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**Don't TREAD on Me:
Faster Than a Tire Blowout, Congress Passes
Wide-Sweeping Legislation That Treads on
the Thirty-Five Year Old Motor Vehicle
Safety Act**

KEVIN M. McDONALD†

INTRODUCTION

In the wake of one of the most controversial recalls ever to strike the automotive industry, and in its haste to act through the passage of some legislation, indeed almost *any* legislation that could be marketed as “pro-consumer” in time for use in the upcoming elections, the 106th Congress passed the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act on October 11, 2000, which President Clinton signed into law on November 1, 2000.¹

The TREAD Act amends the National Traffic and Motor Vehicle Safety Act of 1966 (“Vehicle Safety Act”) in response to unanswered questions surrounding the (lack of) reporting of potential defect information that led to the recall of over fourteen million Bridgestone/Firestone ATX, ATX II, and Wilderness AT tires on August 9, 2000. Prior to this recall, numerous complaints on file with National Highway Transportation Safety Administration (NHTSA) had alleged

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1. Pub. L. No. 106-414, 114 Stat. 1800 (2000) (to be codified in scattered sections of 49 U.S.C.).

that the Firestone tires, which Ford Motor Company (Ford) mounted as standard equipment on Ford Explorers, suffered tread separation causing vehicle rollover that culminated in death or serious bodily injury. Congress was distraught to learn that Ford failed to notify NHTSA of the numerous tire-related safety campaigns conducted by Ford in overseas markets and the numerous lawsuits filed against Bridgestone/Firestone. Even more distressing to Congress was that, while Ford was required to notify NHTSA of safety campaigns conducted in the United States, Ford was not required under law to report the very same safety campaigns conducted in overseas markets.

This article examines the TREAD Act's massive impact on the thirty-five year old Vehicle Safety Act. Part I (Background) traces the origins of the Vehicle Safety Act of 1966 before turning to the Ford-Firestone tire recall events, which ultimately culminated in high profile congressional hearings and eventual passage of the TREAD Act in October 2000. Part II (Analysis) focuses on the text and impact of the TREAD Act, in particular, the impact both on NHTSA and the automotive industry. Further, Part II points out major differences between the Senate and House versions and offers suggestions for NHTSA to consider as it undertakes numerous rulemaking activities implementing the TREAD Act. The article concludes by focusing on issues NHTSA will need to address as it undertakes to implement the numerous TREAD Act mandates.

I. BACKGROUND

A. *Motor Vehicle Safety Act of 1966*

The National Traffic and Motor Vehicle Safety Act² is the basic motor vehicle safety statute administered by the NHTSA.³ The purpose of the Vehicle Safety Act, originally

2. Pub. L. No. 89-563, 80 Stat. 718 (1966) (codified as amended at 49 U.S.C. §§ 30101-30169).

3. Although the Vehicle Safety Act specifically empowers the Secretary of the Department of Transportation (DOT), the Secretary has delegated much of its authority to NHTSA's Administrator pursuant to 49 C.F.R. § 1.50 (2000). See 49 C.F.R. § 501.2 (1995) (delegating authority to NHTSA to "carry out" Vehicle Safety Act). NHTSA has more than 600 employees with a \$403 million annual budget. See Press Release, U.S. Dep't of Transp., Dr. Jeffery W. Runge Becomes 12th National Highway Traffic Safety Administrator, (Aug. 3, 2001), available at <http://www.dot.gov/affairs.nhtsa4201.htm>. The current (twelfth) NHTSA

passed in 1966, “is to reduce traffic accidents and deaths and injuries resulting from traffic accidents.”⁴ With more than 40,000 fatalities per year, traffic accidents are the leading cause of death for Americans in their mid-thirties and younger.⁵

To effectuate the purpose of “reduc[ing] traffic accidents,” the Department of Transportation (DOT) is authorized “to prescribe motor vehicle safety standards for motor vehicles and motor vehicle equipment in interstate commerce” and “to carry out needed safety research and development.”⁶ Federal motor vehicle safety standards (FMVSS) set minimum performance levels for those parts of the vehicle that most affect safe operation (e.g., brakes, tires, lighting) or that protect drivers and passengers from death or serious injury in the event of a crash (e.g., air bags, safety belts, etc.).⁷

Administrator is Dr. Jeffrey W. Runge, who is a nationally recognized physician expert in motor vehicle injury care and prevention. *See id.*

4. *See* 49 U.S.C. § 30101 (1994); *see also* *United States v. Ford Motor Co.*, 574 F.2d 534, 539 (D.C. Cir. 1978) (finding the purpose of the Vehicle Safety Act is to protect the public against unreasonable risks of accidents that might be caused by defects in design, construction, or performance of motor vehicles and against unreasonable risk of death or injury as a result of such accidents); *Chrysler Corp. v. Dep’t of Transp.*, 472 F.2d 659, 671 (6th Cir. 1972) (finding “the explicit purpose of the [Vehicle Safety] Act, as amplified in [its] legislative history, is to enable the Federal government to impel automobile manufacturers to develop and apply new technology to the task of improving safety design of automobiles as readily as possible”); *Truck Safety Equip. Inst. v. Kane*, 466 F. Supp. 1242, 1248 (M.D. Pa. 1979) (classifying the Vehicle Safety Act as a “detailed and pervasive regulatory scheme designed to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents throughout the United States by requirement of *uniform national standards*”).

5. *See* Jeff Plungis, *Auto Safety Panel on Autopilot*, DETROIT NEWS, May 30, 2001, at B1.

6. 49 U.S.C. § 30101. Pursuant to 49 C.F.R. § 1.50, DOT has delegated much of its authority under the Vehicle Safety Act to NHTSA. *See also supra* note 3. The original Act conferred authority to issue safety standards on the Secretary of Commerce. *See* 15 U.S.C. §§ 1391(10), 1392(a) (1964) (repealed 1994). By subsequent legislation, Congress transferred all powers of the Act to the Secretary of Transportation. The Secretary delegated these powers, with several exceptions, to the Federal Highway Administrator until March 22, 1970, at which time they were withdrawn and delegated to the National Highway Safety Bureau (predecessor of NHTSA) contemporaneous with the Bureau’s separation from the Highway Administrator and elevation within the Department to the status of an Administration. By terms of the Highway Safety Act of 1970, the National Highway Safety Bureau became the NHTSA.

7. FMVSS 209 was the first standard to become effective on March 1, 1967 (regulating seat belt assemblies). A number of FMVSSs became effective for

The Vehicle Safety Act also imposes upon motor vehicle manufacturers a duty to notify both NHTSA and the owners of their vehicles when the manufacturers learn the vehicles possess "safety-related defects," and then to remedy those defects without charge to the owners (together known as the "notification and remedy duty").⁸ The Vehicle Safety Act also envisages a notification and remedy duty for any motor vehicle manufacturer that "decides in good faith that [its] vehicle or equipment does not comply with an applicable [federal] motor vehicle safety standard,"⁹ whether or not the noncompliance includes a

vehicles manufactured on and after January 1, 1968. "These [initial] safety standards governed the strength and quality of seat belts and anchorages, safety glass, impact-absorbing steering columns and its rearward displacement in a frontal collision, safety door latches and hinges, location of dash instrumentation, padded dash and visors and mounting of fuel tanks and filler spouts." RALPH NADER & CLARENCE DITLOW, *THE LEMON BOOK* 256 (3d ed. 1990). Other safety standards covered performance criteria for brakes, tire tread, lights, and windshield wipers. *See id.* New standards and amendments to existing standards are published in the Federal Register.

8. *See* 49 U.S.C. §§ 30118(c), 30120 (1994). Under 49 U.S.C. § 30118(c)(1), a manufacturer of a motor vehicle or replacement equipment must notify NHTSA if the manufacturer "learns the vehicle or equipment contains a defect and decides in good faith that the defect is related to motor vehicle safety." Notification is also required if a manufacturer "decides in good faith that the vehicle or equipment does not comply with an applicable motor vehicle safety standard prescribed under this chapter." *Id.* § 30118(c)(2); *see also infra* note 9 and accompanying text. The manufacturer's self-start remedy provisions now found in 49 U.S.C. § 30120 did not appear in the original 1966 Act but were added by the Motor Vehicle and Schoolbus Safety Amendments of 1974, Pub. L. 93-492, §§ 154(a), (b)(1)-(2), (c), 156, 157, 88 Stat. 1472, 1474-75. In accordance with 49 C.F.R. § 573.6, manufacturers are required to submit consecutive quarterly status reports for every safety recall. Failure to submit these reports on time can result in civil penalties pursuant to 49 U.S.C. § 30165, or lead to an action for injunctive relief pursuant to 49 U.S.C. § 30163.

9. 49 U.S.C. § 30118(c)(2). These standards are the federal motor vehicle safety standards (FMVSSs) codified at 49 C.F.R. pt. 571 (2000). *See supra* note 7 and accompanying text. However, if a manufacturer determines that a defect or noncompliance with a federal motor vehicle safety standard is "inconsequential" as it relates to motor vehicle safety, then the manufacturer may be exempted from the Act's notification and remedy requirements. *See* 49 U.S.C. § 30118(d) (1994); 49 C.F.R. pt. 556 (2000). For an example of NHTSA denying an automobile manufacturer's application for a determination of inconsequential noncompliance, see General Motors Corp., 66 Fed. Reg. 18,518 (Apr. 9, 2001) (NHTSA denying application of GM petition for inconsequential noncompliance relating to model year 1996 through 1999 Chevrolet and GMC vans in which the audible seat belt warning signal, when the seat belt is not buckled, operates for less than the four to eight seconds mandated by 49 C.F.R. § 571.208 (2000)).

safety-related defect.¹⁰ The notification and remedy duty for a noncompliance arises whether a motor vehicle manufacturer actually determines, or should have determined, that its vehicles contain a safety-related defect.¹¹

The Vehicle Safety Act defines the term "defect" rather circularly to include "any defect in performance, construction, a component, or material of a motor vehicle or motor vehicle equipment."¹² A defect is "safety-related" if it presents an "unreasonable risk of accidents."¹³ More specifically, a vehicle or vehicle component contains a "safety-related defect" if it is subject to a significant number of failures in normal operation, including failures either occurring during specified use or resulting from owner abuse (including inadequate maintenance) that is reasonably foreseeable, but excluding failures attributable to normal deterioration of a component as a result of age and wear.¹⁴ Prima facie proof of a defect in a class of

10. See *United States v. Chrysler Corp.*, 158 F.3d 1350, 1354 (D.C. Cir. 1998) (noting that "NHTSA may seek recall of a motor vehicle . . . when a vehicle 'does not comply with an applicable motor vehicle safety standard'" and that "[a]n allegation of *noncompliance* may or may not include a charge that a vehicle has a safety defect") (citation omitted).

11. See *United States v. Gen. Motors Corp.*, 656 F. Supp. 1555, 1559 n.5 (D.C. Cir. 1987) (noting that a "manufacturer cannot evade its statutory obligations: that exist when it determines that a defect is safety-related "by the expedient of declining . . . to reach its own conclusion as to the relationship between a defect in its vehicles and . . . safety"") (quoting *United States v. Gen. Motors Corp.*, 574 F. Supp. 1047, 1050 (D.C. Cir. 1983)). However, under the Vehicle Safety Act, failure to notify customers of safety-related defects does not constitute mail and wire fraud for purposes of establishing racketeering activity of mail and/or wire fraud. See, e.g., *Ayres v. Gen. Motors Corp.*, 234 F.3d 514, 521-22 (11th Cir. 2000) (finding that a motor vehicle manufacturer that fails to disclose safety-related defects to purchasers does not commit federal mail or wire fraud).

12. 49 U.S.C. § 30102(a)(2) (1994).

13. See *id.* § 30102(a)(8). In determining the existence of a "defect," courts should also adopt a "commonsense" approach in ascertaining what constitutes an unreasonable risk. See *United States v. Gen. Motors Corp.*, 565 F.2d 754, 757 (D.C. Cir. 1977) (carburetor defect). However, as a general proposition, any defect that involves a loss of control presumptively presents an unreasonable risk of accidents as a matter of law. See *United States v. Gen. Motors Corp.*, 561 F.2d 923 (D.C. Cir. 1977) (*per curiam*) (pitman arms defect).

14. See *United States v. Gen. Motors Corp.*, 518 F.2d 420 (D.C. Cir. 1975) (wheel defect) (finding that the existence of a defect in a particular case depends on: (1) the nature of the component involved; (2) the circumstances in which the failures occurred; and (3) the number of failures experienced). Where a component is designed to function without replacement over the lifetime of a vehicle, the government may discharge its burden of establishing a defect by

vehicles requires only a showing that a "significant" number in the class have failed as a result of the defect.¹⁵ A "significant" number is merely a "non-*de minimus* [sic]" quantity; the "significant" number need not be "a substantial percentage of the total."¹⁶ Evidence of a non-*de minimis* number of defect-induced failures establishes a rebuttable presumption of the existence of a class-wide defect in the vehicles, and the burden of proof shifts to the motor vehicle manufacturer to rebut the government's *prima facie* showing.

Under the Vehicle Safety Act, if the Secretary of the DOT determines that certain vehicles contain either a safety-related defect or do not comply with any FMVSS, then the Secretary may administratively order the manufacturer to take remedial action.¹⁷ The Secretary's order is judicially enforceable.¹⁸ The Vehicle Safety Act grants the DOT broad powers to conduct an investigation necessary to the Act's enforcement.¹⁹ Motor vehicle manufacturers are required to maintain information, and to produce such information upon request, in conjunction with

showing a significant number of failures without showing cause, but the manufacturer may prove, as an affirmative defense, that the failures resulted from unforeseeable owner abuse or unforeseeable neglect of vehicle maintenance. *Id.* at 427.

15. *See id.* at 431, 438, 442.

16. *Id.* at 438 n.84. Evidence of a non-*de minimis* number of defect-induced failures establishes a rebuttable presumption of the existence of a class-wide defect in the vehicles. The manufacturer may also assert affirmative defenses, for example, that the failures resulted from unforeseeable owner abuse or neglect of vehicle maintenance. *See id.* at 438. In such cases manufacturer has the burden of proof from the outset. *See id.* at 439 nn.88-89.

17. 49 U.S.C. § 30118(b)(2) (1994). *But cf.* *United States v. Chrysler Corp.*, 158 F.3d 1350, 1354 (D.C. Cir. 1998) (holding that due process principles and the Vehicle Safety Act itself (49 U.S.C. §§ 30112(b)(2)(4), 30115) protect vehicle manufacturers from being found out of compliance with an FMVSS if NHTSA has failed to give fair notice of what is required by that FMVSS; absent such notice, NHTSA may not order a recall based solely on noncompliance).

18. 49 U.S.C. § 30163(a). The enforcement provisions of the Vehicle Safety Act are not the only means of judicial review of agency determinations. Judicial review of agency determinations may be sought also under terms of the Administrative Procedure Act, 5 U.S.C. § 701 (2000). *See Gen. Motors Corp. v. Volpe*, 321 F. Supp. 1112 (D. Del. 1970).

19. 49 U.S.C. § 30166(b)(1). NHTSA's information gathering powers under the Vehicle Safety Act includes issuing subpoenas to compel "any person . . . to provide information at an information gathering hearing." *See* 49 C.F.R. § 510.5(a) (2000).

an investigation.²⁰ The Secretary may ask manufacturers for performance or technical data, and the Secretary may require manufacturers to furnish written answers under oath.²¹ If an investigation develops evidence of a violation, the Secretary may refer the matter to the Attorney General, who may bring an enforcement action in a U.S. district court to recover civil penalties as well as to obtain appropriate injunctive relief.²² Manufacturers may challenge an enforcement action in federal court, although the chances of winning are about 20%.²³

During the thirty-three year period from the Vehicle Safety Act's birth in 1966 through 1999, manufacturers conducted over 7200 vehicle recalls that involved over 259 million vehicles; nearly all of these recalls were initiated voluntarily by manufacturers.²⁴ In the year 2000, vehicle manufacturers sold a record 17.4 million vehicles in the United States, but recalled 22.8 million for safety-related defects and parts that did not meet federal safety standards.²⁵ Through the first half of 2001, automakers have conducted 233 recalls involving 6,271,729 vehicles, including a General Motors recall of 1.4 million full-size

20. *Id.* § 30166(e).

21. *Id.* § 30166(f).

22. *Id.* § 30163.

23. NHTSA has defended its mandatory recalls ten times (through Aug. 15, 2001). NHTSA has won eight of the ten cases. The two losses were to GM in the famous *X-Car* case in the mid-1980s and to Chrysler in 1998. *See generally* Jeff Plungis, *Odds Are Against Firestone in Court*, DETROIT NEWS, July 20, 2001, at 9.

