEVELAND PLAIN DEALER, June 26, 2005, at F1.

68. Valukas cited only *Salsitz v. Nasser*, 208 F.R.D. 589 (E.D. Mich. 2002). VALUKAS, *supra* note 37, at 72 n.280.

69. Denial of Motor Vehicle Defect Petition, 72 Fed. Reg. 73,973 (Dec. 28, 2007). The factors included: the frequency of stalling, the speeds at which it occurs, the type of operation that produces it (e.g., starting, accelerating), the ease of restarting the vehicle, the stall’s effects on steering functions, and any resulting crashes. *Id.*

70. *See* Kevin M. McDonald, *Judicial Review of NHTSA-Ordered Recalls*, 47 WAYNE L. REV. 1301, 1336 (2001); Letter from Clarence M. Ditlow, Exec. Dir., Ctr. for Auto Safety, to the Hon. Calvin L. Scovel III, Inspector Gen., Dep’t of Transp., at 7–8 (June 9, 2014), http://www.autosafety.org/sites/default/files/imce_staff_uploads/Scovell%20Letter.pdf [<https://perma.cc/NM3Q-P4WA>].

71. *See* VALUKAS, *supra* note 37, at 103.

72. *Id.* at 115–17, 121–24.

accident, the state trooper, relying on reports accessible on the NHTSA's website regarding Cobalt moving stalls and GM's TSB, attributed the airbag's nondeployment to the ignition switch problem.⁷³ GM included the report in its quarterly TREAD Act submission.⁷⁴ An April 2007 Indiana University Transportation Research Center report on the same accident also attributed the airbag's failure to the defective ignition switch.⁷⁵ The NHTSA-commissioned report appeared on the agency's website.

The NHTSA was aware of both the ignition switch and airbag deployment problems but, like GM, considered them unrelated. The ignition switch never gave rise to an investigation.⁷⁶ The NHTSA took the airbag failures more seriously. In November 2007, the NHTSA's Defect Investigation Panel considered opening an investigation of Cobalt/Ion airbag nondeployments. However, the panel ultimately decided against doing so, under the misconception that the airbag failures could be explained by the drivers' failure to wear seatbelts and the vehicles' departure from the roadway during the accidents.⁷⁷ In April 2009 and February 2010, the NHTSA's Office of Defect Investigations (ODI) looked into Cobalt crashes, but failed to investigate fully the airbag nondeployments.⁷⁸

Meanwhile, Cobalt crashes began coming up at GM legal department roundtables. In September 2006, the roundtable approved a settlement in a case involving an inexplicable airbag nondeployment.⁷⁹ Roundtables approved two more airbag nondeployment settlements in 2008. The failures in each case were attributed to an unknown "sensing system anomaly."⁸⁰

In October 2010, GM's legal department received its first warning from outside counsel regarding potential punitive damages liability. King & Spalding warned that a significant plaintiff's verdict was likely "under these unusual circumstances in which an apparent malfunction (sensing system anomaly) prevented airbag deployment."⁸¹ Moreover, the law firm continued, the circumstances surrounding the Cobalt sensing system anomaly "could prove fertile ground" for a punitive damages award.⁸² In January 2011, in-house products liability attorney Jaclyn Palmer presented a proposed settlement to the SRC, which approved it. Palmer's superior and Lucy Clark Dougherty, General Counsel for GM North America, indicated that several of the lawyers wanted to meet to discuss the sensing anomaly.⁸³ However, the meeting did not occur until July.⁸⁴

73. *Id.* at 116–17.

74. *Id.* at 117–18.

75. *Id.* at 121–23.

76. OFFICE OF INSPECTOR GEN., *supra* note 67, at 25.

77. *Id.* at 24–25.

78. *Id.* at 25.

79. *See* VALUKAS, *supra* note 37, at 112–13.

80. *Id.* at 141.

81. *Id.* at 142.

82. *Id.* at 141–42.

83. *Id.* at 146–47.

At the July meeting, the legal department told the Product Investigations Unit that Cobalt nondeployment cases represented a safety concern and that discovery of the malfunction's "root cause" was urgent.⁸⁵ Douglas Wachtel, Senior Manager of Product Investigations, expressed reluctance to take on the issue, but appeared to relent.⁸⁶ Wachtel assigned engineer Brian Stouffer to investigate. Such investigations were expected to be completed within forty days, but investigators suffered no adverse consequences for missing that deadline.⁸⁷ Moreover, the engineer was expected to determine the "root cause" of the problem before making recommendations.⁸⁸

After a March 2012 follow-up meeting initiated by Palmer, Kemp promised to seek out an "executive champion" to oversee the investigative process.⁸⁹ But in April 2012, before Kemp had secured a "champion," another outside counsel, Eckert & Seamans, noted the likelihood of legal liability and the risk of a punitive damages award for yet another Cobalt crash.⁹⁰ In May 2012, a member of GM's Executive Field Action Decision Committee (EFADC), the committee that authorizes recalls, agreed to serve as the champion for the Cobalt investigation. In mid-May, Kemp organized a meeting of high-level managers and directors to discuss the Cobalt problem.⁹¹

GM's legal department apparently first became aware of the Indiana study in June 2012, when an expert report by Erin Shipp, a plaintiff's expert, referenced it.⁹² Shipp's report attributed the anomalous airbag failures to the ignition switch defect. Stouffer and other engineers dismissed Shipp's theory because it failed to explain the problem's disappearance in later model Cobalts.⁹³ At a July 25 roundtable, Palmer explained Shipp's theory and reported outside counsel's view that GM would lose the case. A junior and recently hired in-house counsel, Nabeel Peracha, asked why the Cobalt had not yet been recalled. The other roundtable participants explained that GM's engineers were "acutely aware" of the problem but could not fix it.⁹⁴ According to Valukas,

84. *Id.* at 147–48.

85. *Id.* at 150. A month before the meeting would take place, King & Spalding warned of GM's potential liability in yet another case. *See id.* at 149.

86. Valukas reported that Wachtel did not recall attending the meeting. *Id.* at 152 n.684, 153.

87. *Id.* at 289–90.

88. *Id.*

89. *Id.* at 164–65.

90. *Id.* at 167–69.

91. *Id.* at 171–72.

92. *Id.* at 180–82. Prosecutors and GM would later agree that GM's reporting obligation arose during this time period at the latest. Statement of Facts ¶ 115, *United States v. \$900,000,000 in U.S. Currency*, No. 15 Civ. 07342 (S.D.N.Y. Sept. 17, 2015), ECF No. 1 (Exhibit C to General Motors Deferred Prosecution Agreement, attached as Exhibit A to Complaint). Perhaps, given the high burden of proof in establishing criminal liability, prosecutors were particularly generous in arriving at that date.

93. VALUKAS, *supra* note 37, at 185.

94. *Id.* at 184.

