

APPENDIX

Auto Innovators Comments On NHTSA's May 2023 Report To Congress On Proposed Improvements To Early Warning Reporting (EWR) Data.

This Appendix will discuss Auto Innovators' comments and concerns in greater detail with many of NHTSA's proposals contained in its Report to Congress. Major sections or aspects of the Report will be referenced.

"Guiding Principles"¹

NHTSA's Report to Congress outlines seven "Guiding Principles" that were considered in its proposals:

1. Early detection.
2. Enhance data analytics.
3. Enhance risk-based process.
4. Broad based coverage.
5. Rigorous review of severe incidents.
6. Modernize data collection.
7. Reduce burden.

However, the Report does not specifically discuss these principles in connection with each proposal, so it was not apparent how they were balanced in a practical utility/burden analysis as will be required if a new or revised proposed rule is issued.

I. The "Principles" Do Not Provide Clear Guidance for the Proposals.

A. The "Principles" Are Extremely Broad and Should Be Revised To Focus On Utility/Effectiveness Of Each Proposal Considering Existing Or New Burdens.

In general, Auto Innovators supports the establishment of clear metrics upon which to base future changes to the EWR program. This helps avoid arbitrary or potentially ineffective revisions to the reporting requirements. However, we are concerned how the principles are being applied and the extent to which certain principles were prioritized more than others. The principles are broad and should be revised to focus solely on ensuring the utility and effectiveness of new or existing information in improving early warning detection, while also seeking to minimize the burdens associated with collecting, processing, and analyzing information from both a manufacturer and an agency process

¹ NHTSA Report To Congress, page 16.

standpoint. A simpler approach would allow the agency to more accurately balance whether proposed changes are likely to result in meaningful improvements.

B. There Is No Analysis Or Articulation Of The Expected Burdens The Proposals Would Create and No Mention Of the Current Rule's Careful Considerations Of The Practical Utility/Burden Foundational Tradeoffs When The Regulations Were Adopted.

Based on our initial assessment of the agency's proposals, the amount of data that would be provided to NHTSA would increase substantially. With this increase comes significant burden associated with reconfiguring existing systems, establishing new internal processes consistent with the new reporting requirement proposals, and ensuring adequate personnel and resources to meet the necessary reporting schedules. This additional burden would exist for the agency, as well as the manufacturers. None of this is discussed in the Report. The only apparent burden reduction is the elimination of aggregate consumer complaint data, but this is not expected to provide any significant overall reduction for a majority of the manufacturers, because most of the aggregate consumer complaint data being submitted under the current regulations are largely done by systems that have already been developed and in use for many years. Conspicuously absent from the Report is any discussion on the agency's current processes for analyzing EWR data or how those could be improved upon or modernized. Rather, the Report's consistent refrain seems to be that more data will lead to improved results.

In addition, several of the proposals implicate issues that were evaluated at length in the original rulemaking process that led to the Final Rule in 2002 and its subsequent amendments. NHTSA's current proposals suggest that they have disregarded some of the critical feedback received during past rulemaking on the burden impact created by certain reporting requirements, despite the agency's explicit prior statements to the contrary. We urge NHTSA to consider its prior evaluations, take these into account in developing its anticipated rulemaking proposal, and explain any analyses it has done to justify why its own previous burden considerations no longer apply. Additional justification should be provided for issues where the agency has reversed its previous decisions on the practical utility and burden associated with certain EWR information.

C. Further Engagement Is Needed With Stakeholders To Better Understand Industry Concerns and Clarify Misconceptions About True Burdens That The Proposals Represent.

As NHTSA considers future rulemaking, we urge further industry-wide discussion in an attempt to ensure a more consensus driven approach that maximizes the utility of reported data while minimizing the reporting burden. In addition to meeting with Auto Innovators early on, we understand that the agency also met individually with some OEMs prior to the development of its current proposals. However, a more robust, open, and inclusive forum is needed to better understand the true effects of the proposals so that an accurate utility/burden analysis can be done as required. Considering past engagement with agency staff in its Trends Analysis Division about possible EWR rule changes, we see that these limited meetings have created some misconceptions and incorrect assumptions about the ease with which OEMs could adapt to new reporting processes or, conversely, the burden associated with the contemplated new processes.