24. *See* Letter from Robert S. Strassburger, Vice President, Vehicle Safety and Harmonization, Alliance of Automobile Manufacturers, to L. Robert Shelton, Executive Director, National Highway Traffic Safety Administration 2 (Mar. 23, 2000) (on file with author). Historically, nearly 80% of recalls are conducted without any NHTSA involvement. *Id.* The remaining 20%, again conducted voluntarily, are "NHTSA-influenced." *Id.* Indeed, in these few cases, legitimate engineering and interpretive questions may exist regarding the presence or absence of a "safety-related defect." Yet even in these cases the issues are reconciled through the NHTSA investigation. *Id.*

25. *See* Rick Popely, *Return to Sender: Increased Production, New Models, Tighter Tolerances Cited in Increase of Recalls*, CHI. TRIB., Mar. 11, 2001, Transportation, at 1. The greatest number of vehicles ever recalled in any year was thirty million in 1981; however, this total is inflated because Ford recalled twenty-one million cars with automatic transmissions that could be in reverse when the gear indicated they were in park. *Id.* Consumers appear willing to accept a certain number of recalls. A Polk Co. survey conducted in 2000 concluded that one or two recalls will not bother consumers, but three or more rapidly shake consumer confidence. *Id.*

trucks for brake problems, as well as thirty-two recalls involving 7,173,692 items of motor vehicle equipment.²⁶ Vehicle manufacturers and safety officials cannot indicate a single cause for the large number of recalls, although both acknowledge that increasing production lines to meet increased demand in addition to introducing a number of new models are probable factors.²⁷

Among the large number of recalls in 2000, one will remain inextricably etched in history: the recall of millions of Bridgestone/Firestone²⁸ (Firestone) ATX, ATX II, and

26. These numbers are based on conversations with NHTSA. On April 5, 2001, General Motors also announced a recall of 6000 newly introduced midsize sport-utility vehicles (model year 2002 Chevrolet TrailBlazers, GMC Envoys, and Oldsmobile Bravadas), asking owners to park their trucks and wait for a tow to dealers to fix a potentially dangerous steering problem that could lead to loss of control. See Frank Swoboda, *GM Tells 6,000 Owners to Park SUVs: Possibly Serious Steering Problem Spurs Recall*, WASH. POST, Apr. 6, 2001, at E1; see also Richard Truett, *GM Halts Sales of 3 New Sport-Utilities*, AUTOMOTIVE NEWS, Apr. 9, 2001, at 3. GM will likely spend up to \$15 million on this one repair. See Dave Guilford & Mary Connelly, *GM, Ford Dole out Perks*, AUTOMOTIVE NEWS, Apr. 16, 2001, at 1. Despite delaying the sale of the all new model year 2002 Explorers, Ford conducted a recall on April 9, 2001 of 56,652 new Explorers as well as the Mercury Mountaineers sport-utility vehicles, because the rear liftgate glass tended to shatter or detach when closed. *Id.*; see also Mark Truby, *Bad Liftgate Plagues Explorer*, DETROIT NEWS, April 10, 2001, at 1. According to Ford, the problem occurred because a supplier failed to paint properly and apply adhesive to the glass, which meant that the brackets holding the glass had to be tightened too much causing the glass to pop out of its frame. See Frank Swoboda, *Ford Hits Rough Road: Firm Recalling 2002 Explorers, Going to Owners' Homes*, WASH. POST, Apr. 11, 2001, at E1.

27. Popely, *supra* note 25, at 1. Another factor could include the increased number of cars and trucks on the nation's highways. In 1999, the number of cars and trucks in operation reached an all-time high of 209.5 million. See Mark Truby, *Record Recalls Plague Automakers: Defects Are Raising Doubts About Gains in Vehicle Quality*, DETROIT NEWS, Sept. 29, 2000, at 1. Also, motor vehicle manufacturers may be more committed now than in prior years in trying to fix problems that arise. The growth of the Internet has provided disgruntled consumers with an easy tool to file complaints and disseminate negative experiences, possibly adding to the pressure a motor vehicle manufacturer may feel in determining whether to conduct a recall. The trend of increased recalls can also be seen in other major automobile markets, such as Germany. In the year 2000, vehicle manufacturers sold approximately 3.4 million vehicles in Germany while conducting ninety-four recalls, which represents a 10.6% increase in recalls compared with 1999. See FEDERAL MOTOR VEHICLE OFFICE, ANNUAL PRESS REPORT 2001 (2001), available at the Office's homepage <http://www.kba.de> (in German).

28. Bridgestone is the Japanese parent company of Firestone. Firestone is Bridgestone's unit for tire manufacturing and sales in the Americas. Firestone brand tires account for approximately 70% of Bridgestone's sales in the United States, whereas Bridgestone brand tires account for the remaining 30%. See

Wilderness AT tires on Ford Explorer sport-utility vehicles. The events surrounding this recall unleashed an atmosphere in Washington not seen since Ralph Nader led his "raiders" to lobby Congress on passage of the original Vehicle Safety Act. This atmosphere ultimately culminated with Congress passing the TREAD Act,²⁹ which ushered in the most wide-sweeping amendments ever seen to the Vehicle Safety Act.

B. *The TREAD Act of 2000*

1. *Background Events.* The events that led Congress to amend the Vehicle Safety Act in late fall of 2000 are well known, well documented,³⁰ and need only select elaboration here.

In 1990, Firestone began to produce a specially-designed fifteen-inch "ATX" tire for use as original equipment on the Ford Explorer Sport-Utility Vehicle (SUV), which Ford introduced in model year 1991.³¹ The ATX tire was also sold directly to consumers as replacement equipment, and was used as original equipment on several other Ford models.³² Firestone introduced a redesigned

James B. Treece, *Firestone Tire Recall Punctures Bridgestone's Profit*, AUTOMOTIVE NEWS, Aug. 13, 2001, at 8.

29. Pub. L. No. 106-414, 114 Stat. 1800 (2000).

30. Several articles provide excellent background on the Firestone tire recalls that led to passage of the TREAD Act. See, e.g., James R. Healey, *Special Report: Firestone Leaves an Indelible Mark*, USA TODAY, Dec. 26, 2000, at 1B; Keith Naughton & Mark Hosenball, *Ford vs. Firestone*, NEWSWEEK, Sept. 18, 2000, at 26; Alex Taylor III, *Jac Nasser's Biggest Test*, FORTUNE, Sept. 18, 2000, at 123; Daniel Eisenberg, *Anatomy of a Recall; How a Small-Town Lawsuit in Texas Cascaded into the Biggest Consumer Panic Since the Tylenol Scare, Plaguing Firestone and Ford with Allegations of Factory Flaws and Design Errors*, TIME, Sept. 11, 2000, at 11; John Greenwald, *Firestone's Tire Crisis; The Company Recalls 6.5 Million of Its Most Widely Used Tires. Did It Act Fast Enough?*, TIME, Aug. 21, 2000, at 64.

31. The Explorer is not only Ford's top-selling SUV in the world but also one of Ford's most profitable vehicles; each Explorer sold represents more than \$10,000 in gross profit and \$4000 in operating profit to Ford. David Kiley, *After Tireless Efforts, Ford Launches All-New Explorer 2002 Model Looks the Same, But Automaker Says It's Not*, USA TODAY, Mar. 29, 2001, at 1B.

32. In addition to being installed on the Explorer (model years 1991-2000), the Firestone tires were also installed on the Mercury Twin Mountaineer (model years 1996-2000), Ford Ranger pickup truck (model years 1991-2000), Ford F-Series Light Trucks (model years 1991-1994), Ford Bronco (model years 1991-1994), Mazda Navajo (model years 1991-1994), and Mazda B-series pickup trucks (model years 1994-1996). NATIONAL HIGHWAY TRANSPORTATION SAFETY

version of the tire in 1995 (under the name "ATX II") and again in 1996 (under the name "Wilderness AT").

Beginning in 1996, Firestone began receiving numerous claims relating to the fifteen-inch version of the ATX, ATX II, and Wilderness AT tires. Most of these claims alleged that these tires suffered from tread separation. Tread separation occurs when the tread and one steel belt separate from the other steel belt.³³ When the treads separated on the tires, the Explorer often rolled over with fatal results. Beginning in mid-1997, Ford dealers in the Middle East began to report similar problems with the sixteen-inch version of the ATX, ATX II, and Wilderness AT tires. Ford and Firestone conducted tests shortly thereafter. These tests ultimately led to limited recall actions in the Middle East, Venezuela, Malaysia, and Thailand in 1999 and the spring of 2000. Neither Ford nor Firestone notified NHTSA of any of these recall actions—nor were they required to under law.

On February 7, 2000, a Houston television station (KHOU) aired an exclusive report that described fatal

ADMINISTRATION, FIRESTONE TIRE RECALL, at <http://www.nhtsa.dot.gov/hot/Firestone/Index.html> (last visited Sept. 20, 2001). Ford owns a 33.4% controlling stake in Mazda. See Todd Zaun, *As the Yen Weakens, Japan's Auto Makers Score Windfalls*, WALL ST. J., Apr. 10, 2001, at A15.

33. According to a study released by Firestone on December 19, 2000, a combination of factors, including cracks, low inflation pressure, overloaded vehicles, and variations in tire belt adhesion characteristics, caused increased tread separations of Firestone ATX, ATX II, and Wilderness AT tires. *Firestone Says Defects Plus Other Factors Cause Increase in Tire Tread Problems*, 29 *Prod. Safety & Liab. Rep. (BNA)* 17, 17 (Jan. 1, 2001) [hereinafter *Firestone Says Defects*]. After examining more than 2500 recalled tires, Firestone engineers, technical experts, and statisticians concluded: (1) low inflation pressure found in many of the recalled tires increased the running temperatures of tires, which would contribute to a decreased belt adhesion level; (2) a combination of overloading the vehicle and low tire pressure led to a "decreased margin of safety for tire performance"; and (3) ATX and Wilderness AT fifteen-inch tires produced at the Decatur, Illinois plant exhibited lower initial adhesion than those same tires produced at other Bridgestone/Firestone plants. *Id.* According to a Ford report submitted to NHTSA, faulty tire design and manufacturing by Firestone, as well as customers' tire care, not the design of the Explorer, caused the accidents. See *Ford Clears Explorers in Tread Accident Blame*, DETROIT NEWS & FREE PRESS, Apr. 21, 2001, at 11A. According to Jill Batina, a spokeswoman for Bridgestone/Firestone, both companies are to blame. See Alejandro Bodipo-Memba, *Report Cites Tire Flaws: 2 Consumer Groups' Joint Study Conflicts with Other Findings*, DETROIT FREE PRESS, Apr. 25, 2001, at 12C.

motor vehicle accidents allegedly as a result of tread separation from certain Firestone tires.³⁴

In March 2000, based at least in part on the KHOU report, as well as on twenty-five complaints filed with NHTSA from 1999 through 2000, NHTSA opened an initial inquiry into the Firestone tire matter.³⁵ On May 2, 2000, prompted by evidence linking four deaths to the Firestone tires, NHTSA opened a formal investigation of the Firestone ATX, ATX II, and Wilderness AT tires manufactured primarily for use as original equipment on Ford Explorers.³⁶

On August 9, 2000, after meetings with NHTSA and Ford, Firestone announced a voluntary recall of 14.4 million tires, which represented all ATX and ATX II fifteen-inch tires manufactured in North America since 1991 and Wilderness AT tires of the same size manufactured at Firestone's Decatur, Illinois plant.³⁷ "Firestone estimated that approximately 6.5 million of the affected tires were still in service on the date the recall was announced."³⁸ The recall was announced following an analysis by Ford and Firestone that identified a "statistically significant" number of tread separations occurring in the affected tires.³⁹ Most of the affected tires were installed on the Ford Explorer.⁴⁰

NHTSA continued to urge Firestone to expand its voluntary recall to include the Wilderness AT tires produced at other plants.⁴¹ The investigation undertaken by NHTSA on May 2, 2000 concluded in July 2001 with NHTSA issuing a statement that Firestone should expand its recall to include all Wilderness AT tires.⁴² However, Firestone refused at that time to expand its recall this wide;

34. At about this time, Firestone had already recorded 193 personal injury claims; 2288 property damage claims; and was a defendant in 66 law suits related to the tires covered by the investigation. Advanced Notice of Proposed Rulemaking: Record Retention, 66 Fed. Reg. 6532, 6533 (Jan. 22, 2001).

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

36. S. REP. NO. 106-423, at 1-2 (2000). According to NHTSA, most of the injuries and fatalities caused by Firestone tire failures occurred in warm-weather climates, such as Texas, Arizona, Louisiana, Nevada, Georgia, and Tennessee. *Id.* at 2.

37. See S. REP. NO. 106-423, at 2.

38. See *id.*; FORD MOTOR CO., 2000 ANNUAL REPORT 22 (2001).

39. See FORD MOTOR CO., *supra* note 38, at 22.

40. *Id.*; see also *supra* note 32 and accompanying text.

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

42. See Statement from the U.S. Dep't of Transp. Concerning the Firestone Tire Investigation (July 19, 2001), at <http://www.dot.gov/affairs/dot07301.htm>.

rather, Firestone agreed to examine and replace those tires on a case-by-case basis.⁴³

Upset because Firestone did not expand the recall, ex-Ford CEO Jacques Nasser announced on May 22, 2001 that Ford would spend as much as \$3 billion to undertake the largest product recall in automotive history,⁴⁴ namely, the replacement of ten million to thirteen million of the Firestone Wilderness AT tires that were not subject to the initial recall, including 1.5 million tires that were mounted on the vehicles as replacements.⁴⁵ This announcement followed Firestone's action to sever a ninety-five year-old supplier relationship with Ford.⁴⁶

Through October 4, 2001, NHTSA said that 271 people died and over 700 people suffered injuries in accidents involving Firestone Wilderness AT and ATX tires (mostly involving Explorer rollovers); ten of these deaths are linked to tires that are among the ten to thirteen million tires Ford began to replace in the May 2001 round of recalls.⁴⁷ Bridgestone/Firestone announced on June 27, 2001 that it intends to close the Decatur, Illinois tire plant, which was linked to numerous quality problems.⁴⁸ Firestone expects to lose approximately \$210 million for costs tied to closing the

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

44. See Joann Muller et al., *Ford: Why It's Worse Than You Think*, BUS. WK., June 25, 2001, at 80.

45. See Keith Bradsher, *Ford Begins a Recall of 13 Million Tires*, N.Y. TIMES, May 23, 2001, at C1. Ford will replace all Firestone Wilderness AT tires, in fifteen-, sixteen-, and seventeen-inch sizes, on all Ford products, as well as all Wilderness tires purchased as replacement tires. *Id.*

46. See Joseph B. White et al., *Ford Intends to Replace Millions of Tires*, WALL. ST. J., May 23, 2001, at A3.

47. See Timothy Aepfel et al., *Firestone Broadens Recall of Defective Tires*, WALL ST. J., Oct. 5, 2001, at A3; Jeff Plungis & Mark Truby, *Feds Launch Explorer Inquiry*, DETROIT NEWS, June 20, 2001, at 1; Joseph B. White et al., *Agency to Comment on Ford Tire Safety, While Inquiry into Explorer Is Considered*, WALL ST. J., June 20, 2001, at A8. As of February 6, 2001, NHTSA had received over 6000 complaints relating to Firestone tires. See *Firestone Recall Complaints Listing*, at <http://www.nhtsa.gov/hot/firestone/update.html> (last modified June 28, 2001). Many of these complaints involve tire tread separation or blowout that led to a vehicle rollover. *See id.*

48. See *Firestone Says Defects*, *supra* note 33. Decatur is one of six Bridgestone/Firestone plants in North America that make passenger and light truck tires. The Decatur plant makes several lines of tires, many for light trucks, specifically Ford's Explorer. See Jennifer Dixon, *Troubled Tire Plant to Be Closed*, DETROIT FREE PRESS, June 28, 2001, at 12A.

plant.⁴⁹ For the year 2001, Firestone expects to report a loss of \$530 million after taxes.⁵⁰ Bridgestone already has set aside \$800 million to pay for the recall and the expected cost of settling lawsuits involving the recalled tires.⁵¹ Ongoing costs to fund the recall of Firestone tires caused Bridgestone to lose \$251.1 million in the first half of 2001.⁵² For all of 2001, Bridgestone estimates that net profit will drop 44% compared with 2000.⁵³ On the other side, in addition to funding the \$3 billion follow-up recall, Ford continues to defend numerous personal injury and class action lawsuits totaling over \$590 million, not including potential punitive damages awards, relating to rollovers of Explorers equipped with Firestone tires.⁵⁴ In total, at least 280 personal injury lawsuits involving Firestone tire failures have been filed in the United States alone; as of July 23, 2001, Firestone had already settled 200, or 40% of the total outstanding, of the claims and lawsuits filed against it.⁵⁵

The events surrounding the recall of Firestone tires prompted Congress to accuse NHTSA of not "adequately detect[ing] and investigat[ing] safety-related defects in motor vehicles and motor vehicle equipment."⁵⁶ Accordingly, "in response to the deficiencies highlighted by [the Firestone] incident," Congress, after holding intensive

49. See David Barboza, *Bridgestone/Firestone to Close Tire Plant at Center of Huge Recall*, N.Y. TIMES, June 28, 2001, at C1. "About 1,500 employees, mostly union workers and many with more than 20 years of experience, will probably lose their jobs." *Id.* Firestone insists the decision to close the factory was based solely on economic concerns and did not reflect the performance of workers and the Decatur plant. *Id.*

50. See Dixon, *supra* note 48.

51. See Peter Landers & Todd Zaun, *Bridgestone Takes Gamble in Ford Case—In Cutting Off Client, Tire Maker Obtains Room to Defend Itself*, WALL ST. J., May 23, 2001, at A21.