Peracha “got the sense from the other lawyers that they had done everything [they] could do.”⁹⁵

Stouffer continued working on the Cobalt issue. Among other things, he asked DeGiorgio again if the ignition switch had been changed, and DeGiorgio reiterated that it had not. Product Investigations engaged the Red X team, GM’s master problem solvers. At the same time a group of engineers discussed options, including increasing the torque on the ignition switch and redesigning the sensors so that airbags would deploy even when the car was in accessory mode.⁹⁶

Meanwhile, yet another Cobalt nondeployment involving an August 12, 2012, crash was the subject of a case evaluation by Eckert & Seamans. In an October 31 memo, the firm noted that the case involved an airbag nondeployment typical of those “GM ha[d] seen [] in a few other matters.”⁹⁷ The legal department approved a settlement at its December 12 roundtable.⁹⁸

Product Investigations continued to investigate and hold brainstorming sessions regarding possible solutions.⁹⁹ Ultimately, in February 2013, Stouffer pronounced the investigation “stuck”¹⁰⁰ and asked that Subbaiah Malladi, GM’s top engineering consultant, be consulted.¹⁰¹

But matters took a turn during an April 29, 2013, deposition,¹⁰² initiating a third phase of the Cobalt story. Plaintiff’s counsel confronted DeGiorgio with photographic evidence of the Cobalt ignition switch’s modification. GM’s in-house lawyer, Ronald Porter, drove to the deposition site to retrieve the photographic evidence. Three days later, King & Spalding’s Philip Holladay, who had defended DeGiorgio’s deposition, recommended to Porter and Kemp that GM hire Malladi, because the airbag nondeployment investigation needed to reach “closure without delay.”¹⁰³

On July 30, 2013, Malladi briefed Porter, Kemp, and outside counsel on his findings, namely that the switches installed in the 2005 to 2007 Cobalts did not meet GM’s torque specifications.¹⁰⁴ Porter presented the case that led to GM’s discovery of the ignition switch change to the SRC in August 2013. The SRC authorized a \$5 million settlement.¹⁰⁵

In November 2013, Stouffer concluded, anticlimactically, that the ignition switch had caused the airbag nondeployments. Shortly thereafter, GM began its formal multistage internal process for commencing a

95. *Id.*

96. *Id.* at 186–90.

97. *Id.* at 190.

98. *Id.* at 190–91.

99. *Id.* at 193, 195.

100. *Id.* at 196.

101. *Id.* Kemp encountered resistance in obtaining approval from GM’s Chief Engineer due to cost concerns; Kemp sought to have Malladi appointed by GM’s outside counsel instead. *Id.* at 197.

102. *Id.* at 199.

103. *Id.* at 200.

104. *Id.* at 205.

105. *Id.* at 206–07.

recall.¹⁰⁶ Ordinarily, a Product Investigations engineer presents his findings informally to the Product Investigations Director, the Director of Field Performance Evaluation (FPE), and in-house counsel, *inter alia*.¹⁰⁷ Thereafter, the FPE team meets to recommend a recall or some alternative action. Next, the Field Performance Evaluation Recommendation Committee (FPERC) reviews the investigation and makes a recommendation to the EFADC. A recall requires a unanimous vote of the three-person EFADC.¹⁰⁸

The Cobalt recall did not follow this process; perhaps the idiosyncratic nature of the process represented a failed attempt at expedition. The FPE Director contemplated putting the matter on the EFADC's November 18 agenda, but was persuaded to move the item to the December 3 agenda, given the matter's "complexity."¹⁰⁹ On December 2, 2013, two days before he was to retire, Stouffer made a presentation regarding the ignition switch defect to an informal group of FPERC members.¹¹⁰ They referred the issue directly to the EFADC, because of the legal department's desire to proceed quickly.¹¹¹

However, the matter was pushed back to the EFADC's December 17 agenda.¹¹² John Murawa, Stouffer's replacement, presented the case for recall. One EFADC member questioned whether the engineers had found the "root cause" of the airbag nondeployment.¹¹³ After the meeting, in a conversation with one of the EFADC members, the FPE Director expressed concern about the "execution details" of the recall, arguing that "the absolute last thing we need to do from a customer perspective is to rush a decision, post it on the NHTSA website that we have a safety decision but we cannot fix the customer vehicles for some period of time."¹¹⁴

At this point, one EFADC member briefly advised CEO Mary Barra of the potential recall; she advised him to "get the right data; then do the right thing."¹¹⁵ Almost simultaneously, GM's General Counsel was first advised of the Cobalt switch issue by Lucy Clark Dougherty.¹¹⁶ On January 31, 2014, after Murawa's supplemental presentation, the EFADC authorized a recall.¹¹⁷ On February 7, 2014, GM informed the NHTSA of a safety recall of 780,000 vehicles at an estimated cost of over \$32 million.¹¹⁸

On February 26, 2014, the NHTSA opened a civil enforcement investigation regarding GM's delay in disclosing the ignition switch

106. *Id.* at 211.

107. *Id.* at 290.

108. *Id.* at 217.

109. Statement of Facts, *supra* note 93, ¶ 102.

110. VALUKAS, *supra* note 37, at 215–16.

111. *Id.* at 216.

112. Statement of Facts, *supra* note 93, ¶ 103.

113. VALUKAS, *supra* note 37, at 218.

114. Statement of Facts, *supra* note 93, ¶ 104.

115. VALUKAS, *supra* note 37, at 221.

116. *Id.*

117. *Id.* at 222–23.

118. *Id.* at 224.

defect.¹¹⁹ On May 16, 2014, the NHTSA and GM entered into a consent decree resolving those proceedings.¹²⁰ GM admitted its violation of the Highway Safety Act's five-day reporting requirement and agreed to pay \$35 million in penalties.¹²¹

Federal prosecutors entered into a deferred prosecution agreement with GM on September 16, 2015.¹²² The prosecutors did not identify any TREAD Act reporting violations, but did allege, and GM admitted, that GM had "overshot" the Highway Safety Act five-day reporting requirement by twenty months.¹²³ In addition, prosecutors and the company agreed that in light of GM's response to the Cobalt defects, GM's representations to the NHTSA during meetings on October 22, 2012, and November 7, 2013, were false and thus violated 18 U.S.C. § 1001.¹²⁴

The course of events described above, in light of other motor vehicle defect scandals, suggest that motor vehicle manufacturers often do not act aggressively with respect to safety defects despite what appear to be considerable incentives to do so. Strict products liability would appear to give motor vehicle manufacturers strong incentives to find and remedy safety defects in their products. Indeed, given the potential liabilities, in-house and outside counsel might appear to be particularly strong advocates for addressing automotive defects.

Strict products liability is designed to maximize the incentives for manufacturers to reduce product dangers. With respect to GM's lawyers, those incentives proved insufficient, but not entirely ineffectual. Despite GM's significant exposure to compensatory, and indeed punitive, damages (not to mention civil penalties under the Highway Safety Act), GM delayed for years in advising consumers of the danger or correcting the defect in its Cobalts, and its lawyers did not treat the issue with sufficient urgency. However, products liability law did result in at least GM's lawyers—outside counsel and in-house products liability attorneys—prodding engineers to identify and correct the problem and pressing for a recall. And even William Kemp, GM's chief regulatory compliance lawyer, made substantial efforts to move the investigation into the airbag nondeployments forward.

III. REGULATING ATTORNEYS TO ADDRESS MOTOR VEHICLE DEFECT SCANDALS

The Cobalt tragedy has spawned several reform proposals. Some see enhancement of the NHTSA's monitoring capabilities or augmentation of

119. Consent Decree ¶ 9, TQ14-001, NHTSA Recall No. 14V-047 (May 16, 2014).

120. *See generally id.*

121. *See generally id.*

122. *See generally* Statement of Facts, *supra* note 93.