For example, staff indicated they are not asking or expecting manufacturers to change their business processes, and expressed a mistaken belief that the proposals would require new resources only for some initial system set-up. However, as will be discussed in further detail below, the proposals contemplated by the Report would require significant resources, including process changes, for reporting (and updating) information on death, injury, property damage claims, and undefined SELs. Initial resources will be required to amend existing reporting protocols to meet the new proposals. There will be burdens to support the new reporting schema on an on-going basis, which will require new and expanded personnel resources, data processing requirements and IT infrastructure. There will also be large and on-going burdens associated with the manual processing of data that cannot be achieved through updated IT capabilities, including significantly increased legal review.

The need for more open and collaborative discussions is a logical extension of prior government-industry engagements to evaluate the EWR process from a holistic perspective. These discussions focused on evaluating the burden, utility, and effectiveness of existing data sources and highlighted several areas for improvement.

In reviewing the agency proposals, we have overarching concerns that NHTSA has not fully considered or quantified anticipated burden impacts versus practical utility, which will be required in the rulemaking. There appears to be some effort to recognize the burden in the reporting for certain aggregate categories with little overall value. However, with the inclusion of additional reporting requirements for death/injury, property damage claims, field reports, and SELs, we anticipate a significant increase, requiring additional systems and personnel resources. Many of NHTSA's proposals would impose major burdens due to the new processes and systems changes that would have to be implemented, and the increased scope to 15 model years compounds the concerns (although this burden would be significantly relieved if the increased scope to 15 years is phased-in gradually by adding one year at a time to the existing 10-year scope). Based on an initial review of the agency's recommendations, the amount of data that would be provided to NHTSA would significantly increase and would greatly slow down the processes for gathering, classifying and reporting these data.

As will be discussed further below, there are also concerns related to the reporting cadence and the extent to which the increased frequency in some cases may slow manufacturers' ability to analyze the data. TREAD was developed to identify potential defects in an "early warning" manner. Contrast that with many of NHTSA's proposals in its Report which appear to step over that boundary and into the area of extensive defect investigation before a defect has even been identified. Additionally, both the original statute and regulations contemplated that manufacturers would provide data on a one-time basis to NHTSA so that NHTSA could have early warning of incidents that potentially were safety related and that could be subject of further inquiry. The current proposal effectively requires a constant updating of information previously submitted in addition to providing a regular flow of new data.

“General (GN)” Proposals²

In the Report to Congress, the agency proposed three general reporting changes. Among these of major concern to Auto Innovators include a proposal to require safety evaluations (G2).

II. A Requirement to Provide A Safety Evaluation List (SEL) Is Undefined and Requires Objectivity Before It Can Be Adopted for EWR Purposes; In Addition, Proposed Data Reporting Is Overbroad, Burdensome, and Not Consistent With the Intent of Early Warning Reporting.

An examination of the history of NHTSA’s limited use of Safety Evaluation Lists will demonstrate why NHTSA’s proposal (GN2) is not appropriate and cannot be transferable to a broader regulation in a meaningful, objective, and nonburdensome way.