52. See *Bridgestone Posts First-Half Loss on Massive U.S. Tire Recalls*, DETROIT NEWS, Aug. 10, 2001. In sharp contrast to a year ago, through the first six months of 2000, Bridgestone earned a profit of \$155.2 million. *Id.*

53. Treece, *supra* note 28.

54. See FORD MOTOR CO., *supra* note 38, at 22; Muller et al., *supra* note 44, at 80.

55. NHTSA Updates Database to 174 Deaths: 6,000 Complaints Linked to Firestone Tires, 29 Prod. Safety & Liab. Rep. (BNA) 174, 174 (Feb. 12, 2001). Personal injury lawyer Tab Turner from Little Rock, Arkansas, has filed 174 suits against Ford and Firestone in state courts nationwide. White et al., *supra* note 46, at A3. Stephen Power & Clare Ansberry, *Firestone Girds for Battle Against Bigger Recall*, WALL ST. J., July 23, 2001, at A3.

56. S. REP. NO. 106-423, at 1 (2000).

hearings, amended the Vehicle Safety Act “to improve and strengthen the Secretary’s [i.e., NHTSA’s] ability to detect and investigate defects.”⁵⁷

2. *Congressional Action.* Concerned about how Ford, Firestone, and NHSTA were handling the overseas tire recalls, Congress held hearings in September 2000 to assess the situation. In particular, Congress felt a need to strengthen NHTSA’s ability to identify defects, even though State Farm insurance officials confirmed that the company warned NHTSA via e-mail as early as 1998 that State Farm saw twenty-one potential failures of Firestone ATX tires (fourteen involving Explorers) in claims over six and a half years.⁵⁸ That e-mail was followed a year later by a telephone call from State Farm to NHTSA warning of a growing number of Firestone failures.⁵⁹ Yet NHTSA failed to act. Congressional hearings that followed in the wake of the Firestone recall focused, however, not on this NHTSA failure to act, but rather chiefly on Ford and Firestone’s behavior.

On September 6 and again on September 21, the House Subcommittee on Telecommunications, Trade, and Consumer Protection held a joint hearing with the House Subcommittee on Oversight and Investigations into the Firestone recall actions. Speaking for the House Commerce Committee in justifying the congressional hearings, Congressman John D. Dingell (D-Mich. and ranking Democratic member of the House Commerce Committee) argued: “‘There have been a significant number of tire failures which have caused accidents, in which people were injured or killed’ . . . ‘That constitutes a real threat to the public safety and is something into which Congress should look.’”⁶⁰

Not to be outdone, the Senate Committee on Commerce, Science, and Transportation held its own hearings on September 12, 2000.

57. *Id.*

58. See Jennifer Dixon, *Insurance Firms Going After Ford, Firestone*, DETROIT FREE PRESS, Aug. 6, 2001, at 1; see also Mark Skertic, *Tire Firm Faces House Probe: Panel to Ask Why Problems Went Unchecked*, CHI. SUN-TIMES, Aug. 17, 2000, at 8.

59. Skertic, *supra* note 58, at 8.

60. Richard A. Ryan & Mark Truby, *Ford: Firestone Dragged Feet*, DETROIT NEWS, Sept. 6, 2000, at 1.

When finally completed, Congress had heard testimony from Jacques Nasser, (then) President and CEO of Ford Motor Company;⁶¹ Masatoshi Ono, (then) Chief Executive Officer, Bridgestone/Firestone, Inc.;⁶² Rodney T. Slater, (then) Secretary of Transportation; Dr. Sue Bailey, (then) Administrator of NHTSA; Joan Claybrook, former NHTSA Administrator under President Carter and current President of Public Citizen (a self-proclaimed consumer advocacy group with close ties to personal injury and lemon law attorneys); and Clarence Ditlow, Executive Director of the Center for Auto Safety (officially a non-profit organization founded by Consumers Union and Ralph Nader in 1970, but now independent of both; nevertheless, this self-proclaimed consumer advocacy group retains close financial ties to personal injury and lemon law attorneys).⁶³

The testimony revealed five overarching concerns that Congress ultimately sought to remedy: (1) a (perceived) ineffectiveness and inefficiency of NHTSA's process of gathering and analyzing data pertaining to vehicle defects, initiating investigations, and issuing recalls; (2) NHTSA's failure to update the Federal motor vehicle safety standards, in particular the standards for tires; (3) the

61. Because of (or despite) his handling of the Ford-Firestone tire recall, Ford paid Nasser \$12.1 million for his services in 2000, which represented a 19% increase over his 1999 salary. See Norihiko Shirouzu, *Ford Paid Its CEO Nasser \$12.1 Million in 2000, Up 19%, Despite Tire Problem*, WALL ST. J., Apr. 11, 2001, at A8. Perhaps Ford credits Nasser, through his direct television campaign in the recall's wake, with having effectively pinned the blame of Explorer rollovers on Firestone tires, not Ford or the Explorer. Jamie Butters, *Ford Raises Nasser's Salary*, DETROIT FREE PRESS, Apr. 11, 2001, at 7A. On October 30, 2001, Ford forced the resignation of Jacques Nasser as Ford's President and CEO, replacing him with William Clay Ford, Jr., the great-grandson of Henry Ford. See Danny Hakim, *Effort to Overcome Rift at Troubled Company*, N.Y. TIMES, Oct. 31, 2001, at C1. Mr. Ford said that Nasser's handling of the Firestone recall played no role in the forced resignation. *Id.* This author highly doubts Mr. Ford's assertion; however, based on the bonus paid to Nasser during the year of the recall (see above), perhaps Mr. Ford is indeed telling the truth.

62. Mr. Ono was asked to resign by Bridgestone President Yoichiro Kaizaki. Ono returned to the Bridgestone parent company, where he eventually resigned on January 31, 2001. See *Bridgestone President to Quit in March; Tire Recall Marred Kaizaki's Tenure*, WASH. POST, Jan. 12, 2001, at E3. Ono was replaced by John T. Lampe. For background on Mr. Lampe, see David Welch, *Meet the New Face of Firestone*, BUS. WK., Apr. 30, 2001, at 64.

63. For an excellent discussion of how personal injury and class action attorneys worked (and continue to work) together in suing Firestone, see Mike France, *The Litigation Machine*, BUS. WK., Jan. 29, 2001, at 115-20.

absence of a federal law requiring manufacturers to notify NHTSA of recalls or safety-related actions taken in foreign countries that involve products sold in the United States;⁶⁴ (4) the absence of a routine “early warning” reporting system, (i.e., the fact that NHTSA did not require manufacturers to report information relevant to defects that may indicate a safety problem with vehicles);⁶⁵ and (5) the need to increase civil penalties and belief “that criminal penalties should be imposed in cases of particularly egregious acts.”⁶⁶

64. Ford replaced Firestone tires in sixteen foreign countries beginning in August 1999, but Ford did not notify—nor was Ford required to notify—NHTSA. If Ford had replaced the Firestone tires on its vehicles sold in the United States, 49 U.S.C. § 30166(f) would have required both companies to report their actions to NHTSA. *See* S. REP. NO. 106-423, at 2 (2000).

65. For example, the Senate Committee on Commerce, Science, and Transportation noted that “NHTSA does not collect claims data that may serve as an early indicator of a problem.” *See* S. REP. NO. 106-423, at 2. Personal injury and property claims and lawsuits involving the Firestone recalled tires began to increase as early as 1996, yet neither Ford nor Firestone were obligated to inform NHTSA. *See id.* Ms. Claybrook testified that NHTSA should force vehicle manufacturers to notify NHTSA whenever customers filed three or more lawsuits dealing with the same vehicle problem. *See Firestone Tire Recall: Hearing Before the Senate Committee on Commerce, Science, and Transportation*, 106th Cong. (Sept. 12, 2000) (statement of Joan Claybrook), available at <http://www.senate.gov/~commerce/hearings/hearings.htm> (last visited Nov. 10, 2001). Ms. Claybrook did not discuss the cost to the manufacturer, and ultimately the customer, nor the intrusion into business caused by this recommendation. *See id.* Nor did she discuss how three complaints could possibly indicate any safety-related defect, especially considering her call for reporting for any reason. *See id.* In other words, her recommendation would seem to imply that three customer complaints—and nothing more—justify a notification requirement to the federal government. Yet three customer complaints could be merely subjective dissatisfaction reports with the vehicle and not objective failures indicating the existence of a safety-related defect. Ms. Claybrook’s suggestion, however, does not distinguish between these situations.

66. *See* S. REP. NO. 106-423, at 3. Ms. Claybrook and Mr. Ditlow called on Congress to amend the Vehicle Safety Act so that executives of automobile companies would face criminal penalties for manslaughter and even murder for knowing and willful violations of Federal motor vehicle safety standards. *See Firestone Tire Recall: Hearing Before the Senate Committee on Commerce, Science, and Transportation*, 106th Cong. (Sept. 12, 2000) (statements of Joan Claybrook & Clarence Ditlow), available at <http://www.senate.gov/~commerce/hearings/hearings.htm> (last visited Nov. 10, 2001). Specifically, Mr. Ditlow recommended removing the civil liability ceiling of \$925,000 “to be in line with the Clean Air Act which has no ceiling for violation of vehicle emission standards.” *Id.* (statement of Clarence Ditlow). Ms. Claybrook urged Congress to ban all gag orders issued as part of settlement arrangements or decrees whenever the underlying matter concerns “vehicle safety.” *See id.* (statement of

At the Senate hearing on September 12, 2000, Jacques Nasser agreed to several major reforms that Congress would later write into the TREAD Act, thereby applying not only to Ford but also to the entire automobile industry. Nasser, de facto representative of the entire automobile industry, accepted Congress's proposals to: (1) require companies to notify NHTSA of recalls in foreign countries involving motor vehicles and motor vehicle equipment sold and used in the United States; (2) extend the five year record retention period; (3) lengthen the statute of limitations period on reporting defects and recalls; (4) require manufacturers to report lawsuits in which they are named as a defendant; and (5) increase the criminal penalties to be imposed in cases of particularly egregious acts.⁶⁷

Congressman Fred Upton (R-Mich.) introduced H.R. 5164 on September 13, 2000.⁶⁸ The bill was referred to the House Committee on Commerce, which then referred the bill on September 14, 2000 to the House Subcommittee on Telecommunications, Trade, and Consumer Protection. Briefly, as introduced in the Senate this bill: (1) requires manufacturers to report to DOT (i.e., NHTSA) information about foreign recalls; (2) increases civil penalties for manufacturers that fail to comply with the Vehicle Safety Act (e.g., civil penalty increased from \$980,000 to \$15 million and imposition of a criminal penalty for falsifying or withholding information); (3) directs DOT (i.e., NHTSA) to conduct dynamic rollover tests of vehicles and make the results available to the public; (4) directs NHTSA to upgrade the current tire standard; and (5) adopts measures designed to improve the design of child safety seats.⁶⁹

Joan Claybrook). Considering that nearly every settlement in the automobile sector could be construed to concern "vehicle safety," her suggestion, if implemented, would effectively end the practice of issuing gag orders in the automobile industry. Whether such a rule would pass constitutional muster (i.e., not violate due process protections) was also not discussed or considered at the congressional hearings.

67. See S. REP. NO. 106-423, at 2-3.

68. H.R. 5164, 106th Cong. (2000). The official title as introduced read: "To amend title 49, United States Code, to require reports concerning defects in motor vehicles or tires or other motor vehicle equipment in foreign countries, and for other purposes." *Id.* The short title as introduced read: "Transportation Recall Enhancement, Accountability, and Documentation Act." *Id.*

69. Details of the bill are discussed *infra* Part II.

In the Senate, John McCain (R-Ariz.) introduced a bill the next day (September 15, 2000) that contained, *inter alia*, stronger criminal provisions than the House version.⁷⁰ The Senate bill would have required manufacturers to inform the federal government about dangerous defects or else face criminal penalties, including imprisonment up to five years, for deliberately failing to report defects or issue a recall where the defect caused “grievous bodily injury” (in cases where the defect caused death, the bill envisaged imprisonment up to fifteen years).⁷¹ In addition, the Senate bill differed from the House bill in that the Senate bill authorized the President to negotiate for an international agreement governing the dissemination of information about the recall by manufacturers of motor vehicles and motor vehicle equipment with safety-related defects.⁷² The bill was unanimously reported by the Senate Committee on Commerce, Science, and Transportation.⁷³ However, because of “holds” by anonymous senators, McCain could not bring the bill to the Senate floor for a full vote.⁷⁴

70. See Motor Vehicle and Motor Vehicle Equipment Defect Notification Improvement Act, S. 3059, 106th Cong. § 10 (2000). The short title as introduced read: “Motor Vehicle and Motor Vehicle Equipment Defect Notification Improvement Act.” *Id.* § 1. The official title as introduced read: A bill “[t]o amend title 49, United States Code, to require motor vehicle manufacturers and motor vehicle equipment to obtain information and maintain records about potential safety defects in their foreign products that may affect the safety of vehicles and equipment in the United States, and for other purposes.” *Id.*

71. *Id.* § 10 (knowingly selling a defective vehicle or vehicle equipment that causes grievous bodily harm is punishable by fine of not more than \$10,000, imprisonment for not more than five years, or both; knowingly selling a defective vehicle or vehicle equipment that causes death is punishable by fine of not more than \$50,000, imprisonment for not more than fifteen years, or both).

72. See *id.* § 3.

73. On September 27, 2000, the Senate bill was placed on the Senate legislative calendar under general orders, where it remained.

74. A “hold” is used in the Senate and refers to a private objection that one or more senators may have to scheduling a matter for debate. During a “rolling hold,” one senator anonymously blocks the bill, and before the “holder” can be “unmasked” by the bill’s supporters, he or she passes off the hold to another senator, who in turn continues the block. CBS News Correspondent Sharyl Attkisson identified Senators Orrin Hatch (R-Utah), Jim Bunning (R-Ky.), and Mitch McConnell (R-Ky.) as three of the dozen “holders.” *The Fix Is in’ On Auto Safety Bill*, CBS.com, Apr. 11, 2001, at <http://kjeo.cbsnow.com/story/0,1597,232610-371,00.shtml> (on file with the author). Senator George Voinovich (R-Ohio) later revealed himself as a “holder,” see Stephen Power, *In Response to Firestone Recall, Senate Approves Bill to Overhaul the Nation’s Auto-Safety Laws*, WALL ST. J., Oct. 12, 2000, at A16, as did Senator Jeff Sessions (R-Ala.),

Recognizing not only the mounting pressure on Congress to amend the Vehicle Safety Act in such a fashion to include a global reporting element so as to prevent another Ford-Firestone situation but also Nasser's announced commitment to the Senate Commerce Committee, on September 15, 2000, the Alliance of Automobile Manufacturers sent a letter to Dr. Sue Bailey (Administrator of NHTSA) announcing a voluntary commitment on behalf of its members⁷⁵ to report to NHTSA "safety recalls and other safety campaigns that are conducted in a foreign country on a vehicle or component part that is also offered for sale in the United States."⁷⁶

On September 21 and 26, 2000, the House Subcommittee on Telecommunications, Trade, and Consumer Protection met in open markup session⁷⁷ and approved H.R. 5164 for full committee consideration.⁷⁸ On October 5, 2000, the full House Committee on Commerce met and, after a five-hour markup session, ordered H.R. 5164 favorably reported to the House, with an amendment, by a record vote of forty-two yeas and no nays.⁷⁹

see CONG. REC. S10061, daily ed. Oct. 6, 2000 (statement of Sen. Sessions). Ultimately, the Senate approved the House bill (H.R. 5164). See *infra* text accompanying notes 87-91.