123. *Id.* ¶ 115.

124. *Id.* ¶¶ 79–81, 97–98. GM represented that the average time between identification of a problem and a recall was 160 days in 2008 and that the average had dropped to eighty-four days in 2012. The November 2013 statement was made to assuage concerns expressed by NHTSA's ODI Director regarding GM's delayed response to safety defects. *Id.* ¶¶ 95, 97.

penalties for noncompliance as the most efficacious response.¹²⁵ Others see precluding secret settlements of products liability cases as a means of enhancing vehicle safety.¹²⁶ Some reform efforts seek to encourage “whistleblowing,” offering a bounty to encourage employees to report defects to the NHTSA.¹²⁷ Despite the criticisms of GM’s in-house counsel, no major proposal focuses on motor vehicle manufacturers’ in-house counsel.

Lawyers’ provision of advice and laxity in monitoring compliance is particularly likely to facilitate corporations’ regulatory violations. The NHTSA might consider enhancing the recall process, which largely depends on automobile manufacturers’ compliance efforts, by promulgating standards for lawyers counseling engineers and business executives regarding potential safety defects. This part discusses the merits of such an approach. First, the question of an agency’s authority to reach lawyer conduct must be tackled. Thereafter, the question of whether an agency should add regulation of attorneys to its regulatory repertoire can be addressed.

A. *Can the NHTSA Regulate Lawyers?*

In general, Congress has not explicitly granted federal agencies authority to regulate lawyers.¹²⁸ In his seminal study, Michael P. Cox observed that “[e]xcept for the few agencies with express authority to promulgate rules and discipline attorneys for violation,” the authority to do so must be implied.¹²⁹ Indeed, the Agency Practice Act allows individuals to select any member of a state bar in good standing to represent them in agency proceedings.¹³⁰ Nevertheless, the Agency Practice Act’s text and the legislative history suggest that Congress did not intend to preclude agencies from disciplining lawyers for conduct that threatened the “order . . . and integrity of agency proceedings.”¹³¹

125. The Department of Transportation has sought dramatic increases to the civil penalties for failure to report defects and the NHTSA’s budget. *See, e.g.*, Grow America Act, H.R. 2410, 114th Cong. §§ 4101, 4110 (2015).

126. Sunshine in Litigation Act of 2014, S. 2364, 113th Cong. (2014); *see* Request for Public Comments on NHTSA Enforcement Guidance Bulletin 2015-01, 80 Fed. Reg. 57,046 (Sept. 21, 2015); Press Release, Sen. Richard Blumenthal, For Bad Actors Seeking to Seal Court Documents, Blumenthal, Graham, Hope to Permit Sunshine (May 20, 2014), <http://www.blumenthal.senate.gov/newsroom/press/release/for-bad-actors-seeking-to-seal-court-documents-blumenthal-graham-hope-to-permit-sunshine> [https://perma.cc/Q6K4-YRFV].

127. Motor Vehicle Safety Whistleblower Act, S. 304, 114th Cong. (2015).

128. Typically, lawyers’ professional conduct is regulated by state bar authorities. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1, reporter’s notes. Congress could surely preempt such state authority. U.S. CONST. art. VI, cl. 2.

129. Michael P. Cox, *Regulation of Attorneys Practicing Before Federal Agencies*, 34 CASE W. RES. L. REV. 173, 198 (1984).

130. 5 U.S.C. § 500(b) (2012).

131. *See* Cox, *supra* note 129, at 198–200, 204 & n.139, 214 n.178; *see* 5 U.S.C. § 500(b). Section (d)(2), which provides that the Agency Practice Act does not “authorize or limit the discipline, including disbarment, of individuals who appear in a representative capacity before an agency,” was understood to permit a continuation of many agencies’

1. *Gonzalez v. Oregon* and *Loving v. IRS*

Two major cases, *Gonzalez v. Oregon*¹³² and *Loving v. IRS*,¹³³ suggest that an assertion of jurisdiction over lawyers' conduct when participating in product recall decision making might be subject to a successful challenge. *Gonzalez* involved the Attorney General's assertion of authority over the practice of medicine. The Supreme Court acknowledged the federal government's constitutional authority to regulate medical practice, despite the traditional state control over the subject.¹³⁴ However, the Court rebuffed the Attorney General's argument that the Controlled Substances Act allowed him to preclude doctors from prescribing drugs to terminal patients to end their lives. Given the traditional state regulatory powers over medical practice, the Court was unwilling to assume such an expansion of federal authority over medical practice without a clear expression of intent.¹³⁵ As a matter of "commonsense," the Court noted, "the background principles of our federal system . . . belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police power."¹³⁶

In *Loving*, the D.C. Circuit considered whether the IRS's express statutory authority to "regulate the practice of *representatives* of persons *before the Department of the Treasury*"¹³⁷ allowed the IRS to regulate paid tax preparers. Despite the agency's invocation of *Chevron* deference,¹³⁸ the court concluded that the statute did not authorize the IRS to regulate tax preparers.¹³⁹ The court gave six reasons for its conclusion, but only two are critical for our discussion.¹⁴⁰ First, tax preparers could not be considered "representatives" of taxpayers, because tax preparers have no power to bind their clients. The court distinguished assisting a taxpayer from representing a taxpayer. Second, to "practice" before an agency involves work only in connection with an "investigation, adversarial hearing, or other adjudicative proceeding."¹⁴¹ The court considered preparing tax returns fundamentally

exercise of disciplinary authority of lawyers who appeared before them. *See, e.g.*, Letter from Nicholas deBelleville Katzenbach, Deputy Att'y Gen., Dep't of Justice, to Hon. James O. Eastland, Chairman, Senate Comm. on the Judiciary (June 10, 1963) (appendix to H.R. REP. NO. 89-1141, *as reprinted in* 1965 U.S.C.C.A.N. 4170) (observing that many agencies "exercise disciplinary authority, such as suspension or disbarment from practice before them, where attorneys have engaged in misconduct before them" and that the Department of Justice understood that the proposed statute did not modify that authority); S. REP. NO. 89-755, at 5 (1965) (observing that "if matters of ethical misconduct are brought to the attention of the agencies, adequate tools are at their disposal" because the proposed statute "specifically provides that the agencies shall lose none of their rights to discipline or bar attorneys").

132. 546 U.S. 243 (2006).

133. 742 F.3d 1013 (D.C. Cir. 2014).

134. *Gonzalez*, 546 U.S. at 270–71.

135. *Id.* at 270.

136. *Id.* at 274.

137. *Loving*, 742 F.3d at 1014 (citing 31 U.S.C. § 330(a)(1) (2012)) (emphasis added).

138. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

139. *Loving*, 742 F.3d at 1015.

140. *Id.* at 1016–21.

141. *Id.* at 1018.

distinguishable from preparing for an agency adjudication and acting as an advocate during that proceeding.¹⁴² It noted that the act of filing a tax return does not initiate any adversary proceeding. If the IRS disagrees with the tax return, the tax preparer is not invited to present arguments or engage in advocacy; instead, the IRS conducts its own *ex parte*, nonadversarial assessment of the taxpayer's liability. Only when a "return is selected for an audit, or the taxpayer appeals the IRS's proposed liability adjustments, does a taxpayer designate a representative."¹⁴³ The tax preparer may be "practicing" in assisting with preparation of the tax return, but that does not constitute practice *before the IRS*.¹⁴⁴

2. The NHTSA's Context

Like other agencies, the NHTSA has inherent power to regulate lawyers who practice before it. But what does that mean in an area, like motor vehicle safety, that lies at the intersection of civil justice and regulation?