A. There Is No Regulatory Or Understood Industry Definition Of A SEL

There is no regulatory definition of the term “safety evaluation list.” This term, SEL for short, has been used in certain recent Consent Orders issued by NHTSA for companies that were alleged to have violated the National Traffic and Motor Vehicle Safety Act statutory and regulatory provisions. The first Consent Orders using the term SEL were in November 2020 involving both Hyundai and Kia.³ Subsequently, it has only been used in one other Consent Order for Daimler Trucks North America in December 2020.⁴

The SEL provision in each Order suggests that it is tailored to each company’s unique internal processes. For example, in the DTNA Order, paragraph 25 describes the obligation as follows:

DTNA shall submit a Safety Evaluation List ("SEL") to NHTSA's Office of Defects Investigation ("ODI") and Office of Chief Counsel ("NCC") on a monthly basis. The SEL will be compiled in a form, manner, and scope and submitted on a schedule agreed to by NHTSA and DTNA, and shall include potential safety-related defects or noncompliances, including issues related to existing recalls, regardless of whether those issues are being investigated or reviewed by NHTSA. (Emphasis added.)

This provision is the same in the Hyundai and Kia Consent Orders.⁵ It appears, therefore, that NHTSA and the involved companies have had more detailed discussions about the form, manner, and scope of the SEL, which presumably is based on the unique processes that each company uses to investigate potential safety-related defects and noncompliances and to conduct recalls. The matters that may be included on the SEL are not specified, nor is the scope of the coverage, whether focused on potential safety matters

² NHTSA Report To Congress, page 18.

³ See *In re; Hyundai Motor America, Inc.* ([RQ17-004 - Hyundai - Consent Order - Executed \(Certificates\).pdf \(nhtsa.gov\)](#)) and *In re; Kia Motors America, Inc.* ([RQ17-003 - Kia - Consent Order - Executed \(Certificates\).pdf \(nhtsa.gov\)](#)).

⁴ See *In re: Daimler Trucks North America, LLC* ([AQ18-002 Consent Order Fully Executed Original Signatures.pdf \(nhtsa.gov\)](#)).

⁵ See Paragraph 39 in *Hyundai* and Paragraph 35 in *Kia*.

in the U.S. or elsewhere in the globe. The Consent Orders themselves provide little insight into the meaning of SEL.

Not all Consent Orders or other resolutions of NHTSA enforcement proceedings have SEL provisions. The most recent Consent Order, announced January 27, 2023, involving major Motor Vehicle Safety Act violations by Volvo Group NA, contained various obligations beyond a \$130 million civil penalty, including the development of “Safety Data Analytics infrastructure,” but did not include any provisions for, or mention of, an SEL.⁶

Based on the sparse written history of the SEL, it appears that the term was coined as a short-hand reference to the process by which NHTSA and companies subject to the agency’s enforcement process implemented certain provisions of some Consent Orders. While remaining vague in nature and scope, the general meaning of the informal short-hand phrase is likely in reference to the unique internal investigation processes of each vehicle manufacturer.

B. NHTSA Considered But Could Not Find An Objective Way To Include Internal Investigations In Its Early Warning Reporting Regulations.

In 2001, NHTSA published an Advanced Notice of Proposed Rulemaking (ANPRM)⁷ outlining initial thoughts it had on what information it might seek from manufacturers under the authority it had been granted by the TREAD Act which became law in the previous year.⁸ In the ANPRM, the agency said:

Internal investigations. After receiving field reports, consumer complaints, or other data indicating a potential problem in a vehicle component, manufacturers often initiate internal investigations into the issues which may or may not be concluded with the reporting to NHTSA that a safety-related defect has been determined to exist. In some instances, these investigations may parallel a related NHTSA investigation. We are considering whether to require manufacturers to provide us with information regarding such internal investigations pursuant to Section 30166(m)(3)(B). If we do so, we will need to identify precisely what sort of "investigations" are covered, what information we should require about these investigations, and when we would require the information to be submitted. (emphasis added.)⁹

NHTSA clearly recognized that any regulation it adopted would need to be a precise requirement. To provide adequate precision, it would need to be targeted and described objectively so that all in the regulated industry could understand and implement the requirement in the same way. Vague, ambiguous regulations would be unacceptable, leaving open the likelihood of differing interpretations by companies with different investigative processes. Not only would this lead to uneven burdens on companies with differing interpretations, but it also would create unfair enforcement risks for those companies who interpret a requirement in good faith, but later learn that the regulator may reach a different conclusion about compliance.