75. The Alliance's members are: BMW, DaimlerChrysler, Fiat, Ford, General Motors, Isuzu, Mazda, Mitsubishi, Nissan, Porsche, Toyota, Volkswagen, and Volvo.

76. Letter from Robert S. Strassburger, Vice President, Vehicle Safety and Harmonization, Alliance of Automobile Manufacturers, to L. Robert Shelton, (then) Executive Director, National Highway Traffic Safety Administration 3 (Mar. 23, 2000) (on file with author).

77. A markup session refers to the meeting a committee holds to review the text of a bill before reporting it out. Committee members offer and vote on proposed changes to the bill's language, known as amendments. Most markups end with a vote to send the new version of the bill to the floor for final approval.

78. The record vote was twenty-three yeas and no nays. See H.R. REP. NO. 106-954, at 8 (2000). Representative James Rogan (R-Cal.) did not vote on the bill because he also sits on the House Judiciary Committee, which reviewed the bill before it was sent to the House floor. See Michael Steel, *Panel Adds Teeth to TREAD Safety Bill*, NAT'L J. NEWS SERV., Sept. 27, 2000, available at LEXIS, 106 Markup H.R. 5164 [hereinafter Steel, *Panel Adds Teeth to TREAD*].

79. See Michael Steel, *Commerce Committee Approves TREAD Recall Bill*, NAT'L J. NEWS SERV., Oct. 5, 2000, available at LEXIS, 106 Markup H.R. 5164 [hereinafter Steel, *Commerce Committee Approves TREAD Recall Bill*]; see also H.R. REP. NO. 106-954, at 8 (2000). An amendment introduced by Congressman Pallone (D-N.J.) addressing the disposal of replacement tires was withdrawn. H.R. REP. NO. 106-954, at 9. Also, an amendment in the nature of a substitute by Congressman Waxman that would have provided the Secretary of Transportation with administrative penalty authority was voted down by the

At 12:24 a.m. on October 11, 2000, the House passed H.R. 5164 by voice vote.⁸⁰ Later that same day, the bill was received in the Senate. Even though Senator McCain favored the Senate version (S. 3059), he knew that the holds used by other Senators would continue to prevent the Senate from voting on the bill.⁸¹ Also recognizing that Congress was in its final days before adjournment and perhaps wanting to pass *something* that could be marketed as “consumer-friendly” before election day, which was less than a month away, McCain urged the Senate to pass the House version.⁸² Accordingly, the Senate read the House bill twice, considered, read the third time,⁸³ and passed it

Committee by a record vote of fourteen yeas and thirty nays. *Id.* at 9-10. Congressman Waxman’s amendment would have authorized NHTSA to collect civil penalties for violations of the law through an administrative law judge. *See Steel, Commerce Committee Approves TREAD Recall Bill, supra.* Congressman Waxman told the Committee that, under the current system, the DOT must go to a federal district court for a full trial before levying and collecting fines if the violator turns down DOT’s or NHTSA’s proposed compromise. Thus, according to Waxman, the collection of smaller fines becomes too expensive to be worthwhile and eliminates any deterrent effect of the fines. Waxman said his amendment would give NHTSA a tool that other agencies, such as the FAA and EPA already have. Accordingly, Waxman said he took his amendment language almost directly from the Clean Air Act passed by the Commerce Committee in 1990. The full Committee was unimpressed with this argument and ultimately voted the proposal down by a margin exceeding two to one. *Id.*

80. During a voice vote, members of Congress shout “aye” as a group, followed by members who shout “no” as a group. The presiding officer then decides which group as a whole had more shouts before announcing a final result. No names are recorded. As passed by the House, the short title of H.R. 5164 remained the same as introduced, with the addition of the acronym “TREAD”: “Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act.” *Cf. supra* note 68.

81. *See supra* note 74 and accompanying text.

82. *See* CONG. REC. S10,273 (daily ed. Oct. 11, 2000) (statement of Sen. McCain).

Nevertheless, let me be clear, I would prefer to have the Senate complete action on the bill reported by the Senate Commerce Committee with unanimous support. But holds and stalling tactics used by some members of [the Senate] will prevent us from even considering the Senate measure. The reality we face in the remaining days of Congress because of these tactics is that we pass the House bill or we pass nothing. Left with that decision, I would prefer we moved forward with the House bill.

Id.

83. The third reading in the Senate is the last required reading just prior to the vote on final passage. The first reading occurs when the bill is first introduced; the second reading occurs when the bill is referred to a committee. Bills are rarely read in full, unless a senator so demands.

without amendment by unanimous consent.⁸⁴ Thus, the House bill made it through both houses of Congress in lightning speed of less than eighteen hours.

The bill was then presented on October 20, 2000 to President Clinton, who signed it into law on November 1, 2000.⁸⁵

3. *Post-TREAD Events.* Passage of the TREAD Act hardly ended intense scrutiny of the Ford-Firestone tire recall. Indeed, events occurring even after the Ford-Firestone tire recall continue to generate intense media coverage. Perhaps the most significant event surrounding the recall since passage of the TREAD Act was Firestone's announcement on May 21, 2001 that it would stop selling tires to Ford.⁸⁶ As dramatic as the announcement may seem, Ford and Firestone had not worked well together since the recall was announced on August 9, 2000. Ford accused Firestone of ignoring data that indicated higher than usual failure rates for the unrecalled Wilderness AT tires. Firestone accused Ford of questioning the safety of Firestone tires to divert attention from steering problems with the Explorer. John T. Lampe, Firestone's CEO, told the *New York Times* that he halted Firestone's business with Ford during a meeting on May 21, 2001 at Firestone's headquarters in Nashville with Carlos Mazzorin, Ford's group vice president for purchasing.⁸⁷ When Mr. Mazzorin said Ford would not share safety data on the Explorer, Mr. Lampe said that he handed Mazzorin a letter terminating the companies' relationship.⁸⁸ "The rupture end[ed] a close

84. Unanimous consent means that all members on the floor agree, or consent, to a pending request. Unanimous consent is used in both the House and Senate and is needed when a member wishes to act contrary to or outside regular procedures. As finally enacted, the short title read the same as passed. Pub. L. No. 106-414, 114 Stat. 1800 (2000); *see also supra* note 80. The official title remained the same as introduced in the House. Pub. L. No. 106-414, 114 Stat. 1800; *see also supra* note 68.

85. Pub. L. No. 106-414, 114 Stat. 1800.

86. "The cutoff with Ford applies only to Firestone tires sold for use on new vehicles in North America, Central America, and South America. Firestone will continue to provide tires to Ford in Europe and Asia." Landers & Zaun, *supra* note 51. Firestone estimates that losing Ford as a customer will cost less than 5% of Firestone revenue, which totals about \$7.5 billion. *See* Timothy Aepfel et al., *Firestone Quits As Tire Supplier to Ford*, WALL ST. J., May 22, 2001, at A3.

87. Keith Bradsher, *Firestone to Stop Sales to Ford, Saying It Was Used As Scapegoat*, N.Y. TIMES, May 22, 2001, at A1.

88. *Id.*

business relationship that began in the early 1900s, when Henry Ford first tapped Harvey Firestone's company to make tires for Ford cars."⁸⁹ Citing a study undertaken by Ohio State University professor Dennis Guenther, Firestone maintains that oversteering problems in the Explorer steering system make the vehicle difficult to control during a tire failure.⁹⁰

Ford continues to reject Firestone's accusations and maintains the problem is solely a tire problem. As mentioned above,⁹¹ on May 22, 2001, Ford announced it would pay up to \$3 billion to replace thirteen million Firestone Wilderness AT tires installed mainly on Ford Explorers, including 1.5 million Wilderness AT tires that were mounted on the vehicles as replacements during the Firestone tire recall from August 2000.⁹² Ford will undoubtedly try to persuade NHTSA that the May 2001 recall was mandatory under the Vehicle Safety Act. By so doing, Firestone, not Ford, would be forced to pay for the recall. Until such time, Ford and Firestone will continue to sling mud in the public relations forum, which ultimately undermines both companies' credibility before a jury and serves as fodder for aggressive personal injury lawyers.⁹³

At further congressional hearings held on June 19, 2001, Michael P. Jackson, Deputy Secretary of Transportation, said that NHTSA would evaluate Firestone's claims of Explorer steering defects through a preliminary investigation with results by the end of July 2001.⁹⁴ Only if the preliminary investigation yielded

89. Aepfel et al., *supra* note 86, at A12. Ford was Firestone's largest single customer, representing 5% of Firestone's revenues. See Dixon, *supra* note 48, at B1.

90. See Plungis & Truby, *supra* note 47. Firestone also claims that Florida accident data suggests that the Explorer rolled over four times as often as comparable SUVs. *Id.*

91. See *supra* note 45 and accompanying text.

92. See also Keith Bradsher, *Ford Intends to Replace 13 Million Firestone Wilderness Tires*, N.Y. TIMES, May 23, 2001, at C1. "Ford will pay up to \$110 per fifteen- and sixteen-inch tire and \$130 per seventeen-inch tire. The company said it would take an aftertax write-off against earnings of \$2.1 billion . . . to cover the expense of the recall." *Id.* at C4.

93. See Aepfel et al., *supra* note 86, at A3 (quoting personal injury lawyer Mike Edison, co-lead plaintiff's counsel for more than 200 individual death and injury cases filed in federal courts nationwide against Ford and Firestone as saying, "We couldn't be in a better situation in any case than to have two defendants fighting each other.").

94. Plungis & Truby, *supra* note 47.

substantial evidence of a safety-related defect would NHTSA proceed to the second phase of the defect investigation, i.e., the engineering analysis.⁹⁵ Indeed, on July 19, 2001, the DOT issued a press statement indicating that the results of its preliminary investigation show that Firestone will need to expand its recall of August 9, 2000.⁹⁶ Indeed, on October 4, 2001, Bridgestone/Firestone reversed course and agreed to replace nearly 800,000 Firestone Wilderness AT tires, which are the fifteen- and sixteen-inch tires manufactured in Firestone's Wilson, N.C., Joliette, Quebec and Oklahoma City factories before May 1998 that were mounted on Ford Explorers, Ford Ranger Pickups, and Mercury Mountaineers.⁹⁷ Although the number of tires affected was 3.5 million, because of Ford's voluntary replacement program began in May 2001, the open number of tires affected is now about 768,000.⁹⁸ This thirty million dollar recall closes NHTSA's high-profile investigation, originally begun in early 2000.⁹⁹

Lastly, on October 30, 2001, Ford fired Jacques Nasser as President and CEO, though it denied that the firing had anything to do with the Firestone recall.¹⁰⁰

II. ANALYSIS

A. Purpose of the TREAD Act

Troubled not only by a perceived malfeasance by top management at both Ford and Firestone—in particular by top management's decision not to report the overseas safety campaigns involving the affected tires, but also (though to a lesser extent) by how NHTSA failed to act on customer complaints and information provided by State Farm—Congress felt compelled to “act,” i.e., pass additional legislation that would be designed to prevent another Ford-Firestone situation. In the words of the House Committee on Commerce, which authored the TREAD Act and

95. *Id.*

96. Press Release, U.S. Dep't of Transp., Concerning the Firestone Tire Investigation (July 19, 2001), <http://www.dot.gov/affairs/dot07301.htm>.

97. See Harry Stoffer, *Firestone Surrenders As Hard-Line Strategy Fails*, AUTOMOTIVE NEWS, Oct. 8, 2001, at 1, 8; see also Jeff Plungis & Mark Truby, *Feds Side with Ford*, DETROIT NEWS, Oct. 5, 2001, at 1.

98. See Stoffer, *supra* note 97, at 8.

99. See Aepfel et al., *supra* note 47, at A3; Stoffer, *supra* note 97, at 8.

100. See Hakim, *supra* note 61.

Commerce, which authored the TREAD Act and unanimously recommended passage to the full House, the events surrounding the Ford-Firestone situation made clear that: (1) “the data available to NHTSA regarding the problems with Firestone tires was insufficient”¹⁰¹ and (2) “NHTSA did not effectively use the data it did have in its possession to spot the trends related to the failure of th[ose] tires.”¹⁰²

Accordingly, relying on constitutional authority vested in the Commerce Clause, which grants Congress the power to “regulate commerce . . . among the several States,”¹⁰³ Congress amended the Vehicle Safety Act to require manufacturers to provide NHTSA with “appropriate data in a timely fashion, including [data] related to foreign recall actions and internal company data on claims and lawsuits related to defects.”¹⁰⁴

In signing H.R. 5164 into law on November 1, 2000, President Clinton noted that the TREAD Act’s purpose is “[to respond] directly to some of the key shortcomings in identifying the recent Firestone tire problem.”¹⁰⁵

B. Section-By-Section Analysis

The means used by Congress to effectuate the enunciated ends include mandating new in-vehicle tire pressure warning devices and increased reporting obligations on manufacturers, in particular, for overseas recalls and overseas “safety campaigns.” Congress strengthened both the civil and criminal penalties of the

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

102. *Id.*

103. U.S. CONST. art. I, § 8, cl. 3; *see also* H.R. REP. NO. 106-954, at 12.

104. *See* Advanced Notice of Proposed Rulemaking: Record Retention, 66 Fed. Reg. 6532 (Jan. 22, 2001); *cf.* S. 3059, 106th Cong. (2000) (“to require motor vehicle manufacturers and motor vehicle equipment manufacturers to obtain information and maintain records about potential safety defects in their foreign products that may affect the safety of vehicles and equipment in the United States, and for other purposes”).

105. *Clinton Signs Tire-Safety Bill*, WASH. POST, Nov. 2, 2000, at E2; *see also* S.F. CHRON., Nov. 2, 2000, at E2. According to White House spokesman Jason Schechter, “President Clinton strongly [supported] this legislation because he believes it strengthens the government’s ability to investigate vehicle safety defects and incorporates many of the changes the administration sought.” Janet L. Fix, *Groups Deride Auto Safety Bill*, DETROIT FREE PRESS, Oct. 24, 2000, at B1. However, President Clinton did not comment on NHTSA’s failure to respond to State Farm’s information. *See id.*

Vehicle Safety Act to underscore the seriousness of failing to report overseas actions. This part of the article analyzes the TREAD Act section-by-section, focusing on the key changes to the Vehicle Safety Act, particularly as they relate to the automotive industry.

1. *Short Title.* Section 1 provides the short title of the bill, namely, the "Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act."¹⁰⁶ The short title of the Senate bill was the "Motor Vehicle and Motor Vehicle Equipment Defect Notification Improvement Act."¹⁰⁷ Clearly, the House version wins the day for catchier acronym.

2. *Reporting Requirements.* In addition to the increased penalties,¹⁰⁸ the most controversial aspects of the TREAD Act are the new reporting requirements. The new reporting requirements include not only a new international component, but also mandate regular reporting of "early warning" information streams, including information that could be considered highly sensitive to vehicle manufacturers, such as field reports and claims data. The impact of these amendments will depend on the specifics of NHTSA's rulemaking over the coming months.