Three groups of lawyers played a role in GM's Cobalt response (and would probably play a role in any manufacturer's response to vehicle defects): outside products liability counsel, in-house products liability counsel, and in-house compliance counsel. Of the three, the first seems furthest afield from the core of the agency's inherent authority to regulate those who practice before it. Outside products liability counsel unquestionably practice before the state and federal courts in which they litigate product defect cases. They are subject to the obligations imposed by those tribunals and subject to control by state disciplinary authorities. It is difficult to construe defending a products liability case as "practic[ing]" before the NHTSA.¹⁴⁵ Indeed, such an approach would extend beyond the capacious approach the SEC has adopted in its Sarbanes-Oxley regulations—those regulations expressly exempt advocacy and investigative counsel from the duty to report up "evidence of a material violation of securities law or breach of fiduciary duty" by the company or its agents.¹⁴⁶ And the role of the courts raises either separation of powers

142. *Id.* ("The Federal tax system is basically one of self-assessment, whereby each taxpayer computes the tax due and then files the appropriate form of return along with the requisite payment.").

143. *Id.*

144. The Treasury statute specified that those who practiced before the agency had to demonstrate each of four types of competencies, including the "competency to advise and assist persons *in presenting their cases*." *Id.* The court concluded that preparing a tax return clearly fell outside the definition of "presenting a case." *Id.*

145. See Fred C. Zacharias, *Understanding Recent Trends in Federal Regulation of Lawyers*, 2003 PROF. LAW. 15, 23–24; cf. Jill Evans, *The Lawyer As Enlightened Citizen: Towards a New Regulatory Model in Environmental Law*, 24 VT. L. REV. 229, 290 (2000) (observing, in discussing potential EPA regulation of environmental attorneys, that "many contacts occur directly and continuously between the [environmental attorney's] client and the agency" and that "compliance with environmental requirements does not necessarily require 'practice' before the EPA").

146. 17 C.F.R. § 205.3(b)(6)(ii) (2016); see Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296, 6308 (Feb. 6, 2003). For criticism of this exception see Cramton, *supra* note 9, at 775–79. The SEC's exemption is also consistent

or federalism issues. To the extent that the NHTSA's exercise of authority would interfere with defending a products liability action, it might interfere with the operation of the federal courts, creating a separation of powers concern.¹⁴⁷ The federalism concerns resemble those raised in *Gonzalez*, as control over lawyer conduct traditionally lies within the purview of state licensing and disciplinary authorities.

Similar arguments can be advanced with regard to in-house products liability counsel. Though they may not make appearances in court, such attorneys primarily provide support and guidance for civil litigation and address claims in anticipation of civil litigation. At least GM in-house products liability lawyers do not appear to make NHTSA filings.¹⁴⁸

Arguably, under *Loving*, even compliance lawyers do not "practice" before the NHTSA. In at least one critical respect, in-house compliance counsel's role resembles that of tax preparers'. Like the tax system, the product-recall system is based largely on self-reporting. The *Loving* court relied heavily on the self-reporting nature of the tax system in finding that tax preparers did not "practice" before the IRS. In effect, like the tax preparer, compliance lawyers for motor vehicle manufacturers assist in a self-reporting process that essentially precedes any form of agency process. The decision to initiate a recall is often an initiative of the regulated entity, not the result of interactions with the NHTSA. The Cobalt recall ultimately involved GM's own identification of the defect and provision of notice and a remedy to the public.

However, the *Loving* court's approach is arguably too artificial in the motor vehicle safety context. The NHTSA's ODI did contemplate opening an investigation into the airbag nondeployment issue; indeed, its failure to do so can be attributed to negligence.¹⁴⁹ ODI and GM were also engaged in discussions regarding the safety implications of "moving stalls." Moreover, GM's 2005 TSB was crafted to avoid the NHTSA scrutiny. Thus, the line between self-reporting and "agency proceedings" is problematic. While the NHTSA's mandatory recall authority has fallen into disuse, voluntary recalls are merely an alternative to the NHTSA recall proceedings.¹⁵⁰

The application of another *Loving* factor is somewhat ambiguous in the motor vehicle context. *Loving* emphasized tax preparers' lack of authority to bind taxpayers, concluding that tax preparers do not "represent" the

with Model Rule of Professional Conduct § 1.13(d). Comment 7 explains that § 1.13(d)'s exemption of certain lawyers from certain disclosure obligations "is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim." MODEL RULES OF PROF'L CONDUCT r. 1.13 cmt. 7 (AM. BAR ASS'N 2013).

147. *Legal Serv. Corp. v. Velazquez*, 531 U.S. 533, 545–46 (2001) (finding that congressional limitations on representations by the Legal Services Corporation interfered with the functioning of the federal courts).

148. Granted given the broad definition of "claim[s]" in the NHTSA's TREAD Act regulations, 49 C.F.R. § 579.4 (2014), in-house counsel probably provide information for inclusion in TREAD Act reports.

149. *See supra* note 77 and accompanying text.

150. 2 GOODMAN, *supra* note 16, § 6:3.

taxpayer. In-house compliance counsel presumably can make binding representations on behalf of the company. However, unlike in the typical adversarial proceeding, other GM officials communicating directly with NHTSA officials can also bind the company.¹⁵¹ The lawyers appear to lack the sort of control in asserting the client's position that lawyers traditionally hold in the prototypical adversarial proceeding at the core of the typical federal agency's authority to regulate practice before it.

Yet another obstacle to the assertion of jurisdiction over vehicle manufacturers' lawyers' compliance counseling may be the TREAD Act, which seems to embody a distinctly different approach from that taken in Sarbanes-Oxley. Sarbanes-Oxley clearly embraced lawyer-specific SEC regulations as an essential component of the regulatory regime.¹⁵² The TREAD Act includes no similar mandate. Instead, Congress appears to have embraced an alternative approach, namely that automakers provide sufficiently comprehensive information to enable the NHTSA itself to identify vehicle defects and encourage, or if necessary order, automakers to recall defective vehicles.¹⁵³

Finally, any reporting out requirement may fundamentally restructure the lawyer-client relationship. In *Legal Services Corp. v. Velazquez*,¹⁵⁴ the Court found a fundamental restructuring of the lawyer-client role unconstitutional even when the restrictions on Legal Services lawyers were related to government funding of legal services for private individuals.¹⁵⁵ While there may well be no First Amendment or other constitutional problem with a reporting out provision in the motor vehicle defect context, *Velazquez* may suggest caution nonetheless. Where a restriction is imposed by the government not as a part of its control over its own expenditure but in its capacity as a regulator, a court could well demand that Congress clearly express its intent to allow the agency to regulate in such a way.

In short, the NHTSA's authority to regulate compliance lawyers' advice on the necessity and timing of a recall is questionable, at least absent clearer legislative authorization.