⁶ See *In re; Volvo Group NA* ([Microsoft Word - FINAL Volvo Group Consent Order.docx \(nhtsa.gov\)](#)).

⁷ 66 Fed. Reg. 6532, January 22, 2001.

⁸ The Transportation Recall Enhancement, Accountability and Documentation Act (Pub. L. 106-414), November 1, 2000.

⁹ 66 Fed. Reg. 6532, 6359, January 22, 2001.

After eleven months of consideration, NHTSA issued a Notice of Proposed Rulemaking (NPRM)¹⁰ with regulatory language for new Early Warning Reporting requirements. A requirement for internal investigations was not included. The agency stated:

We received a number of comments on the questions we asked regarding manufacturers' internal investigations of possible safety-related defects. Manufacturers generally called attention to the semantic difficulties in determining when an investigation had been commenced and the alleged chilling effect a reporting requirement might have on such investigations. For the present, we have decided not to seek this type of information, but we may give further consideration to this issue in future rulemaking relating to early warning reporting.¹¹

Since the adoption of the Final Rule¹² in 2002 without any internal investigation requirement, NHTSA has amended the Part 579 regulations nearly a dozen times between 2003 and 2015, but it has never revisited the internal investigation issue. In fact, when clarifying the definition of a “field report” in making a 2003 modification to that definition, that agency said:

The “field” is any location where a vehicle or equipment beyond the direct control of a manufacturer is located. Thus, we do not view the field as encompassing the company itself or its internal correspondence about a field report after it has been filed. However, our definition of “field report” would cover any further communication from the field in response to inquiries from the company for clarifications, further data, and the like on a field report that has been filed (emphasis added).¹³

Thus, it continued to be clear that NHTSA was not seeking “internal investigations” about field reports, presumably for, among other reasons, the inability to develop a “precise” and objective way to craft a fair regulation that can be reasonably implemented and applied across the spectrum of regulated manufacturers with their unique investigation processes. Instead, for those serious violations that warrant the monitoring of a noncompliant manufacturer’s processes in the specific circumstances of its violations, NHTSA individualizes a Consent Order containing what it has termed SEL.

The challenges of defining the SEL are further exacerbated in the context of the actual practices of manufacturers. There are practical impediments as well, grounded in the diverse ways in which manufacturers investigate potential quality and safety issues.

C. Manufacturers’ Investigative Processes Are Diverse And Dynamic, Making It Virtually Impossible To Write A Regulation Defining A “Safety Evaluation List” In A Precise And Objective Way.

As NHTSA noted in 2001, manufacturers questioned the ability to define when relevant investigations begin and their boundaries. This is because manufacturers receive field information in many ways. The current Early Warning Reporting regulations include specified categories of information: production

¹⁰ 66 *Fed. Reg.* 66190, December 21, 2001.

¹¹ *Id.* at 66210.

¹² 67 *Fed. Reg.* 45822, July 10, 2002.

¹³ 68 *Fed. Reg.* 18136, 18138, April 15, 2003

information, consumer complaints, warranty claims, property damage claims, field reports, and death and injury reports. Different manufacturers have their own systems to monitor and process the various types of information received in these categories.

Some categories of data are “primary” or direct in nature. Field reports, for example, typically are specific observations of a manufacturer’s technically trained representatives who report on vehicle inspections elected to be undertaken by the manufacturer, and often provide a rich source of direct or primary data. Some categories are “secondary,” such as consumer complaints, which contain information from non-technical vehicle owners with limited understanding of complex vehicle systems. Warranty claims information from dealers can be a larger data set of secondary information from which statistical analyses can sometimes be developed as an initial method of investigating quality and potential safety issues.