As noted above, under the Vehicle Safety Act (pre-TREAD), a manufacturer of a motor vehicle or replacement equipment must notify NHTSA if the manufacturer "learns the vehicle or equipment contains a defect and decides in good faith that the defect is related to motor vehicle safety."¹⁰⁹ Prior to passage of the TREAD Act, a manufacturer's automatic (i.e., not in response to NHTSA's information requests under which information is required as part of an investigation) reporting obligations were to provide copies of communications about defects and

106. Pub. L. No. 106-414, § 1, 114 Stat. 1800 (2000); see also *supra* notes 68, 80, 84 and accompanying text.

107. See S. 3059, 106th Cong. § 1; see also *supra* note 70 and accompanying text.

108. See *infra* notes 158-83 and accompanying text.

109. See *supra* note 8. Notification is also required if a manufacturer "decides in good faith that the vehicle or equipment does not comply with an applicable motor vehicle safety standard." 49 U.S.C. § 30118(c)(2) (1994); see *supra* notes 8-11 and accompanying text.

noncompliance(s).¹¹⁰ Specifically, a manufacturer must provide to NHTSA a copy of all “notices, bulletins, and other communications,” including warranty and policy extension communications, “regarding any defect in its vehicles or items of equipment (including any failure or malfunction beyond normal deterioration in use, or any failure of performance, or flaw or unintended deviation from design specifications), whether or not such defect is safety related.”¹¹¹

In the House Committee Report accompanying the TREAD Act, Congress noted that NHTSA did not have adequate, timely data about Firestone ATX and Wilderness AT tires.¹¹² Accordingly, the TREAD Act seeks to ensure that NHTSA receives data in a timely fashion, including data related to foreign recall actions and internal company data on claims and lawsuits related to defects.¹¹³

a. *Foreign Recalls and Safety Campaigns.* The TREAD Act amends the Vehicle Safety Act to require a vehicle manufacturer, not later than five days after determining (or after receiving notification that the government of a foreign country has determined) to conduct a safety recall or other safety campaign in a foreign country on a motor vehicle, tire, or motor vehicle equipment that is also offered for sale in the United States, to report such determination to the NHTSA.¹¹⁴ The TREAD Act also sets forth similar requirements for reporting possible defects (in a vehicle or equipment) that have resulted in a significant number of serious injuries or fatalities in a foreign country.¹¹⁵ These amendments to the Vehicle Safety Act arose because of criticism leveled against Ford for replacing tires on Explorers in Saudi Arabia and Venezuela without informing NHTSA or Explorer owners in the United States.¹¹⁶

110. See 49 U.S.C. § 30166(f) (1994); 49 C.F.R. § 573.8 (2000).

111. See 49 C.F.R. § 573.8 (2000). These reports are submitted on a monthly basis. *Id.*

112. See H.R. REP. NO. 106-954, at 7 (2000); see also *supra* notes 60-66 and accompanying text.

113. Advanced Notice of Proposed Rulemaking: Record Retention, 66 Fed. Reg. 6532, 6534 (Jan. 22, 2001).

114. See Pub. L. No. 106-414, § 3(a), 114 Stat. 1800 (2000) (to be codified at 49 U.S.C. § 30166).

115. *Id.*

116. See *supra* note 64 and accompanying text.

Some of the impact on the automotive industry as a result of these new reporting requirements was taken away weeks before passage because of the commitment assumed by vehicle manufacturers to “voluntarily report to [NHTSA] safety recalls and other safety campaigns that are conducted in a foreign country on a vehicle or component part that is also offered for sale in the United States.”¹¹⁷ Although not legally binding on the automotive industry, the automobile manufacturers view the letter as binding and market forces would have assured compliance with the terms of the letter without congressional intervention or the need for additional legislation.

Remaining disturbingly vague and ambiguous are key provisions regarding the scope of the new reporting requirements. Specifically, the TREAD Act calls for reporting of a safety recall or other safety campaign in a foreign country “on a motor vehicle or motor vehicle equipment that is identical or *substantially similar* to a motor vehicle or motor vehicle equipment offered for sale in the United States.”¹¹⁸ While “identical” is defined as “the same as,” NHTSA is struggling to define “substantial similarity” with any clarity.¹¹⁹ In the Advanced Notice of Proposed Rulemaking that implements the statutory reporting requirements, NHTSA considered several sources from which to glean guidance for a definition, from listing examples of what NHTSA would consider “substantially similar”¹²⁰ to referencing definitions of “substantially similar” in other vehicle legislation.¹²¹ NHTSA offered manufacturers a rule of thumb that “the simpler an item of equipment is, the more likely it is to be identical or substantially similar in the United States and in foreign markets.” Considering that, even by NHTSA’s own estimation, over 14,000 items of original equipment go into

117. See *supra* note 24 and accompanying text.

118. See TREAD Act § 3(a), 114 Stat. at 1800 (emphasis added).

119. See Advanced Notice of Proposed Rulemaking: Record Retention, 66 Fed. Reg. 6532, 6539 (Jan. 22, 2001).

120. For example, if a vehicle manufactured outside the United States is certified for sale in the United States and the foreign manufacturer produces the same model (i.e., same exterior body shell and family of engines) for sale in other countries, NHTSA would consider the vehicle “substantially similar.” *Id.* at 6540.

121. For example, NHTSA referenced 49 U.S.C. § 30141(a)(1)(A) of the Vehicle Safety Act, which was added by the Imported Vehicle Safety Compliance Act of 1988. *Id.* at 6540.

current passenger cars,¹²² clearly NHTSA will have to define with greater precision the parameters of the reporting obligations, in particular as they relate to foreign manufacturers.

To define these provisions with greater precision, NHTSA should develop a defined process and specific guidelines for identifying “substantially similar” vehicles. NHTSA already accurately recognizes that the increasing globalization of the automotive industry in the past decade is likely in future years to result in the use of common platforms and parts during the manufacturing process, which could raise “complex issues” about the relationship of defects in derivative vehicles and questions about whether vehicles and equipment are “substantially similar.”¹²³

However, the “complex issues” involved in defining “substantially similar” have already been resolved in other contexts. For example, under the “gray market” process, NHTSA develops and publishes a list of vehicles that have been determined to be “substantially similar” to United States certified vehicles for purposes of determining whether such vehicles may be imported into the United States. Such a process could be used in the “early warning” context. Accordingly, each vehicle manufacturer would be required to submit to NHTSA annually, at the beginning of each model year, a list of those vehicles that the manufacturer intends to sell in countries other than the United States and that the manufacturer has determined are “substantially similar” to a vehicle certified for sale in the United States. The following criteria should be used to identify “substantially similar” vehicles: (1) same platform and body shell; (2) same engine family; (3) same engine displacement; and (4) compliance or “substantial compliance” with specified safety standards. NHTSA could review the list and work with the manufacturer to resolve and differences before publishing the list as the final list for the model year. If desired, NHTSA could publish this list for public comment. Such an approach would establish both a defined process and specific guidelines needed for legal certainty.

122. See Advanced Notice of Proposed Rulemaking: Record Retention, 66 Fed. Reg. 6532, 6535 (Jan. 22, 2001).

123. See *id.* at 6540.

The Senate approach to global reporting relied chiefly on the United States entering into international agreements.¹²⁴ Specifically, the Senate version would have authorized and requested the President to initiate negotiations, within sixty days of enactment, for an international agreement governing the recall by manufacturers of motor vehicles or motor vehicle equipment with safety-related defects.¹²⁵ The purpose of such an international agreement would be to foster “global transparency” with regard to recalls of motor vehicles and motor vehicle equipment to promote “consumer safety and to enhance consumer confidence.”¹²⁶ To this end, the bill identified certain provisions that should be incorporated into a negotiated agreement, including provisions that would: (1) encourage the signatory nations to identify a responsible governmental authority for recalls; (2) foster open communication on recalls between the signatories; and (3) establish a website in each nation to convey information about recalls.¹²⁷ Finally, the Senate version also authorized DOT to cooperate with similar agencies in foreign countries “to enhance motor vehicle and traffic safety by exchanging information with those authorities related to motor vehicle and motor vehicle equipment safety defects and noncompliance.”¹²⁸ Although some limited language in the Senate version appeared to protect confidential information, it should be noted that the issue of protecting confidential information abroad, including valuable trade secrets, would have been extremely difficult had the bill actually passed; how NHTSA would have guaranteed that a foreign government protected information deemed “confidential” under U.S. law remained unclear.

b. *Early Warning Requirements.* The TREAD Act amends the Vehicle Safety Act to direct NHTSA to complete

124. See S. 3059, 106th Cong. §§ 2-3 (2000).

125. See *id.* § 3. The Senate version did not, however, call for the President to utilize the World Trade Organization (“WTO”) for a multilateral trade agreement. See *id.* A multilateral trade agreement could offer the advantage of having numerous countries agreeing on common safety standards. For a general discussion of the WTO, see Kevin M. McDonald, *The Unilateral Undermining of Conventional International Trade Law via Section 301*, 7 DETROIT J. INT’L L. & PRAC. 395 (1998).

126. S. 3059, § 3(b).

127. *Id.* § 3(c).

128. See *id.* § 2.

a rulemaking no later than June 30, 2002, to establish early warning reporting requirements for vehicle and vehicle equipment manufacturers to include information on: (1) defects; (2) injury, death, or property claims; (3) customer satisfaction campaigns, consumer advisories, recalls, or other relevant activities; and/or (4) incidents in the United States where a manufacturer receives actual notice alleging its vehicle or equipment caused fatalities or serious injuries or, in a foreign country, where the allegedly defective vehicle or equipment is identical or substantially similar to that sold in the United States.¹²⁹ The final rule must include requirements for manufacturers to report, periodically or upon request by NHTSA, information that the manufacturer has in its possession that would help identify defects in motor vehicle and motor vehicle equipment safety in the United States.¹³⁰ In addition, NHTSA appears at first glance to have received *carte blanche* to also include "additional reporting requirements that [NHTSA] determines are necessary to identify defects related to vehicle and equipment safety in the United States."¹³¹

However, only at first glance may NHTSA require anything it desires. Before requiring any new reporting obligations, NHTSA "must specify in its final rule how it will review and utilize such reports to help identify defects related to motor vehicle safety, what systems and processes it will employ or establish to review and utilize such information, and the manner and form in which manufacturers are required to report."¹³² Even supporters of the bill agreed that NHTSA does not have a "fishing license."¹³³ For example, Congressman Billy Tauzin (D-La.),

129. See Pub. L. No. 106-414, § 3(b), 114 Stat. 1800, 1801-02 (2000) (to be codified at 49 U.S.C. § 30166). This requirement arose out of an *en bloc* amendment offered by Congressman Cliff Stearns (R-Fla.) and passed on a voice vote during the House Subcommittee on Telecommunications, Trade, and Consumer Protection markup. See Steel, *Panel Adds Teeth to TREAD*, *supra* note 78.

130. See TREAD Act § 3(b), 114 Stat. at 1801-02; see also H.R. REP. NO. 106-954, at 13 (2000).

131. See TREAD Act § 3(b), 114 Stat. at 1801-02; cf. S. 3059, § 11.

132. See H.R. REP. NO. 106-954, at 13-14 (2000). Strikingly, no such limiting language appeared either in the Senate version or in the Senate report accompanying the bill. See S. 3059; S. REP. NO. 106-423, at 7 (2000).

133. See Steel, *Panel Adds Teeth to TREAD*, *supra* note 78 (quoting Congressman Cliff Stearns (R-Fla.), who offered the "early warning" amendment to the TREAD Act).

Chairman of the House Subcommittee on Telecommunications, Trade, and Consumer Protection, which authored the bill, went on record saying, “[NHTSA] must show how the information could be stored, how it will be utilized, [and] how it will be processed and interpreted.”¹³⁴

Further limits on NHTSA include the statutory requirements in the TREAD Act that any new reporting obligations (1) not require manufacturers “to maintain or submit records not in the manufacturer’s possession”¹³⁵ and (2) not impose requirements that are “unduly burdensome to a manufacturer . . . taking into account the manufacturer’s cost of complying with such requirements and the Secretary’s ability to use the information sought in a meaningful manner to assist in the identification of defects related to motor vehicle safety.”¹³⁶ The issue of “possession” is of particular interest to automobile manufacturers. Should NHTSA define “possession” to include “constructive possession,” as opposed to “actual possession,” information housed abroad or with the numerous foreign distributors and importers could be deemed to be in the “possession” of the manufacturer and thus reportable to NHTSA, which would run contrary to basic principles of corporate and agency law, thereby defeating a major purpose of establishing separate legal entities to conduct business.

As a final consideration, NHTSA should place early warning requirements in a vehicle context, because most defects and other field concerns are highly application specific. In other words, many defects and other field concerns manifest themselves only under certain conditions stemming from the general operating environment and

134. *Id.*

135. This is in stark contrast to the Senate version, which would have required DOT (i.e., NHTSA) to establish increased reporting and record retention requirements for manufacturers. See S. 3059, § 6. Specifically, the Senate bill mandated that NHTSA require manufacturers to “collect and report to [NHTSA] periodically, or upon request . . . accidents or incidents, or trends or patterns of accidents or incidents, involving motor vehicles [or] motor vehicle equipment, . . . [a]ny 3 or more lawsuits in which the manufacturer is a defendant involving a substantially similar, alleged defect” and all information relating to “recalls . . . [and] warranty or adjustment data received by the manufacturer.” *Id.*

136. See TREAD § 3(b), 114 Stat. at 1801-02; see also H.R. REP. NO. 106-954, at 3.

application. For example, certain high load operating conditions that a pickup truck experiences may cause the transmission fluid temperature to exceed the melting point of materials used in the connector that joins the fluid line to the transmission. If the same fluid line is also used in a passenger car, where the fluid line never sustains the same high load and high temperature operation, then no melting may occur. Forcing vehicle manufacturers to generate automatic reports in such a case is not only non-productive and potentially misleading as an early indicator of safety-related defects, but also runs contrary to guidelines established in the House Committee Report, namely, that some connection to vehicle safety be established before mandating information reporting. Therefore, TREAD reports about original equipment should be made in the context of the vehicle.

In the end, the primary differences between pre-TREAD Act and post-TREAD Act reporting are likely to be in the mechanisms and amount of information reported. Under the TREAD Act, information that otherwise might not have been reported by the manufacturer unless requested by NHTSA will now be generated periodically.

The major challenges facing NHTSA in its final rulemaking pursuant to the early warning mandate will include: (1) obtaining appropriate information in an efficient and useful format; (2) adopting objective requirements that clearly define all of the terms that are being used for the various types of information being considered; and (3) establishing manageable thresholds for reporting of certain information, such as warranty and field reports, to avoid overwhelming its already overstretched capacities.

c. Sale or Lease of Defective or Noncompliant Tire. Under pre-TREAD law, when a manufacturer of a motor vehicle or replacement equipment notified a dealer (including a retailer of motor vehicle equipment) that a new motor vehicle or new item of replacement equipment either does not comply with a safety standard or contains a safety-related defect, then the dealer could not sell or lease the noncompliant or defective vehicle or equipment unless the defect was remedied or the recall order was restrained in a

court order.¹³⁷ However, prior to passage of the TREAD Act, this sale and lease prohibition did not apply to the sale or lease of *used* vehicles or equipment. During the Ford-Firestone congressional hearings, media reports indicated that some persons were selling defective Firestone ATX or Wilderness AT tires that had been returned to dealers for replacement tires under the ongoing safety recall.¹³⁸ Although Congress chose not to explicitly ban such sales, the TREAD Act imposes a new reporting requirement.¹³⁹

Pursuant to this new reporting requirement, the TREAD Act directs NHTSA to issue a final rule within ninety days of enactment (i.e., by February 1, 2001) requiring any person, who knowingly and willfully sells or leases a defective or noncompliant tire with actual knowledge that the tire manufacturer has notified dealers of the defect, to report such sale or lease to NHTSA. The House Commerce Committee intends the phrase "knowingly and willfully" to "represent the common and traditional meaning of those words involving actual knowledge and willful action, as opposed to including any facet of reckless disregard."¹⁴⁰ The reporting obligation drops if the defect or noncompliance is remedied before the sale or lease, or if the recall order is restrained or set aside in a civil action.¹⁴¹

On December 26, 2000, NHTSA issued an interim final rule pursuant to this TREAD requirement.¹⁴² On July 23, 2001, NHTSA issued its final rule (effective August 22, 2001), which did not differ materially from the interim final rule.¹⁴³ NHTSA concluded that "any person who knowingly and willfully sells or leases for use on motor vehicle a defective tire" must report within five working days to NHTSA pursuant to the above reporting obligation.¹⁴⁴

137. See 49 U.S.C. § 30210(i) (1994).

138. See Reporting the Sale or Lease of Defective or Noncompliant Tires, 65 Fed. Reg. 81,409, 81,410 (Dec. 26, 2000) (interim final rule).

139. See TREAD Act § 3(c), 114 Stat. at 1802-03 (to be codified at 49 U.S.C. § 30166).

140. See H.R. REP. NO. 106-954, at 14.

141. See TREAD Act § 3(c), 114 Stat. at 1802-03.

142. See Reporting the Sale or Lease of Defective or Noncompliant Tires, 65 Fed. Reg. 81,409 (Dec. 26, 2000) (to be codified at 49 C.F.R. pt. 573).

143. See Reporting the Sale or Lease of Defective or Noncompliant Tires, 66 Fed. Reg. 38,159 (July 23, 2001) (to be codified at 49 C.F.R. pt. 573).

144. Reporting the Sale or Lease of Defective or Noncompliant Tires, 65 Fed. Reg. at 81,409-10. NHTSA chose five working days so as to be consistent

NHTSA expects this rule to “generally apply to tire retailers, including individuals.”¹⁴⁵ Accordingly, car dealers are not subject to these particular reporting requirements of this rule, except with respect to tires that the car dealers may sell or lease separately from the vehicle.