3. Two Early 2000's Abortive Agency Attempts to Regulate Lawyers

Though agencies often maintain systems for exerting "institutional control" over lawyers participating in adjudications,¹⁵⁶ two quite modest

151. Cf. Evans, *supra* note 145, at 290 (finding significant direct contact between a lawyer's client and a regulator in the context of discussing potential EPA jurisdiction over environmental lawyers' client counseling).

152. Pub. L. 107-204, § 307, 116 Stat. 745, 784 (2002) (codified at 15 U.S.C. § 7245 (2012)); Cramton, *supra* note 9, at 727-28.

153. See H.R. REP. NO. 106-954, at 7 (2000).

154. 531 U.S. 533 (2001).

155. *Id.* at 543 ("[T]he Government seeks to use an existing medium of expression and to control it [in ways which] distort its usual functioning.").

156. David B. Wilkins coined the term "institutional controls," referring to specific government institutions "expressly taking responsibility for uncovering and sanctioning" the

efforts to extend regulation of attorneys beyond the context of administrative adjudication in the early 2000's both resulted in an agency retreat.

In 2000, the CPSC sought to expand its jurisdiction over lawyers to cover attorney conduct outside of the context of formal adjudication.¹⁵⁷ The CPSC explained that it conducts most of its business “outside of adjudicatory proceedings,” offering as examples negotiation with attorneys during an investigation or inquiry regarding a product or with respect to a voluntary corrective action plan for products or civil penalties.¹⁵⁸ The proposed rule covered “regulatory matters or any other activities between attorneys . . . and a [CPSC] Commissioner or [CPSC] staff acting in their official capacities.”¹⁵⁹ The CPSC made clear that an attorney need not engage in actual contact with a CPSC official for the rules’ prohibitions to apply.¹⁶⁰ The CPSC ultimately terminated its rulemaking.¹⁶¹

The NHTSA does not seem to have expanded its jurisdiction in the way the CPSC contemplated.¹⁶² Indeed, in implementing the TREAD Act, which requires vehicle manufacturers to report on vehicle safety claims, the NHTSA has carefully avoided intruding upon the province of outside counsel. Reportable safety claims would include lawsuits. However, the NHTSA excludes from its definition of field report, which must be provided to the NHTSA, any document “covered by the attorney-client privilege or the work product exclusion.”¹⁶³ Moreover, it does not require vehicle manufacturers to obtain from their outside counsel information sufficient to identify a claim in litigation. The manufacturer need merely “*attempt* to obtain the missing minimal specificity information” from outside counsel.¹⁶⁴

Agencies can seek to regulate *clients’* obligations related to legal representation. The proposed alternative to the noisy withdrawal rule, i.e., requiring a company to report a lawyer’s withdrawal, exemplifies such an approach. The FCC’s revision of its rules for representations to the FCC also illustrates this potential approach.

misconduct that work “either directly in, or in the shadow of, state institutions.” David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 807 (1992).

157. Standards of Conduct for Outside Attorneys Practicing Before the Consumer Product Safety Commission; Notice of Proposed Rulemaking, 65 Fed. Reg. 66,515, 66,516 (Nov. 6, 2000).

158. *Id.*

159. *Id.*

160. *Id.* Despite the potential to interpret the caveat broadly, the CPSC appears to have contemplated a narrow interpretation that covered, for example, knowing destruction of a document relevant to a staff investigation. *Id.*

161. Standards of Conduct for Outside Attorneys Practicing Before the Consumer Product Safety Commission; Termination of Rulemaking, 68 Fed. Reg. 20,356 (Apr. 25, 2003) (explaining that it had “evaluated the comments and has decided the proposed attorney conduct rules are not necessary”).

162. 49 C.F.R. § 511.76 (2014).

163. Reporting of Information and Documents about Potential Defects; Defect and Noncompliance Reports, 68 Fed. Reg. 18,136, 18,138 (Apr. 15, 2003).

164. 49 C.F.R. § 579.28(d) (emphasis added).

Section 1.17 of the FCC's regulations provided that "[n]o applicant, permittee or licensee shall in any response to [FCC] correspondence or inquiry or in any application, pleading, report or any other *written* statement submitted to the [FCC], make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the [FCC]."¹⁶⁵ In February 2003, the FCC sought to expand the rule in four ways.¹⁶⁶ First, the revision would prohibit even negligent misstatements or omissions.¹⁶⁷ Second, it would more clearly encompass statements made to the FCC in all contexts,¹⁶⁸ including unsolicited voluntary submissions and statements made during investigatory proceedings.¹⁶⁹ Third, the revised rule would include oral statements.¹⁷⁰ Fourth, the provision was to apply to "all persons making statements to the [FCC] (e.g., including non-regulatees)."¹⁷¹

The Federal Communications Bar Association argued that applying the rule to lawyers would "potentially interfere with the attorney-client relationship by giving the attorney an incentive to disregard the client's wishes to protect the attorney," *inter alia*.¹⁷² In response, the FCC refocused the regulations on actual or potential FCC licensees, revising it to exclude "non-regulatees," such as attorneys communicating with the FCC. Attorney misrepresentations would be attributed to the licensee rather than the lawyer.

B. Should the NHTSA Regulate Lawyers?

Even if the NHTSA can regulate counsel's regulatory compliance advice, should it? An agency like the NHTSA might consider several types of issues in deciding whether to do so. In particular, an agency should assess and evaluate the potential rationales for regulating lawyers' conduct, the aspects of the legal practice context that might impact the efficacy of any such regulatory efforts, and potential alternatives (including imposing obligations on regulated entities) less likely to intrude upon the attorney-client relationship.

1. The Rationales for Regulating Compliance Lawyers

An agency might regulate lawyers: (1) to ensure that those entitled to a government benefit receive it, particularly when beneficiaries may be

165. 47 C.F.R. § 1.17 (2000) (amended).

166. Amendment of Section 1.17 of the Commission's Rules Concerning Truthful Statements to the Commission, 17 FCC Rcd. 3296, 3297 (Feb. 14, 2002) (notice of proposed rulemaking).

167. *Id.*

168. *Id.*

169. Amendment of Section 1.17 of the Commission's Rules Concerning Truthful Statements to the Commission, 18 FCC Rcd. 4016, para. 13 (Mar. 4, 2003) (final rule).

170. 17 FCC Rcd. at 3297.

171. *Id.*

172. 18 FCC Rcd. 4016, para. 15.

unsophisticated; (2) to protect the integrity of its own processes; and (3) to help restrain regulated entities.

Under the first rationale, the regulation of lawyers—often to ensure competence—further the interests of the government programs’ beneficiaries. Thus, regulating tax preparers could, in part, ensure that taxpayers, particularly unsophisticated ones, receive the benefits they deserve while not being victimized by those providing assistance. Perhaps regulation of patent lawyers could be justified on similar grounds. This first rationale has little relevance to the regulation of motor vehicle manufacturers’ lawyers. Sophisticated clients have ample ability to protect their own interests vis-à-vis their legal representatives.¹⁷³

The second rationale, protecting the integrity of the agency’s own processes, could justify the NHTSA’s jurisdiction over legal practice. Ensuring the veracity and accuracy of the information regulated entities submit as well as access to information about safety hazards goes to the heart of the integrity of the NHTSA’s processes. In the Cobalt case, however, this rationale does not appear to be implicated; GM’s TREAD Act disclosures appear to be in substantial compliance with the Act’s requirements.