The ways in which the various data sources are used have typically been developed over many years and are unique to the business processes that a manufacturer finds most suitable for its own business needs. The methods are dynamic and can change with new technologies and investigative tools. When warranted at all, timely investigation is fundamental to the processes used to minimize or eliminate further field concerns, to minimize inconvenience to owners and prospective purchasers, and to help maintain overall brand reputation. Not every field event warrants the preparation of a “field report,” as defined by NHTSA, and different manufacturers have different criteria by which they select events for inspection resulting in “field reports.” Notably, not all events resulting in field inspection are crashes, a fact that may be misunderstood by NHTSA staff.

Moreover, OEM investigation processes are even more complex than NHTSA staff seem to appreciate, because quality and potential safety concerns can arise in contexts other than field experiences. Examples include:

- Manufacturing facilities have their own quality control processes which are monitored extensively during vehicle production. Any perceived deviation can result in an internal investigation not simply to correct production issues, but also to confirm if the deviation is significant enough to impact field quality and safety.
- Supplier quality is also closely monitored, as thousands of components are obtained from others. Component deviations that are discovered in receiving inspections and audits must be evaluated for potential quality and safety impacts.
- Post-assembly inspections at vehicle logistical facilities, ports of entry, and other processing centers can also be a source of actionable information that could prompt a deeper investigation. Even future product development and testing can uncover an issue on a system that might carry over from a previous model presently on the road.

Irrespective of the initiating source, it may not be obvious at first whether a given concern may have a minimal effect on overall vehicle quality or rise to the level of a safety risk or even a safety standard noncompliance. Investigations can be very dynamic and non-linear. What starts out as an apparent small quality concern could eventually be found to have more significant safety implications. Similarly, a safety concern that may be suspected by an employee when a deviation is found can be reviewed by a responsible product engineer who can immediately determine that no risk is involved.

General evaluations about whether a concern has safety relevance are inherently part of any product performance review, whether initiated by a single field report on an in-use vehicle or from manufacturing,

supplier, or post-assembly quality control processes. Each manufacturer has its unique process to receive, review, and analyze data, and these processes are dynamic and can change over time as information is received. A “one-size-fits-all” approach is impractical and infeasible. In 2001, NHTSA recognized the inability to define an objective, one-size-fits-all, regulation that could elicit targeted, non-burdensome information about internal investigations for early warning reporting purposes.

D. The 21 Data Elements In Appendix D To NHTSA’s Report To Congress Relating To SELs Create Enormous And Unnecessary Burdens For An Early Warning Reporting Regulation.

Even if the term SEL can be objectively and precisely defined so that a manufacturer could reasonably understand such a requirement, the list of data elements contemplated for reporting contained in Appendix D to NHTSA’s Report to Congress is extreme. As noted, quality and safety evaluations are typically dynamic and non-sequential. As such, the 21 records and fields listed in Appendix D to be contained on a SEL may be unknown when a report is initially received and an investigation begins, or the information can become out-of-date the moment a SEL report would be made to NHTSA if such a regulation were adopted. Maintaining 21 data elements for one item on a “list” would be a cumbersome and distracting task for those who are, at the same time, investigating the issue, and this could be multiplied by hundreds or thousands depending on how an SEL is defined.

In looking at the 21 fields, when a report is first received from whatever source and an initial quality and safety evaluation is done of that report, most of the data elements identified in Appendix D are not yet known. The scope of vehicles that might be affected, the root cause, the number of vehicles affected, the potential impact of any failure, and most other data fields are the very issues that require investigation. The investigation status elements are items to be developed and can significantly change over time. Some data fields in Appendix D seek investigation closing information, which is obviously not available until the investigation is completed; nor would this provide “early warning” of an issue, which is the presumed public policy purpose of the EWR requirements. The last element, “supplemental materials,” is completely undefined in nature, scope, or level of detail.