NHTSA views the principle of *respondeat superior* as applying to this rule, “such that employers, principals, and other persons who are legally accountable for the actions of their employees or agents are required to report any covered sales or leases that their employees or agents cause while acting within the scope of their employment.”¹⁴⁶ For example, if an employee of a tire retailer sells or leases a defective tire or fails to otherwise comply with a tire safety standard, then both the employee and the tire retailer would have to report the sale within five working days to NHTSA, and both would be accountable if the sale was not reported.¹⁴⁷

d. *Insurance Study.* The TREAD Act directs NHTSA within 120 days after enactment (i.e., by March 1, 2001) to study the feasibility and utility of obtaining aggregate information from insurance companies regarding claims made for private passenger automobile accidents.¹⁴⁸ NHTSA has obtained some claims information on an informal basis for a limited number of insurance companies in the past. However, those insurance companies have supplied most of that information in response to specific requests from NHTSA, as opposed to providing the information on a regular basis as an “early warning” of possible safety problems. Indeed, some insurance companies have refused in the past to provide NHTSA with information requested as part of an investigation.

To understand why insurance data is of such interest to NHTSA, one must first appreciate how NHTSA conducts its

with 49 C.F.R. § 573.5, which requires defect and noncompliance reports to be submitted within a five day time frame. Reporting the Sale or Lease of Defective or Noncompliant Tires, 66 Fed. Reg. at 38,160.

145. Reporting the Sale or Lease of Defective or Noncompliant Tires, 65 Fed. Reg. at 81,411.

146. Reporting the Sale or Lease of Defective or Noncompliant Tires, 66 Fed. Reg. at 38,160. However, only one report per covered sale or lease is required, such that either an employee or their employer could file a report pursuant to the new rule. *Id.*

147. *Id.*

148. Pub. L. No. 106-414, § 3(d), 114 Stat. 1800, 1803 (2000).

investigations. Safety-related defects investigations, conducted by NHTSA's Office of Defects Investigation (ODI), are initiated based on the information available to NHTSA. In most cases, ODI opens an investigation based on increased reports indicating an increased trend in incidents. Vehicle owners, consumers, fleet managers, etc. file these types of reports with NHTSA in various ways. Approximately 70% of the investigations opened by ODI are based on these reports.¹⁴⁹ However, to file a report the person experiencing the incident must be aware of NHTSA and its mission, know how to contact NHTSA, and be willing to expend the effort and often headaches necessary to file the report. Despite ODI's public outreach efforts to make the public aware of NHTSA and to encourage consumers to report defects, in particular through NHTSA's website, ODI estimates that only a small portion of the incidents that occur that might be related to a potential safety-related defect are ever reported to NHTSA.¹⁵⁰

However, insurance companies regularly receive reports of crashes or fires involving insured vehicles that, at a minimum, involve property damage. Also, a vehicle owner typically files his or her first report to the insurance company because the owner's first need is to recover costs for the repair or replacement of the vehicle or to cover medical expenses. Based on these facts, Congress (through the TREAD Act) and NHTSA view insurance data as a rich source of data that could provide "more timely identification of emerging trends in crashes or fires that may be caused by safety-related defects in motor vehicles or equipment."¹⁵¹

NHTSA asked the following insurance agencies to respond to questions about how they collect claims data, including electronic data subrogation, unusual claims rates, and data clearing houses: Allstate Insurance Co., Farmers' Insurance Co., GEICO General, Liberty Mutual Insurance Co., The Progressive Corp., State Farm Insurance Co., and United Services Automobile Association (USAA). In addition, a collaborative collection of four insurance associations and the Insurance Institute for Highway

149. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., TREAD ACT SECTION 3(D) INSURANCE STUDY, § III (2001), available at <http://www.nhtsa.dot.gov/cars/problems/studies/insurance/insreport4final.htm> (last visited Oct. 30, 2001).

150. *Id.*

151. *Id.*

Safety's Highway Loss Data Institute responded to NHTSA's published request for comments.

Although an in-depth analysis of NHTSA's *Insurance Study* is beyond the scope of this article, the results can be summarized roughly as follows: (1) Although the information that insurance companies could provide might be useful to NHTSA, most of the insurance companies do not have the capacity and personnel to collect and synthesize the information. Moreover, even if an insurance company maintained such information, data analysis would be required, which involves human judgment, suggesting that the raw data would be of no use to NHTSA. (2) Data provided to clearing houses do not contain causation or subsystem failure information, so the information may not be useful in identifying potential defects. (3) Insurers are concerned about providing NHTSA with personal information that reveals the names of policyholders without their consent that would violate the Privacy Act of 1974. (4) Although insurers could provide data in the form of subrogated claims, i.e., where an insurer has received a payment for a particular claim from a third party, which could indicate trends establishing possible safety-related defects, this data would likely have limited value because (a) they contain information on subrogated claims that have already been paid; (b) there are no data on subrogated claims that have been made but rejected, and (c) they do not identify third parties who paid the claim.

3. *Extension of Time for No-Charge Remedies.* The TREAD Act amends the Vehicle Safety Act to extend the time period during which manufacturers must provide a cost-free remedy to consumers for any safety-related defect or noncompliance.¹⁵² For motor vehicles and replacement equipment *other than tires*, Congress extended the time period from eight to ten years; for tires, Congress extended the time period from three to five years.¹⁵³ The time period is measured from the time of first sale to the time that either the manufacturer or NHTSA determines the existence of such defect or noncompliance.¹⁵⁴

152. See TREAD Act § 4, 114 Stat. at 1803 (to be codified at 49 U.S.C. 30120(g)(1)).

153. *Id.*; see also H.R. REP. NO. 106-954, at 14 (2000).

154. See TREAD Act § 3, 114 Stat. at 1800-03; see also H.R. REP. NO. 106-954, at 14.

The time extension is due at least in part to Jacques Nasser's acquiescence before Congress.¹⁵⁵ How this particular amendment effectuates *any* of the stated purposes of the TREAD Act remains unclear. After all, Congress passed the TREAD Act so as to expedite reporting of defects and noncompliances.¹⁵⁶ Nevertheless, both Houses of Congress saw fit to extend the time periods.¹⁵⁷ The burden on manufacturers can not be accurately measured yet, but having to remedy products a decade old, when replacement parts may no longer be in stock and even produced any more, may prove to be quite costly to the manufacturers and ultimately the consumers, who will then bear the burden through increased prices and shareholders, who will bear the burden through reduced dividend payouts and reduced share value.

4. *Increased Penalties.* Frustration with the perceived malfeasance by top management at Ford and Firestone generated calls for increased penalties; indeed, some "safety advocates" even urged Congress to establish penalties with no ceilings.¹⁵⁸ Congress responded to these calls by increasing both civil and criminal penalties for violations of the Vehicle Safety Act, albeit with ceilings and a "safe harbor" limitation.

a. *Civil and Criminal Penalties.* Based at least in part on Jacques Nasser's acquiescence before Congress,¹⁵⁹ the TREAD Act increases the civil penalties that NHTSA may assess for violations of the Vehicle Safety Act from \$1000 for each violation to \$5000 for each violation.¹⁶⁰ In addition, the civil penalties for a related series of violations was increased from \$800,000 to \$15,000,000.¹⁶¹ The TREAD Act also imposes *new* civil penalties for violating any of

155. See *supra* note 67 and accompanying text.

156. See *supra* notes 101-05 and accompanying text.

157. The Senate bill provided for the same extensions. See S. 3059, 106th Cong. § 6 (2000); see also S. REP. NO. 106-423, at 7 (2000).

158. See *supra* note 66.

159. See *supra* note 67 and accompanying text.

160. Pub. L. No. 106-414, § 5(a), 114 Stat. 1800, 1803-04 (2000) (to be codified at 49 U.S.C. §§ 30165(a) (civil penalties), 30170 (criminal penalties)).

161. *Id.* These requirements came as a result of amendments offered by Congressman W.J. "Billy" Tauzin (D-La.), Chairman of the House Subcommittee on Telecommunications, Trade, and Consumer Protection. See Steel, *Panel Adds Teeth to TREAD*, *supra* note 78.

NHTSA's reporting requirements under 49 U.S.C. § 30166 (including the new early warning reporting requirements),¹⁶² with maximum penalties of \$5000 per violation per day, with a maximum of \$15,000,000 for a related series of daily violations.

In addition to the amended and newly introduced civil penalties, the TREAD Act amends the Vehicle Safety Act to provide for *criminal* liability where a person violated reporting requirements with the intention of misleading NHTSA with respect to safety-related defects in motor vehicles or motor vehicle equipment that have caused death or serious bodily injury.¹⁶³

The new criminal provisions supplement, indeed perhaps overlap, current law. Pursuant to 18 U.S.C. § 1001, it is a crime punishable by up to five years in jail and by fines up to \$250,000 for individuals and \$500,000 for corporations for any person "in any matter within the jurisdiction" of the federal government to "knowingly and willfully"¹⁶⁴ (1) falsify, conceal, cover up by any trick, scheme, or device a material fact; or (2) make any materially false, fictitious, or fraudulent statement or representation; or (3) make or use any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent information.¹⁶⁵

If a person in fact so acts, with the specific intention of misleading NHTSA with respect to motor vehicle or motor vehicle safety-related defects that have caused death or grievous bodily harm to an individual, then that person is—pursuant to the TREAD Act's new criminal provisions—subject to criminal penalties as set forth under Title 18, or imprisonment for not more than fifteen years (ten years more than the maximum under 18 U.S.C. § 1001), or both.¹⁶⁶ Title 18 seems to cover exactly what the new TREAD Act's provisions cover, namely, sanctioning intentional lying to NHTSA. According to NHTSA, the new TREAD Act

162. For a discussion of the new reporting requirements, see *supra* notes 108-45 and accompanying text.

163. See TREAD Act § 5(b), 114 Stat. at 1803-04; see also H.R. REP. NO. 106-954, at 14 (2000).

164. The House Committee noted in its report that it did "not believe that the knowingly and willful requirement of section 1001 of title 18 could or should be construed to include reckless disregard." See H.R. REP. NO. 106-954, at 15.

165. 18 U.S.C. 1001(a) (1994 & Supp. II 1996).

166. See TREAD Act §5(b), 114 Stat. at 1803-04.

criminal provision presupposes a violation of 18 U.S.C. § 1001.¹⁶⁷ Finally, the additional criminal penalties will be charged against a person by the Attorney General only upon request by NHTSA.¹⁶⁸

To summarize, the TREAD Act amends the Vehicle Safety Act to provide for *criminal liability* where (1) a person or corporation (2) violates the new reporting requirements (3) with the intent of misleading NHTSA (4) regarding safety-related defects in motor vehicles or motor vehicle equipment that (5) have caused death or serious bodily injury. All the elements must be met.

b. *Safe Harbor*. The TREAD Act includes a “safe harbor” provision that offers protection from criminal prosecution where a person corrects any improper reports or failures to report within a “reasonable time.”¹⁶⁹ What constitutes a “reasonable time” was left by Congress for NHTSA to define.¹⁷⁰ After first suggesting twenty-one days in an interim final rule as the “reasonable time period,”¹⁷¹ NHTSA decided upon thirty days in the final rule.¹⁷² In first suggesting twenty-one days, NHTSA considered the following factors: (1) NHTSA’s mission under the Vehicle Safety Act “to collect complete and accurate information in order to decide whether to open investigations of potential defects, to conduct those investigations efficiently and expeditiously, and to assure appropriate oversight of ongoing recalls”; (2) “real world” considerations, i.e., to encourage the use of the safe harbor provision, the time period must be long enough for the provision to be usable in

167. See Criminal Penalty Safe Harbor Provision, 66 Fed. Reg. 38,380, 38,382 (July 24, 2001) (to be codified at 49 C.F.R. pt. 578) (“[T]he TREAD Act criminal provision includes the *predicate* violation of 18 U.S.C. 1001, which has a ‘knowingly and willfully’ standard.”) (emphasis added).

168. See TREAD Act § 5(b); see also H.R. REP. NO. 106-954, at 15.

169. See TREAD Act § 5(b).

170. See *id.* (within ninety days of the TREAD Act’s enactment, “the Secretary [NHTSA] shall establish by regulation what constitutes a reasonable time for [the safe harbor provision] and what manner of correction is sufficient for purposes [of the safe harbor]”). Nevertheless, the House Commerce Committee expected NHTSA to define a “reasonable time” as “some point after the person is aware that a defect or noncompliance related to the falsified or concealed information exists and that the defect or noncompliance has caused serious bodily injury.” See H.R. REP. NO. 106-954, at 15.

171. See Criminal Penalty Safe Harbor Provision, 65 Fed. Reg. 81,414 (Dec. 26, 2000) (interim final rule).

172. See Criminal Penalty Safe Harbor Provision, 66 Fed. Reg. at 38,382.

real world situations; and (3) comparable safe harbor rules and policies used by other federal agencies, such as the EPA, IRS, and FAA.¹⁷³

However, comments submitted by the Motor and Equipment Manufacturers Association (MEMA) and the Original Equipment Suppliers Association (OESA) on the twenty-one day period caused NHTSA to reconsider. MEMA and OESA argued that, because of the "wide disparities in size, sophistication and legal support among motor vehicle and vehicle parts manufacturers," a smaller industry company would need more than twenty-one days to consult with legal counsel about the implications of submitting the corrected information and admitting a felony violation.¹⁷⁴ Although not persuaded by MEMA and OESA's reasoning, NHTSA nevertheless extended the time period to thirty calendar days. According to NHTSA, although "[twenty-one] days ordinarily would be a sufficient time for violators to correct their improper actions, [NHTSA was] willing to make reasonable accommodations in light of concerns of small businesses."¹⁷⁵ The thirty day period will run from the date of the improper report to NHTSA or the date of the failure to report to NHTSA.¹⁷⁶ The safe harbor is apparently intended to apply only to the newly added (TREAD § 5(b)) criminal penalties.¹⁷⁷

In addition to correcting the information within the thirty day time period, to qualify for the safe harbor

173. Criminal Penalty Safe Harbor Provision, 65 Fed. Reg. at 81,415.

174. See Criminal Penalty Safe Harbor Provision, 66 Fed. Reg. at 38,382.

175. See *id.*

176. *Id.* In order for the correction to be timely, it must be received by NHTSA on or before the thirtieth calendar day, not merely mailed or otherwise sent before that day. See Criminal Penalty Safe Harbor Provision, 65 Fed. Reg. at 81,416. The correction must: (1) identify with specificity all items of information and documents that were improper or were not provided, and (2) correct all reporting improprieties and/or failures for which the protections of the safe harbor provision are sought, including providing NHTSA with all missing or corrected documents and information. *Id.* For a corporation to properly make a correction, the correction (letter) must be signed by an authorized person (ordinarily the individual officer or employee who submitted the information and/or who should have provided missing information, or someone in the company with authority to make such a submission). *Id.*

177. See CONG. REC. S10273 (daily ed. Oct. 11, 2000) (statement of Sen. McCain) ("In explaining the safe harbor provision under the enhanced penalty section, the intent of the House sponsors is not necessary because it is clear on the face of the language that it would not apply to an underlying violation of existing criminal law.").

protection, the person must have lacked knowledge at the time of the violation that the violation would result in an accident causing death or serious bodily injury.¹⁷⁸

c. *The Senate's Approach.* The Senate version envisaged more draconian criminal sanctions. Although anticipating the same increase in civil penalties as the House bill, the Senate bill would have established criminal penalties for knowingly violating provisions of the Vehicle Safety Act that relate to compliance with the federal motor vehicle safety standards (FMVSSs) and notification of defects where the violation resulted in a death or substantial injury.¹⁷⁹ In particular, the Senate bill would have made it a criminal offense for a manufacturer to knowingly place into the stream of commerce a vehicle that fails to meet any one of the FMVSSs, or if the manufacturer becomes aware of a defect and fails to report and a death or injury results.¹⁸⁰ The bill called for imprisonment of up to five years when the violation resulted in serious bodily injury, and fifteen years for violations causing death.¹⁸¹ Highly problematic with the Senate version, however, was the scope of application, because "manufacturer" was defined to mean, *inter alia*, "a person manufacturing or assembling motor vehicles or motor vehicle equipment."¹⁸² Accordingly, any plant or factory worker who manufactures or assembles either automobiles or automobile parts would have been covered by the criminal provisions. Perhaps attempting to limit this broad scope, the final Senate bill attached liability only to "a director, officer, or agent of a manufacturer." Nonetheless, what exactly an "agent of a manufacturer" would have been defined to include remained unclear. Luckily, the courts will be spared having to interpret these provisions. Finally, the Senate bill envisaged no safe harbor.¹⁸³

178. See Pub. L. No. 106-414, § 5(b), 114 Stat. 1800, 1803-04 (2000).

179. See S. 3059, 106th Cong. § 10(b) (2000).

180. *Id.*

181. *Id.*

182. *Id.*

183. See CONG. REC. S10273 (daily ed. Oct. 11, 2000) (statement of Sen. McCain) ("I am not a supporter of the safe harbor provisions. . . . I believe that they create a loophole rendering the enhanced penalties meaningless, but it is clear that they do not weaken existing law.").