Under the third rationale, an agency might employ the regulation of compliance attorneys as one tool to attain its regulatory goal of constraining regulated entities to protect those endangered by their actions. The NHTSA, for example, might impose obligations on regulated entities’ lawyers to better protect the public from dangerous products.¹⁷⁴ Lawyers’ advice, both with regard to initiating recalls or lesser remedial actions and compliance with reporting requirements, may have implications for the public’s safety. Particularly given the NHTSA’s heavy reliance on motor vehicle manufacturers’ self-reporting as well as their initiation of voluntary recalls, public safety is particularly implicated in the Cobalt scandal. The agency’s public safety goals are probably consistent with those of the regulated entity to the extent that the conduct required of the regulated entity is clear, a strong monitoring and enforcement system exists, and the magnitude of the penalties provide appropriate incentives.¹⁷⁵ Unfortunately, all three conditions rarely coexist.

2. The Legal Practice Context

In deciding whether and how to regulate lawyers, agency officials must understand the role that lawyers play in the particular area of law, i.e., the legal practice context. Such knowledge is critical to any assessment of the potential effectiveness of enlisting lawyers as gatekeepers. An agency

173. Wilkins, *supra* note 156, at 824–31.

174. *Id.* at 819–20 (distinguishing risk to clients (“agency problems”) from risks to third parties (“externality problems”)).

175. See Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53, 56–57 (1986).

contemplating such a course should consider at least the following five questions:

- (1) When are lawyers consulted and how heavily do company officials rely on their advice?
- (2) Are penalties for noncompliance reduced based on a “mistake of law” or a corporate official’s “good faith” reliance on an attorney’s advice?
- (3) Are actors legally prohibited from proceeding on a course of action without receiving formal concurrence from counsel? If not, can the agency create a meaningful concurrence requirement?
- (4) To what degree do lawyers serve a “rule avoidance” function? That is, how often and to what extent do they structure or characterize actions in light of the applicable legal rules so as to obtain clients’ objectives while complying with the law?
- (5) To what extent can actors “shop around” for a lawyer who will provide the opinion the actor seeks?

With respect to the first question, if the field is one in which actors frequently either do not consult or do not rely upon lawyers, imposing requirements on lawyers may do little good.

With respect to the second question, while “ignorance of the law” is generally no excuse, in some contexts, “ignorance of the law” or reliance on “advice of counsel” may serve to mitigate, or perhaps even excuse, regulatory violations.¹⁷⁶ For example, in the securities field, a reliance-on-counsel “defense” might be available.¹⁷⁷ The defense may apply only to violations that require scienter.¹⁷⁸ To establish the defense, the defendant must establish that that he “(1) made a complete disclosure to counsel; (2) requested counsel’s advice as to the legality of the contemplated action; (3) received advice that it was legal; and (4) relied in good faith on that advice.”¹⁷⁹ In some areas, the actor may be able to assert ignorance of the law even without consulting counsel.¹⁸⁰

Ignorance-of-the-law defenses, particularly if they require seeking advice of counsel, would increase the need to regulate lawyers’ provision of advice. By providing legal advice, the lawyer would give the regulated entity sufficient comfort to pursue a course that it might otherwise be

176. See Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341, 341–58 (1998).

177. See *Zacharias v. SEC*, 569 F.3d 458, 467 (D.C. Cir. 2009); *SEC v. Savoy Indus.*, 665 F.2d 1310, 1314 n.28 (D.C. Cir. 1981); Douglas W. Hawes & Thomas J. Sherrard, *Reliance on Advice of Counsel As a Defense in Corporate and Securities Cases*, 62 VA. L. REV. 1, 19–37 (1976).

178. Thomas C. Frongillo et al., “Late Trading” of Mutual Funds: Chinks in the Armor of the Regulators’ Claim That It Is Illegal Per Se, 10 ANDREWS SEC. LITIG. & REG. REP. 1, 16–17 (2004).

179. See *Savoy Indus.*, 665 F.2d at 1314 n.28.

180. Davies, *supra* note 176, at 357–58 & n.70–72.

disinclined to take (or, indeed, might be willing to take only on the basis of supportive legal advice). Thus, addressing the lawyer's conduct may significantly diminish the number of regulatory violations, depending on how clearly the law reflects regulators' view of actors' compliance obligations. It is unclear whether advice of counsel would serve to mitigate a civil penalty under the Motor Safety Act, which does not appear to have a scienter requirement.

The third question focuses on the existence, or potential to create, "gates" for lawyers to keep. In some circumstances lawyers are natural gatekeepers due to the nature of the process in which the client is involved.¹⁸¹ Lawyers can interdict unlawful conduct where the conduct cannot proceed without their explicit approval. Accountants and lawyers may be natural gatekeepers for certain securities transactions that cannot be closed without formal audits or opinion letters.¹⁸² In other circumstances, the agency perhaps can structure the processes regulated entities must pursue, so that lawyers can act as gatekeepers.¹⁸³

The fourth question focuses on the degree to which lawyers serve a rule-avoidance role. In some areas, lawyers frequently structure transactions to conform to legal requirements while providing many of the benefits the law sought to withhold.¹⁸⁴ Lawyers often seem to function in this way in legal fields involving financial transactions, such as in tax law or securities law. The structuring and characterization of transactions can be critical in these areas. But lawyers may play such a role less regularly in other areas, particularly those not governed by highly structured rules. Flexible standards do not lend themselves to avoidance strategies.¹⁸⁵ Rule avoidance may not be central to motor vehicle compliance lawyers' work. Though the NHTSA has promulgated some motor vehicle safety standards, few rules constrain motor vehicle design; rather the presence of a defect turns on the application of a broad calculus-of-risk standard. The greater the lawyers' rule avoidance role, the more critical it is to regulate lawyers practicing in that area.

The fifth question requires the agency to assess the regulated entity's opportunity to "shop around" for a lawyer. Imposing gatekeeping responsibilities on lawyers will be less successful if the regulated entity can "shop around" for lawyers who will "bless" a desired course of action.¹⁸⁶ One can envision a company changing outside counsel due to counsel's unwillingness to affirm the legality of its desired actions. Corporate officials may face a bit more difficulty in seeking to "shop around" for malleable in-house counsel, given the disruption caused by terminating a permanent employee and training a new one. Of course, reporting up

181. See Kraakman, *supra* note 175, at 54.

182. *Id.*

183. *Id.*

184. See Zoë Prebble & John Prebble, *The Morality of Tax Avoidance*, 43 CREIGHTON L. REV. 693, 704-06 (2010).

185. See CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 133 (1996).

186. See Kraakman, *supra* note 175, at 71-74.

within the legal department, or even a system of hierarchical control and clear areas of responsibility, would help diminish the ability of lower-level officials to shop around for a member of the legal department willing to affirm the legality of a desired course of action.

3. Possible Approaches

The NHTSA might consider: (1) imposing reporting up or reporting out requirements, or (2) imposing a requirement that regulated entities obtain formal concurrences from lawyers before making certain decisions.