The scope of Appendix D is so broad that it goes far beyond the requirements for a Part 573 Report when a manufacturer makes such a determination and submits such reports. The Part 573 requirements fulfill the purposes intended by their regulation. Such safety recall reports have for years well-served the public policy to provide NHTSA and vehicle owners with information about actions a manufacturer intends to take to correct defects or noncompliances in the market, and certain background information on how and when the decision to recall was reached. It is not at all clear what further purpose the additional and detailed information and documents contemplated by Appendix D would serve compared to the extreme burdens involved in making it part of “early warning” requirements.

The scope and breadth of the burdens that Appendix D would impose, if adopted, are enormous. The detail contemplated by Appendix D will require paperwork reporting burdens for the safety and quality engineers who, at the same time, will be trying to promptly investigate issues that can be highly complex and ever changing though the course of an investigation. Placing these new reporting burdens on OEMS will, as a practical matter, require substantial involvement of the engineering investigators themselves, which risks lengthening investigation processes, contrary to the policy goals for early warning reporting, rather than streamlining them to a rapid conclusion as is the desire of all stakeholders.

NHTSA does not define the proposed frequency of SEL reporting in the Report to Congress, and says that the frequency is TBD. Nonetheless, assuming SEL can be objectively defined, which is uncertain at best, it does appear that NHTSA contemplates updating each item on the list consistent with reporting frequency. Many investigations are quite complex, and their resolution is unlikely within an EWR reporting period. And even if an investigation results in a safety recall, manufacturers continue to monitor the implementation and effectiveness of the remedy, so some matters may never truly be “closed” (or not closed for many years). If regular updating of internal investigation information is mandated, as would appear to be the intent, the inevitable result would be an ever-growing SEL, virtually without end in time and scope. This would require extensive follow-up in documentation and the review process for both manufacturers and the agency.

A further discussion of an updating requirement will be provided in Section III.A. below. In particular, NHTSA specifically considered the challenges of updating information in relation to data categories other than SEL (as noted above, internal investigations had been set aside even before the proposed rule stage). The agency decided against any such requirements except in the most limited of situations. There was a recognition that, from a policy standpoint and in the context of obtaining information that was truly “early warning,” the burdens of updating far outweighed any benefits.

“Death or Injury Incidents” (DI) Proposals¹⁴

In the Report to Congress, the agency proposed five recommended changes related to reporting of death or injury incidents. These include adding property damage claims to the reporting requirements for incidents involving death or injury (DI1); establishing a new schema for death, injury, and property damage claim data (DI2); adding requirements for providing copies of all field reports and event data related to incidents involving death, injury, or property damage claims (DI3); amending the reporting frequency for death, injury & property damage claims (DI4); and developing injury severity classification thresholds (DI5).

III. The Proposed Changes To Death and Injury Reporting, Including The Addition Of Property Damage Clams, The Elimination Of Existing Updating Limitations, New and Undefined Reporting Schema and Submission Data, More Frequent Reporting, and Undefined Injury Classification, Create Extraordinary Burdens That Are Not Understood By The Agency, That Have Not Been Assessed Under A Practical Utility/Burden Analysis, and That Represent A Major Departure From the Intent Of The TREAD Act and EWR Regulations.

¹⁴ NHTSA Report to Congress, page 20.

A. Without Any Discussion, NHTSA’s DI Proposals Have Essentially Eliminated The Significant and Burden-Reducing Provisions That Minimize A Manufacturer’s Duty To Update Early Warning Data That Was Carefully Considered In The Adoption Of The Current Rule.

The history of the current Part 579 regulation demonstrates a careful consideration of the utility of EWR data to be submitted by manufacturers and the burdens those submission entail. Beginning with the adoption of the 2002 Final Rule and continuing in later revisions, the burdens associated with the amount and type of data and the duty of a manufacturer to update that information were identified and evaluated. In the Report to Congress, there is no discussion of this careful balancing reflected in the adoption of the current rule or any analysis or rationale for such a significant change that would require updating EWR information.

In adopting the 2002 Rule, NHTSA included regulatory provisions specifying the scope of information to be provided in such a way as to minimize reporting burdens, and later issued an interpretation from the Office of Chief Counsel to further clarify the requirements.