5. *Acceleration of Manufacturer Remedy Program.* The TREAD Act amends the Vehicle Safety Act to empower NHTSA to force a manufacturer to "accelerate" a remedy program if NHTSA finds that a manufacturer's remedy program: (1) will not be completed within a "reasonable time"; (2) that a serious injury is likely to result if the program is not accelerated; and (3) that acceleration of the program can be reasonably achieved by expanding the sources of replacement parts, expanding the number of authorized repair facilities, or both.¹⁸⁴ In addition, Congress has now statutorily mandated that the manufacturer's remedy program "include a plan for reimbursing an owner or purchaser who incurred the cost of the remedy within a reasonable time in advance of the manufacturer's notification [requirements]."¹⁸⁵ This amendment to the Vehicle Safety Act reflects congressional frustration with how Ford and Firestone handled the tire recall, in particular with the (lack of) speed in which Ford and Firestone responded to increased consumer complaints.¹⁸⁶

6. *Plan to Prevent Sale of Replaced Tires.* The TREAD Act amends the Vehicle Safety Act's reporting requirements of recalls involving tires. In particular, the manufacturer of a tire that is the subject of a recall because of a defect or noncompliance must now include in its remedy program a plan

addressing how to prevent, to the extent reasonably within the control of the manufacturer, replaced tires from being resold for installation on a motor vehicle, and how to limit, to the extent reasonable within the control of the manufacturer, the disposal of replaced tires in landfills, particularly through shredding, crum-

184. See Pub. L. No. 106-414, § 6, 114 Stat. 1800, 1804 (2000) (to be codified at 49 U.S.C. § 30120(c)-(d)); see also H.R. REP. NO. 106-954, at 15 (2000). Failure to repair a motor vehicle or replacement equipment adequately not later than sixty days after its presentation is *prima facie* evidence of failure to repair within a "reasonable time." See 49 U.S.C. § 30120(c)(2).

185. See TREAD Act § 6. NHTSA will prescribe regulations determining what exactly constitutes "reasonable time" for purposes of this subsection. *Id.*

186. Considering that the Senate version in general contained more draconian amendments to the Vehicle Safety Act, see, e.g., *supra* notes 179-83 and accompanying text, it is somewhat surprising to note that the Senate version did not contain any similar language on remedy acceleration.

bling, recycling,¹⁸⁷ recovery, and other alternative beneficial non-vehicular uses.

Thus, manufacturers of recalled tires must include in their remedy programs a specific plan for ensuring that any replaced tires are not resold for installation on a motor vehicle.¹⁸⁸

The new disposal plan requirements stopped short, however, of mandating actual environmentally-friendly disposal. A proposed "environmental" amendment that was ultimately withdrawn during House Commerce Committee markup came from Congressman Frank Pallone (D-N.J.).¹⁸⁹ Congressman Pallone's amendment would have required that recalled tires not be disposed in landfills without first being shredded or recycled. However, Congressman Brian Bilbray (R-Cal.) properly noted that changing the tire regulations in the Vehicle Safety Act regarding the waste stream going into public dumps was really an environmental matter, and Congressman Billy Tauzin (R-La.), Chairman of the House Subcommittee on Telecommunications, Trade, and Consumer Protection, agreed that the House Commerce Committee did not have the proper jurisdiction.¹⁹⁰

Notwithstanding the TREAD Act, Ford promises to recycle every tire its dealers collect from Ford's recalls.¹⁹¹ Under a comprehensive recycling plan, Ford has hired Recovery Technologies Group, which uses a cryogenic process to turn the tires into crumb rubber.¹⁹² The crumb rubber is then recycled into asphalt, rubber playground mats, sports arena flooring, and other products.¹⁹³

187. See TREAD Act § 7, 114 Stat. at 1805 (to be codified at 49 U.S.C. § 30120(d)); see also H.R. REP. NO. 106-954, at 15. The Senate version (S. 3059) did not contain any similar requirement(s).

188. See H.R. REP. NO. 106-954 at 15. The manufacturer must also include information about the implementation of such a plan with each quarterly report to NHTSA regarding the progress of any notification or remedy campaigns. See TREAD § 7.

189. See *supra* note 79.

190. This conclusion represents an impressive display of legislative restraint in an otherwise aggressive committee. See Steel, *Commerce Committee Approves TREAD Recall Bill*, *supra* note 79.

191. Joe Truini, *Ford Pledges to Recycle Recalled Firestone Tires*, AUTOMOTIVE NEWS, July 16, 2001, at 18.

192. *Id.*

193. *Id.*

7. *Prohibition on Sales of Recalled Equipment.* The TREAD Act amends the Vehicle Safety Act to now make illegal any sale of any motor vehicle equipment (including a tire) that is the continued subject of a recall program.¹⁹⁴ Such a sale is allowed only if the equipment is not sold in such a condition that it may be used for its original purpose, unless the equipment is made no longer defective or noncompliant, such as by modification, repair, or an injunction of the recall.¹⁹⁵ This amendment responds directly to media reports that surfaced during congressional testimony indicating that some persons were selling defective Firestone ATX or Wilderness AT tires that had been returned to dealers for replacement tires under the ongoing safety recall.¹⁹⁶

8. *Additional Certification Label Requirements.* The Vehicle Safety Act, even before passage of the TREAD Act amendments, requires a manufacturer or distributor of a motor vehicle or motor vehicle equipment to certify to the distributor or dealer at delivery that the vehicle or equipment complies with all applicable federal motor vehicle safety standards.¹⁹⁷ Certification is affected through a label affixed to a vehicle or attached to a container of motor vehicle equipment.¹⁹⁸

The TREAD Act adds yet another requirement to the certification label mandates.¹⁹⁹ Specifically, the TREAD Act requires an intermediate or final stage manufacturer of a motor vehicle that is built in more than one stage to certify that the manufacturer has either assumed responsibility for compliance with the standards or that it has complied with the specifications set forth in the compliance documentation

194. See Pub. L. No. 106-414, § 8, 114 Stat. 1800, 1805 (2000) (to be codified at 49 U.S.C. § 30120). This prohibition arose as a result of an amendment offered by Congressman Gene Green (D-Tex.). See Steel, *supra* note 78. Note that the Senate bill did not contain any similar requirement. See S. 3059, 106th Cong. (2000).

195. See TREAD Act § 8; see also H.R. REP. NO. 106-954, at 15-16 (2000).

196. See *supra* note 138 and accompanying text.

197. See 49 U.S.C. § 30115 (1994).

198. *Id.*

199. See TREAD Act § 9, 114 Stat. at 1805 (to be codified at 49 U.S.C. § 30115); cf. S. 3059, § 4 (requiring testing or engineering analyses that the vehicle or equipment complies with all applicable motor vehicle safety standards by any person who affixes a certification label or tag to a motor vehicle or item of motor vehicle equipment).

provided by the incomplete motor vehicle manufacturer.²⁰⁰ An intermediate or final stage manufacturer that chooses to assume responsibility for compliance with the standard covered by the documentation provided by an incomplete manufacturer must notify the incomplete manufacturer within a reasonable time of affixing the certification label.²⁰¹

9. *Endurance and Resistance Standards for Tires.* The TREAD Act amends the Vehicle Safety Act to require NHTSA to “conduct a rulemaking to revise and update the tire standards published at 49 C.F.R. § 571.109 and 49 C.F.R. § 571.119.”²⁰² NHTSA has until June 1, 2002 to implement new rules.²⁰³ Considering that NHTSA had not updated tire standards for over thirty years, this provision was considered long overdue by almost everyone who testified at the congressional hearings.²⁰⁴ Current tire safety tests measure durability at varying speeds and loads for a fixed time on a rotating drum. Many of the tests pertain to bias ply tires, which automakers rarely fit on vehicles; rather, automakers use radial tires. General Motors is urging NHTSA to use real-world testing, because wheels, suspension systems, loads, road surfaces, and other factors affect tire durability.²⁰⁵ A preliminary outline issued by NHTSA “dramatically increases the number of speed and endurance tests . . . which measure tire performance based on load, speed, temperature, pressure, and duration.”²⁰⁶

10. *Improved Tire Safety Information.* The TREAD Act amends the Vehicle Safety Act to direct NHTSA within thirty days of passage of the Act (i.e., by December 1, 2000) to “initiate a rulemaking proceeding to improve the labeling of tires . . . to assist consumers in identifying tires” that may be the subject of a recall.²⁰⁷ The rulemaking may also include “whatever additional action [NHTSA deems]

200. See TREAD Act § 9; see also H.R. REP. NO. 106-954, at 16.

201. TREAD Act § 9; see also H.R. REP. NO. 106-954, at 16. This new requirement is not subject to the civil penalty provision. See *id.*

202. See TREAD § 10, 114 Stat. at 1805-06. The Senate version (as introduced) contained a similar requirement. See S. 3059, § 13.

203. *Id.*

204. See *supra* notes 64-66 and accompanying text.

205. See Richard Truett, *Test Tires on Road, GM Says*, AUTOMOTIVE NEWS, July 16, 2001, at 3.

206. *Id.*

appropriate to ensure that the public is aware of the importance of observing motor vehicle tire load limits and maintaining proper tire inflation levels for the safe operation of a motor vehicle."²⁰⁸ Such "action may include a requirement that the manufacturer of motor vehicles provide the purchasers of the motor vehicles information on appropriate tire inflation levels and load limits" if NHTSA determines such information is the most efficient means by which to educate consumers.²⁰⁹

On December 1, 2000, NHTSA issued an Advanced Notice of Proposed Rulemaking (ANPRM) implementing this TREAD Act requirement.²¹⁰ In this ANPRM, NHTSA sought responses from the public to questions on matters such as "tire identification number content, readability and location, loading, plies and cord material, tread wear indicators, Uniform Tire Quality Grading Standards, speed ratings, run-flat and extended mobility tires, tire inflation pressure, and dissemination of tire safety information."²¹¹ Although still too early to tell specifically where NHTSA is going with this rule, in particular because NHTSA still has to process the answers submitted in responses to the ANPRM, most likely the final rule will require vehicle manufacturers to provide the purchasers of the motor vehicles information on appropriate tire inflation levels and load limits.²¹²

207. See TREAD Act § 11, 114 Stat. at 1806. The Senate version (as introduced) contained a similar requirement. See S. 3059, § 14. The bill required NHTSA to initiate a rule:

to improve the labeling of tires . . . , to facilitate improved public understanding of load limits and appropriate tire inflation levels. The Secretary shall also take whatever additional action is appropriate to ensure that the public is aware of the importance of observing motor vehicle tire load limits and maintaining proper tire inflation levels to the safe operation of a motor vehicle.

Id.

208. See TREAD Act § 11.

209. *Id.*; see also H.R. REP. NO. 106-954, at 16 (2000). This requirement arose out of an amendment offered by Congressman Bill Luther (D-Minn.), which passed on a voice vote, to require regulations putting tire identification information on the outer sidewalls, where the information is more accessible to consumers. See Steel, *Panel Adds Teeth to TREAD*, *supra* note 78.

210. See Consumer Information Regulations, 65 Fed. Reg. 75,222 (Dec. 1, 2000) (to be codified at 49 C.F.R. pts. 567, 571, 574, and 575).

211. *Id.* at 75,223.

212. *Id.*

11. *Rollover Tests.* The TREAD Act amends the Vehicle Safety Act to require NHTSA within two years of enactment of the Act (i.e., by November 1, 2002) to “develop a dynamic test on rollovers by motor vehicles for the purposes of a consumer information program.”²¹³ Rollover testing is important because “[r]ollovers are the leading type of fatal crashes in light trucks, a category that includes popular [SUVs].”²¹⁴ The TREAD Act also requires NHTSA to “conduct a rulemaking to determine how best to disseminate test results to the public.”²¹⁵ The rollover tests must be designed for new motor vehicles, including passenger cars and multipurpose passenger vehicles, that have a gross vehicle weight rating of 10,000 pounds or less.²¹⁶

The rollover testing is due at least in part to Jacques Nasser’s acquiescence before Congress and runs contrary to the position agreed upon by the automobile industry—at least informally—up until that point. According to NHTSA, the TREAD Act’s rollover testing attempts to address a concern of Consumers Union, namely, that NHTSA’s

213. See TREAD Act § 12, 114 Stat. at 1806 (to be codified at 49 U.S.C. § 30117). This requirement arose out of an amendment offered by Congressman Edward Markey (D-Mass.), ranking Democrat on the House Subcommittee on Telecommunications, Trade, and Consumer Protection. See Steel, *supra* note 78. Note that the Senate bill did not contain any provisions on rollover testing. See S. 3059, 106th Cong. (2000).

214. See Steel, *Commerce Committee Approves TREAD Recall Bill*, *supra* note 79. Nevertheless, the proper role of the federal government in the area of rollovers remains unclear. The National Academy of Sciences recently named thirteen experts to consider the proper role of the federal government in preventing rollovers. See Harry Stoffer, *Makers Prep for Rollover Study*, AUTOMOTIVE NEWS, Apr. 9, 2001, at 8. The current “five-star” safety measurement system used by NHTSA is based not on any test of vehicle handling, but rather solely on measurements of each vehicle’s track width and the height of its center of gravity, which NHTSA calls the “static stability factor.” *Id.*

215. See Steel, *Commerce Committee Approves TREAD Recall Bill*, *supra* note 79. As originally drafted by Congressman Markey, the test results would have been made available to consumers before buying a new car. But Republicans Paul Gillmor (R-Ohio) and Robert Ehrlich (R-Md.) objected to informing consumers about rollover dangers at the “point of sale” because of fear that car dealers would be exposed to new liability. See Steel, *Panel Adds Teeth to TREAD*, *supra* note 78. Rather than address the issue directly, Congressman Markey rewrote the amendment and abdicated the decision to NHTSA. 143 CONG. REC. E1778 (daily ed. Oct. 13, 2000) (statement of Rep. Markey).

216. TREAD Act § 12, 114 Stat. at 1806. The tests will not apply to motor homes. *Id.*; see also H.R. REP. NO. 106-954, at 16 (2000).

proposed use of Static Stability Factor ("SSF"), which is the ratio of one half the track width of a vehicle to the center of gravity height, as part of a consumer information ratings system for rollover resistance of vehicles (under the auspices of NHTSA's New Car Assessment Program ("NCAP")), should be used in conjunction with a dynamic stability test using vehicle maneuvers to better predict the risk of untripped vehicle rollovers.²¹⁷

12. *Tire Pressure Warning.* The TREAD Act amends the Vehicle Safety Act to require NHTSA within one year of enactment of the Act (i.e., by November 1, 2001) to "complete a rulemaking for a regulation [to become effective within two years of such regulation] to require a warning system in new motor vehicles to indicate to the operator when a tire is significantly under inflated."²¹⁸ This requirement arose out of an amendment offered by Congressman Edward J. Markey (D-Mass.) during House Commerce Committee consideration. According to Congressman Markey, a tire pressure warning "could help save lives, help conserve fuel, and prolong the integrity of tires."²¹⁹

When NHTSA first looked at establishing a tire pressure warning in the late 1970s, it decided the technology was too expensive.²²⁰ NHTSA concluded that the retail cost of \$200 (in 1981 dollars) per vehicle for in-vehicle warning devices could not "be justified by the potential benefits, although those benefits might be significant."²²¹ Accordingly, NHTSA terminated the tire pressure rulemaking on August 31, 1981.²²²

However, congressional testimony during the Ford-Firestone hearings from safety experts and automotive executives, including Jacques Nasser, that motorists in the United States needed additional assistance in becoming aware of the tire pressure of their vehicles so that they can

217. See Request for Comments, 66 Fed. Reg. 35,179, 35,180 (July 3, 2001).

218. TREAD Act § 13, 114 Stat. at 1806. Note that the Senate bill did not contain any provisions tire pressure warnings. See S. 3059, 106th Cong. (2000).