Reporting up obligations assist lawyers' clients, but not necessarily regulatory beneficiaries. Reporting up obligations directly serve two related functions. First, they establish a supplemental monitoring system that provides high-level executive officers and the board with information and leverage they can use to rein in wayward subordinates inclined to perpetrate crimes or frauds.¹⁸⁷ Secondly, reporting up obligations help align power with responsibility, ensuring that those who have the power to control corporate conduct cannot shirk their responsibilities by denying knowledge of potentially unlawful conduct.¹⁸⁸ Thus, the requirement largely serves to protect the interests of corporate constituents (i.e., the management, board, and shareholders) and facilitate corporate governance.

Indirectly, reporting up may lead to greater compliance. The more widespread the knowledge of a potential unlawful course of action, the less likely that course of action will be pursued, particularly over lawyers' objections. Moreover, executive officers and board members may bring a broader perspective to the issue than the lower-level official contemplating the unlawful action. Such executive officers and board members are better positioned to ensure that effective action is taken to address the breach.

But reporting up obligations will surely leave many compliance problems unresolved. Reporting up does not ensure that the General Counsel's, the high-level executive officers', and board's view of the applicable regulatory requirements is congruent with the agency's. Indeed, the more ambiguous or indeterminate the legal requirements, the more likely such a divergence will emerge.¹⁸⁹ For example, it is not clear that reporting up would have lead GM's leadership to reject the view, common among the GM lawyers and engineers, that a recall should await determination of a root cause.

187. Indeed, *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996), imposed on directors an obligation to establish some form of system for monitoring legal compliance.

188. The reporting up that was done in the Cobalt case proved to be critical in terms of the prosecutor's findings that the corporation was criminally liable. Statement of Facts, *supra* note 93, ¶ 115 ("This [culpable] knowledge extended well above the ranks of investigating engineers to certain supervisors and attorneys at the Company—including GM's Safety Director and the GM Safety Attorney.").

189. And, of course, deficiencies in agency monitoring or inadequate penalties may mean that reporting up does not successfully prevent unlawful corporate actions.

Similarly, reporting up may well not have changed GM's determination that moving stalls were unrelated to safety.¹⁹⁰

The NHTSA may lack the expertise to impose meaningful professional standards for in-house counsel regarding corporate regulatory compliance with the Highway Safety Act. The appropriate actions are surely highly dependent on the structure and culture of the particular corporation and may not easily be amenable to fixed or determinate rules.

Unlike reporting up, reporting out enhances the agency's monitoring capabilities. Agencies could defend imposition of such an obligation on in-house compliance lawyers as consistent with Model Rule 1.6, though Rule 1.6 generally reflects the view that reporting out is a matter of conscience, not legal obligation.¹⁹¹ Proposing a reporting out obligation would embroil the NHTSA in vigorous, long-standing arguments within the legal community regarding lawyers' duties of loyalty and confidentiality. Viewing regulated entities' lawyers as potential agency-monitoring resources that can assist agency efforts to protect regulatory beneficiaries arguably implicitly conceives of such lawyers as "agents" of the administrative agency, at least in part. Such a conception seems somewhat inconsistent with the traditional client-focused view of the lawyer's role, in which the lawyer primarily seeks to enable clients to protect their interests and attain their goals, advising them on how to do so within the bounds of the law (or that they cannot do so consistent with the law).¹⁹² Under such a view, lawyers do not serve to augment regulators' enforcement resources. As noted earlier, the implicit conception of lawyers as supplemental resources for agencies could easily be viewed as fundamentally altering the attorney-client relationship, much as the restraints on Legal Services Corporation lawyers were viewed as altering the attorney-client relationship in *Vasquez*.

In addition, legal scholars and lawyers have long debated whether requiring attorney disclosure of corporate client's regulatory transgressions will discourage those clients from confiding in lawyers. The SEC's "noisy withdrawal" proposals produced broad opposition in the legal community, in part based on an argument that clients would be less willing to confide in lawyers.¹⁹³ Several scholars in legal ethics have argued to the contrary.¹⁹⁴ An agency would be hard-pressed to rely on its "expertise" in defending its resolution of such issues.

190. Indeed, GM's Board was briefed on the GM-NHTSA discussions regarding the standard for determining safety defects. VALUKAS, *supra* note 37, at 239.

191. The Model Rules do not preclude agencies from requiring a lawyer to disclose information about a client; Rule 1.6(b)(6) permits such disclosures when necessary to comply with the law. MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(6) (AM. BAR ASS'N 2013); *accord id.* r. 1.6 cmt. 12.

192. See Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1548 (1995) ("The traditional understanding is that lawyers as professionals act for the client's benefit in providing that access to the law. Under this understanding, lawyers do not function as law enforcement officers or as judges of their clients in providing knowledge of the law.").

193. 68 Fed. Reg. 6324 (Feb. 6, 2003); Zacharias, *supra* note 145, at 20 n.32.

194. See, e.g., Cramton, *supra* note 9, at 814-17.

In any event, alternative means of increasing monitoring resources may be equally effective and avoid requiring legal professionals to act in tension with the core professional value of protecting client confidences. Congress could increase incentives for whistleblowers. Though Congress has already provided job protection for whistleblowers revealing motor vehicle safety defects,¹⁹⁵ Congress could, as some have proposed, offer bounties to potential whistleblowers.¹⁹⁶ Such whistleblowers would not be bound by confidentiality obligations akin to those that constrain lawyers. Thus, whistleblowers would report out in lieu of the lawyer being obligated to breach confidentiality by reporting out.

The NHTSA could establish requirements for attorney certification, to ensure that corporate officials must consult with and obtain approval from lawyers before taking action.¹⁹⁷ The Valukas report does not clearly describe GM's in-house lawyers' role with respect to some key decisions, such as the decision to classify the ignition switch problem as a customer convenience issue and the decision use a TSB drafted in innocuous language. The nonlawyers' conclusion that the ignition switch did not present a safety issue delayed GM's response for years. The decision to issue a TSB that downplayed the defect led to the failure to inform consumers of the initial "fix" GM had adopted. Each of these decisions had legal ramifications and could have benefited from lawyers' expertise. The question of whether the ignition defect is "safety related" is a legal question that GM's regulatory lawyers were grappling with on a broader level. Questions about the content, design, and delivery of a product warning frequently arise in products liability "warning defect" cases, where often the key question is the adequacy of a product warning.¹⁹⁸ The decisions made regarding the initial characterization of the ignition switch defect and the handling of the TSB may well have been different had there been greater lawyer involvement. Imposing a legal certification requirement would ensure in-house counsel's involvement in such decisions. Such a requirement would, for example, require decision makers to secure a certification from counsel that a defect is not safety related or that a decision to use a TSB in lieu of a recall and the TSB's design and content are reasonable in light of the danger presented. Not only would such a

195. Pub. L. No. 112-141, 126 Stat. 405, 765 (2012) (codified at 49 U.S.C. § 30171 (2012)).

196. *See, e.g.*, Motor Vehicle Safety Whistleblower Act, S. 304, 114th Cong. (2015).

197. *See* Kraakman, *supra* note 175, at 54, 57.

198. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(c), cmt. i (AM. LAW INST. 1998) ("No easy guideline exists for courts to adopt in assessing the adequacy of product warnings and instructions. In making their assessments, courts must focus on various factors, such as content and comprehensibility, intensity of expression, and the characteristics of expected user groups."); 1 DAVID G. OWEN & MARY J. DAVIS, OWEN & DAVIS ON PRODUCTS LIABILITY § 9:12 (4th ed. 2014) ("In most warning defect claims where a warning has been given, the critical inquiry will be whether the warning and instructions given were adequate to inform the user or consumer of the nature of the risk. The question of adequacy is, therefore, central to most warning defect claims.").

certification requirement assure legal counsel's involvement, it would also make counsel accountable for such decisions.¹⁹⁹

However, a certification requirement would compel the agency to confront potential incongruities between compliance lawyers' and the agency's views of the applicable legal constraints. Agencies should expect lawyers' advice to diverge from the advice agencies would find optimal. While compliance lawyers might take a broad pro-consumer approach to the question of what constitutes a safety defect, the NHTSA should not expect them to do so as a matter of professional obligation.²⁰⁰

Any of the above regulatory approaches—mandatory reporting up, mandatory reporting out, and establishing a certification regime—would require the agency to create a disciplinary system. Establishing a disciplinary system is particularly critical if the agency adopts a certification regime, so that the agency could punish lawyers who unreasonably provided certifications. A disciplinary system would presumably prove costly²⁰¹ and might divert the agency's focus from the condition and operation of motor vehicles or the responsibility of the corporation to questions about the conduct of the company's lawyers.

4. Restraining Regulated Entities, Not Lawyers

Rather than regulating lawyers, Congress or the NHTSA might add precision to the obligations of motor vehicle and component parts manufacturers. First, the NHTSA or Congress could address the dilemma facing manufacturers when they conclude a defect exists but cannot immediately determine its root cause. Second, the NHTSA could provide much clearer guidance for determining when a defect is "related to safety."

The Cobalt airbag failures provide an example of a safety-related defect whose cause GM could not immediately ascertain. GM's in-house lawyers appeared to accept the proposition that a recall could not be initiated until GM could remedy the defect. Much of the delay in responding to the ignition switch defect was due to the perceived need to await the engineers' identification of the problem's root cause. However, such an approach ignores the Highway Safety Act's requirement that the company must offer

199. Such certification requirements could easily be phrased as requirements that must be met by the regulated entity and thus would not run afoul of *Loving*.

200. Evans, *supra* note 145, at 295 ("Under the somewhat amorphous regulatory gatekeeper model, the lawyer conceivably would be expected to consider the broad goals sought to be achieved by the environmental statutes and to advise clients not on the best way to avoid or minimize the expense of compliance, but rather on courses of action consistent with the purposes of the statutes regardless of whether those goals mirror those of the client.").

201. See Michael A. Perino, *SEC Enforcement of Attorney Up-the-Ladder Reporting Rules: An Analysis of Institutional Constraints, Norms and Biases*, 49 VILL. L. REV. 851, 853–57 (2004). Moreover, agencies running disciplinary systems punishing lawyers' conduct in agency proceedings, or more generally for conduct that undermines agency processes, are always subject to allegations of bias. See Arthur Best, *Shortcomings of Administrative Agency Lawyer Discipline*, 31 EMORY L.J. 535, 583 (1982); Cox *supra* note 129, at 225.

a refund if it cannot remedy a safety-related defect. Certainly immediately announcing the safety defect without a means to remedy it would be a substantial financial burden on the manufacturer, but the Highway Safety Act does not appear to allow manufacturers to delay the defect notification process on such a basis.

However, even from the consumer perspective, there are reasons manufacturers should not act with undue haste. Acting without understanding the root cause of a performance anomaly might mean that the remedy provided will prove deficient. This could give consumers a false sense of security and require a second recall.²⁰² In the Cobalt case, it might have resulted in a recall of insufficient or excessive scope. An early recall might have been too broad because it might have been conducted before GM realized that later-model Cobalts contained a modified ignition switch. As it was, the initial recall was too limited; GM twice had to expand its scope.²⁰³ Moreover, a recall before the manufacturer has parts available to remedy the problem can frustrate car owners.²⁰⁴

Notifying individuals of a recall without offering a remedy or a refund could allow customers to minimize their risk. But when the malfunction is a mysterious “sensing anomaly” preventing airbag deployment, how can the car owner lessen the risk? Most consumers might simply have to cope with a heightened concern about a safety risk they cannot diminish. Perhaps acknowledging the manufacturers’ dilemma and allowing them a specified period to devise a remedy might produce more expeditious action than the current approach.

The test for determining whether a defect is safety related, namely whether the defect poses “an unreasonable risk of accidents or injuries,”²⁰⁵ is indeterminate and undeveloped. In making the relevant determination, three factors must be weighed: “(1) the severity of the harm it threatens; (2) the frequency with which that harm occurs in the threatened population relative to its incidence in the general population; and (3) the economic, social, and safety consequences of reducing the risk to a so-called ‘reasonable’ level.”²⁰⁶ Even with respect to moving stalls, which would appear to be an obvious safety problem, the NHTSA’s approach turns on

[t]he rate at which stalling occurs . . . , the speeds at which stalling occurs, the type of operation during which stalling occurs (e.g., when starting, accelerating, decelerating, or cruising), [how quickly] the vehicle can []

202. See Christopher Jensen, *Nissan May Repeat Recall Over Airbags*, N.Y. TIMES, Sept. 5, 2015, at A23.

203. VALUKAS, *supra* note 37, at 225–26.

204. More than five months after the recall was announced, GM consumers experienced frustration in obtaining the needed repairs expeditiously due to supply bottlenecks. See *Examining Accountability and Corporate in Wake of the GM Recalls: Hearing before the Subcomm. on Consumer Prot., Prod. Safety & Ins. of the S. Comm. on Commerce, Sci. & Transp.*, 113th Cong. 86–87 (2014).

205. *United States v. Gen. Motors Corp.*, 841 F.2d. 400, 409 (D.C. Cir. 1988) (quoting *United States v. Gen. Motors Corp.*, 656 F. Supp. 1555, 1578 (D.D.C. 1987)).

206. *Id.* at 410.

be restarted, . . . whether the stalling affects steering [or braking] functions, . . . and any crashes or other unsafe events.²⁰⁷

Moreover, due to the prevalence of voluntary recalls, the governing case law is dated—the latest major case was decided in 1988. Thus, manufacturers enjoy a great deal of discretion in determining which defects are “related to safety.”

CONCLUSION

The Highway Safety Act makes identifying and remedying defects highly dependent upon manufacturers’ and components parts makers’ own initiative. The NHTSA lacks, and is unlikely to receive in the near future, sufficient enforcement resources to comprehensively perform such a task. It is natural to look to the automakers’ lawyers to secure manufacturers’ compliance with their Highway Safety Act obligations. While safety should not be solely their responsibility, lawyers can surely be expected to be the primary proponents of regulatory compliance. It is thus sensible to explore whether the NHTSA can impose compliance obligations on the auto industry’s lawyers. Ultimately, however, such an approach would expand the NHTSA’s jurisdiction in a controversial way that Congress does not appear to have contemplated. And neither the NHTSA nor Congress has exhausted the other options for ensuring that the voluntary recall system properly protects the public from motor vehicle defects.

207. See Denial of Motor Vehicle Defect Petition, 72 Fed. Reg. 73,973 (Dec. 28, 2007); see also *supra* note 67 and accompanying text.