219. See 146 CONG. REC. E1778 (daily ed. Oct. 13, 2000) (statement of Rep. Markey).

220. *Id.*

221. Notice of Termination of Rulemaking, 46 Fed. Reg. 43,721 (Aug. 31, 1981).

222. *Id.*

adjust the pressure periodically to insure proper inflation, convinced Congress that the time had come to mandate such warnings.²²³ Accordingly, Congress mandated that NHTSA issue tire warnings on vehicles.

Fulfilling this new requirement, on July 25, 2001, NHTSA proposed a new safety standard requiring the installation of dashboard monitors by 2005 to warn drivers when a tire's pressure becomes low enough to affect driving safety.²²⁴ Specifically, the notice of proposed rulemaking established a new federal motor vehicle safety standard (FMVSS) number 138 that would require all new passenger cars, light trucks, and multipurpose vehicles to have an instrument panel light that flashes when tire pressure is too low.

The new safety standard proposed by NHTSA is a warning telltale that illuminates to inform the driver when a tire on a passenger car, light truck, bus, and multipurpose passenger vehicle (weighing 10,000 pounds or less) is "significantly" under-inflated (defined by NHTSA as between 20-25%). To this end, NHTSA has proposed two alternatives.²²⁵ The first ("Alternative One") would require a warning when the tire pressure in one or more tires—up to four tires—falls to 20% or more below the vehicle manufacturer's recommended cold inflation pressure, or a minimum pressure level specified in the new standard, whichever is higher.²²⁶ The second ("Alternative Two") would require a warning when the tire pressure in one or more tires—up to three tires—falls to 25% or more below the vehicle manufacturer's recommended cold inflation pressure for the vehicle's tires, or minimum pressure level specified in the new standard, whichever is higher.²²⁷

223. *See id.* Surveys indicate that most drivers do not check their tires' inflation pressure frequently. A recent NHTSA study showed that 71% of drivers said they check their tires' air pressure less than once a month. *See* Notice of Proposed Rulemaking, 66 Fed. Reg. 38,982, 38,984 (July 26, 2001). Motorists' failure to maintain proper tire inflation and maintenance also contributed to the Firestone tread separation problems. Under-inflation of tires can result in tire failure, loss of tire traction (making handling more difficult), increased rolling resistance and correspondingly decreased fuel economy. *Id.* at 38,985.

224. *See id.* at 38,982.

225. NHTSA seeks comments by September 6, 2001 from tire pressure monitoring system (TPMS) manufacturers. *Id.*

226. *Id.*

227. *Id.*

The two alternatives differ in several areas. First, Alternative One would cost about \$66.33 per vehicle, whereas Alternative Two would cost about \$30.54 on vehicles already equipped with an antilock braking system (ABS).²²⁸ Second, Alternative One requires manufacturers to install a direct tire pressure monitoring system (TPMS), which has a tire pressure sensor in each tire and directly measures the pressure in a vehicle's tires.²²⁹ Alternative Two would seem to require either the use of direct TPMSs or indirect TPMSs. Indirect TPMSs do not have individual tire sensors; rather, they work in conjunction with a vehicle's ABS to detect and compare differences in the rotational speed of a vehicle's wheels and then estimate the pressure.²³⁰

Both alternatives would require the low tire pressure warning telltale to illuminate within ten minutes of driving after any tire or combination of tires on the vehicle becomes significantly under-inflated as defined by the alternative (20-25%).²³¹ Both alternatives would also require the low tire pressure warning telltale to remain illuminated as long as any of the vehicle's tires remains significantly under-inflated, and the ignition switch is in the "on" ("run") position.²³²

According to NHTSA, between forty-nine to seventy-nine deaths and 6585 to 10,635 injuries could be prevented each year if all vehicles were equipped with tire pressure warning systems.²³³ The monitors could be phased in over several years, beginning with 35% of new vehicles built between November 1, 2003 and 2004, 65% in the second year, and all new vehicles in the third year.

13. *Improving the Safety of Child Restraints.* The TREAD Act amends the Vehicle Safety Act to direct

228. *See id.* at 38,983, 38,987. Adding ABS and the necessary indirect TPMS features would cost about \$240 per vehicle. *Id.* Adding wheel speed sensors and the necessary TPMS features would cost about \$130 per vehicle. *Id.* at 38,987.

229. *Id.*

230. *See id.* Wheel speed correlates to tire pressure because the diameter of a tire decreases slightly as tire pressure decreases. *Id.* at 38,983. Because indirect TPMSs can not detect when all four tires simultaneously lose pressure and become significantly under-inflated, Alternative Two requires warnings about pressure loss in only one to three tires. *Id.* at 38,987.

231. *Id.* at 38,989.

232. *Id.*

233. *Id.* at 38,996.

NHTSA to complete rulemakings within two years of enactment (i.e., by November 1, 2002) to: (1) improve child restraint safety, under which NHTSA must consider whether to mandate from among nine separate safety, equipment, and testing related elements in its final rule and (2) establish a child restraints safety rating consumer information program.²³⁴ The TREAD Act also directs NHTSA within one year of enactment (i.e., by November 1, 2001) to: (1) complete a child booster seat study and (2) develop a five-year strategic plan to reduce by 25% deaths and injuries caused by failure to use correct booster seats among four to eight year old children.²³⁵

Finally, the TREAD Act requires NHTSA within twelve months of enactment (i.e., by November 1, 2001) to "initiate a rulemaking for the purpose of improving the safety of child restraints, including minimizing head injuries from side impact collisions."²³⁶ This requirement, which incorporated a measure sponsored on the Senate side by Senator Peter G. Fitzgerald (R-Ill.), was promoted in the House bill by Congressman John. M. Shimkus (R-Ill.).

234. See Pub. L. No. 106-414, § 14, 114 Stat. 1800, 1806-08 (2000). NHTSA will consider whether to:

(1) require more comprehensive tests of child restraints using an array of crash conditions and an updated test seat assembly; (2) use test dummies that represent a greater range of sizes of children and that incorporate current technologies; (3) require improved protection from head injuries in side- and rear-impact crashes; (4) provide consumer information on the physical compatibility of child restraints and vehicle seats on a model-by-model basis; (5) prescribe clearer and simpler labels and instructions on child restraints; (6) consider restraints for children weighing up to 80 pounds; (7) apply scaled injury criteria performance levels, including neck injury; and (8) include a child restraint in each vehicle crash tested under the New Car Assessment Program.

Improving the Safety of Child Restraints, 66 Fed. Reg. 25,900, 25,900-01 (May 14, 2001).

235. *Id.* (this is a group that safety advocates consider "forgotten children," i.e., children who have outgrown child restraints but are too big to fit safely in adult seat belts). Children using seat belts directly after using child safety seats are 3.5 times more likely to sustain significant injury (4.2 times more likely for those injuries to be head injuries) than those restrained in child safety seats or booster seats. A proper fit consists of the lap belt fitting low over the hips of the child and the shoulder belt crossing the shoulder and sternum, which distributes crash forces to the stronger parts of the body. See *Restraint Experts Meet to Discuss Ways to Bolster Booster Use, NHTSA Plan*, 29 Prod. Safety & Liab. Rep. (BNA) 678 (July 16, 2001).

236. TREAD Act § 14(a), 114 Stat. at 1806. The Senate bill did not contain any provisions on child restraints. See S. 3059, 106th Cong. (2000).

According to Congressman Edward J. Markey (D-Mass.), Member of the House Commerce Committee, child restraints (also know as "child safety seats") are "often marketed for children who are larger and heavier than the anthropomorphic test dummies used by [NHTSA]."²³⁷ The House Commerce Committee relied heavily on a *Consumer Reports* magazine article that found through independent testing that child safety seats tested with a child at the highest weight recommended by the manufacturer of that product failed.²³⁸ The House added this provision dealing specifically "to encourage NHTSA to allow child restraints to be marketed for children at specific weights only if the restraint has been tested at that weight, even if this means adding weights to a dummy during testing."²³⁹ Congressman Markey encourages NHTSA to require testing be carried out at speeds of between 27.9 miles per hour to 30.3 miles per hour.²⁴⁰ The *Consumer Reports* investigation found that tests are regularly conducted at speeds as low as 27.6 miles per hour, even though the federal motor vehicle safety standard requires testing at an impact of thirty miles per hour.²⁴¹

14. *Improving Criteria Used in a Recall.* The TREAD Act amends the Vehicle Safety Act to require NHTSA within thirty days of enactment of the Act (i.e., by December 1, 2000) to "undertake a comprehensive review . . . [and] undertake such steps as may be necessary to update and improve such standards, criteria, procedures, and methods, including data management and analysis" used by NHTSA in determining whether to open a defect or noncompliance investigation.²⁴² Within one year of

237. See 106 CONG. REC. E1816 (daily ed. Oct. 17, 2000) (statement of Rep. Markey).

238. *Id.* (citing CONSUMER REP., Jan. 1999, at 21, available at <http://www.consumerreports.org/main/home.jsp>).

239. *Id.* (statement of Rep. Markey).

240. See *id.*

241. *Id.* "This 3 mile per hour differential means that only 81% as much energy is going into the crash." *Id.* The federal motor vehicle safety standard on child safety seats can be found at 49 C.F.R. § 571.213 (2000).

242. See Pub. L. No. 106-414, § 15, 114 Stat. 1800, 1808 (2000); see also H.R. REP. NO. 106-954, at 17 (2000). This requirement came as a result of an amendment offered by Congresswoman Heather Wilson (R-N.M.). See Michael Steel, *Commerce Panel Reviews TREAD Safety Bill*, NAT'L J. NEWS SERV., Sept. 21, 2000, available at LEXIS, 106 Markup H.R. 5164. The Senate bill did not

enactment (i.e., by November 1, 2001), DOT must submit a report of its "findings and actions" to the House Committee on Commerce and the Senate Committee on Commerce, Science, and Transportation.²⁴³

15. *Follow-up Report.* The TREAD Act requires the NHTSA to report to Congress within one year after enactment (i.e., by November 1, 2001) "on the implementation of the amendments made by [the TREAD Act] and any recommendations for additional amendments for consumer safety."²⁴⁴

16. *Authorization of Appropriations.* Based in part on congressional testimony lamenting an overextended staff with underfunded resources, Congress authorized an additional \$9.1 million for the DOT and NHTSA to carry out the TREAD Act.²⁴⁵ However, Congress specified that the DOT and NHTSA were not to spend this additional funding "for the general administrative expenses."²⁴⁶ President George W. Bush's budget for fiscal year 2002 includes \$419 million for NHTSA's operations, an increase of 5% over 2001.²⁴⁷

contain any similar provisions on mandating a review of recall standards. *See* S. 3059, 106th Cong. (2000).

243. TREAD Act § 15(b).

244. *Id.* § 16. The Senate bill did not contain any similar provision requiring a follow-up report. *See* S. 3059.

245. *See* TREAD Act § 17, 114 Stat. at 1808-09; *see also* H.R. REP. NO. 106-954, at 17. The Senate bill did not authorize any additional spending. *See* S. 3059.

246. *See* TREAD Act § 17.

247. *See \$419 Million Provided for NHTSA in Bush's Fiscal Year 2002 Request*, 24 Prod. Safety & Liab. Rep. (BNA) 374 (Apr. 16, 2001). The amount includes \$196 million for operations and research, including \$74 million for a highway trust fund (\$38 million of which reward states that pass new laws and programs that attack drunk driving) and \$223 million for highway traffic safety grants. *Id.* at 374-75.

C. Summary of H.R. 5164 (P.L. 106-414) and S. 3059

<i>Provision</i>	<i>H.R. 5164</i>	<i>S. 3059</i>	<i>Comments</i>
Reporting Foreign Recalls/ Safety Campaigns	Yes	Yes, albeit indirectly	H.R. 5164: report recalls of "substantially similar vehicles or equipment."
Early Warning Reporting	Yes	Yes	S. 3059 envisaged duty on manufacturer to generate and keep certain records.
International Cooperation/Agreements	No	Yes	S. 3059 envisaged international agreement governing recalls.
Extension of Time for No-Charge Remedies	Yes	Same as H.R. 5164	Vehicle & Equipment = 10 years. Tires = 8 years.
Increased Civil Penalties	Yes	Same as H.R. 5164	\$5000 per violation; \$15,000,000 for series.
Increased Criminal Penalties	Yes, up to 15 years Safe Harbor	5-15 years plus \$10-50K; No Safe Harbor	S. 3059 envisaged wider scope and application.
NHTSA Acceleration of Mfr. Remedy Program	Yes	No	Risk of "serious injury or death" must exist.
Tire Mfr. Plan to Prevent Sale of Recalled Tires	Yes	No	Recall must also include plan for "green" disposal of replaced tires.
Prohibition on Sales of Recalled Equipment	Yes	No	No sale unless defect remedied.
Additional Certification Label Requirements	Yes	Yes	Could affect both intermediate and final stage manufacturers.
Duty on Used Car Dealer to Notify of Non-Remedied Recall	No	Yes	Fear of dealer and small business backlash kept this out of H.R. 5164.
School Bus or Commercial Operators Not to Drive Recalled Vehicle	No	Yes	Operators must have received notice of defect or noncompliance.
Revised Tire Safety Standards	Yes	Yes	Updated 30 year-old standards.
Improved Tire Information	Yes	Yes	Will likely end up on sidewalls of tires.
Rollover Tests	Yes	No	Rollovers lead type of fatal crashes in SUVs.
Tire Pressure Warning	Yes	No	Will be part of on-board display.
Improving Safety of Child Restraints	Yes	No	More accuracy in advertising weight.
Improving Criteria Used in a Recall	Yes	No	DOT to report back to Congress within one year.
Increased Odometer Penalties	No	Yes	Had nothing to do w/ TREAD.
Follow-Up Report	Yes	No	DOT to report back to Congress within one year.
Increased Appropriations	\$9,100,000 increase for FY 2001	No	Not for "general administrative expenses."

CONCLUSION

Thanks in large part to a perceived malfeasance in how top management at Ford and Firestone handled the recall of Firestone tires overseas vis-à-vis NHTSA, Congress put extraordinary pressure on itself to act quickly before heading out to the campaign trail. In only eighteen hours, Congress passed the most wide-sweeping amendments to the (then) thirty-five-year old Vehicle Safety Act, from new worldwide reporting obligations to new dashboard tire pressure monitors. By so doing, Congress affected not only Ford and Firestone but also the entire automotive industry, from motor vehicle manufacturers to equipment suppliers and retail tire outlets.

The TREAD Act should not be viewed as a panacea for the failures of Ford and Firestone. While the TREAD Act sets higher standards for tire performance, tires will continue to fail. Even with all the additional statutory requirements and ensuing regulations, consumers, who remain ultimately responsible for ensuring proper tire inflation, will continue to neglect checking their tires for proper inflation. The TREAD Act stopped short of requiring that consumers actually check their own tires for proper air inflation.

As NHTSA undertakes to complete its numerous rulemakings in fulfillment of the TREAD Act, certain questions must be answered in its follow-up report to Congress, such as: (1) What systems has NHTSA put into place to respond to increased streams of data required to be submitted by manufacturers? (2) How effective are these systems in accurately and reliably identifying trends pointing to safety-related defects? (3) How effective are the revised tire safety standards and improved tire information in preventing customer abuse in caring for tires? (4) What information has proven to not be helpful in identifying trends pointing to safety-related defects? (5) What has the cost been to manufacturers, and ultimately, consumers and shareholders to comply with the TREAD Act's amendments and NHTSA's rulemaking? (6) How effective has NHTSA been in balancing the public's right to know certain information versus the manufacturer's need to protect legitimate trade secrets?

Whether additional congressional intervention will determine what caused the failure of Firestone tires on

Ford Explorers is highly doubtful. Congressman Billy Tauzin, otherwise a conservative Republican, has shown a surprising willingness to launch the federal government, in particular the House Commerce Committee, into a complex arena of engineering issues for which specialized experts at NHTSA, not amateur congressional staffers, were trained to solve. Tauzin's several high-profile hearings generated no specific answers to the complex issues of tread separation and rollovers. It is highly doubtful that additional hearings will generate any specific answers, either.

Although the impact of the TREAD Act on industry will be felt gradually as NHTSA completes its numerous rulemakings, the thrust behind the TREAD Act can be felt already. In announcing the "follow-up" recall of the Firestone Wilderness AT tires in May 2001, Ford said it was guided at least in part by underlying principles of the TREAD Act, in particular principles of early warning reporting. A day before, Firestone severed a ninety-five-year-old business relationship with Ford because Firestone disagreed with Ford's interpretation of safety data. Perhaps Ford and Firestone also disagreed on how to interpret the principles underlying the TREAD Act. Hopefully, this article has helped to clarify at least some of these principles.