For larger volume manufacturers, the scope of information required to be reported is as follows:

For each incident described in paragraph (b)(1) of this section, the manufacturer shall separately report the make, model, model year, the type, the fuel and/or propulsion system type (as specified in paragraph (a)), and VIN of the vehicle, the incident date, the number of deaths, the number of injuries for incidents occurring in the United States, the State or foreign country where the incident occurred, each system or component of the vehicle that allegedly contributed to the incident, and whether the incident involved a fire or rollover, coded as follows: 01 steering system, 02 suspension system, 03 foundation brake system, 04 automatic brake controls, 05 parking brake, 06 engine and engine cooling system, 07 fuel system, 10 power train, 11 electrical system, 12 exterior lighting, 13 visibility, 14 air bags, 15 seat belts, 16 structure, 17 latch, 18 vehicle speed control, 19 tires, 20 wheels, 22 seats, 23 fire, 24 rollover, 25 electronic stability control system, 26 forward collision avoidance system, 27 lane departure prevention system, 28 backover prevention system, 98 where a system or component not covered by categories 01 through 22 or 25 through 28, is specified in the claim or notice, and 99 where no system or component of the vehicle is specified in the claim or notice. If an incident involves more than one such code, each shall be reported separately in the report with a limit of five codes to be included. If a vehicle manufacturer is unaware of the vehicle type at the time it receives the incident, the manufacturer shall use the abbreviation “UN” in its report to indicate that the vehicle type is unknown. (Emphasis added.)¹⁵

Therefore, for motor vehicles, there are ten items to report, with coding to specify the system or component allegedly defective, if known. NHTSA adopted these requirements, and only these requirements, with purpose and intent. It carefully balanced the safety benefits of receiving such information with the burdens it recognized would accrue from a different reporting process. For example, in discussing the information to be collected about a fatality “claim” when adopting the Final Rule, it addressed a comment by Public Citizen (PC) about the scope of the information that should be submitted:

¹⁵ 49 CFR § 579.21(b)(2)

PC expressed approval of the proposed definition, with the caveat that the agency should also require the submission of basic information concerning lawsuits, such as the date the complaint was filed, the alleged injury, and the eventual disposition of the case. The additional information proposed by PC would not be necessary for early warning screening. The date the complaint was filed and the eventual disposition of the matter are not important to NHTSA for early warning purposes. NHTSA is concerned with the incident and using the basic information about the incident to identify a potential defect trend, not the outcome of litigation, which often occurs years later. (Emphasis added.)¹⁶

NHTSA outlined the basic information requirements in the EWR regulations to identify a potential trend, which would allow the agency to follow-up with manufacturers, as appropriate. This reflects the policy intent of the TREAD Act, and has the policy benefit of minimizing the regulatory burden on manufacturers and the burden on NHTSA to receive and review unneeded information.

The response to Public Citizen was not the only indication of NHTSA's regulatory intent in its limitation on the information it sought in the original EWR rule. There are two other important indications. First, after the adoption of the Final Rule, questions arose concerning how to report matters that are initially rather vague or that may have changed descriptions later. For example, a claim or complaint may be initially described as an acceleration issue but is then later described as a brake failure. This is common in receiving consumer complaints, but also arises when receiving death, injury, or property damage claims. A predecessor association to Auto Innovators sought clarification from NHTSA in a request for an interpretation of the rule by Chief Counsel. In a response that addressed several questions, Chief Counsel wrote:

Reporting Information on the Face of a Claim/Complaint. The Alliance inquired as to whether manufacturers must report complaints/claims based on the information contained on the face of the complaint or claim, rather than reporting on the basis of the manufacturer's review or analysis of the complaint/claim.

The answer is yes. Reporting is to be based on the information in the complaint or claim, rather than on the manufacturer's assessment. Even if the manufacturer disagrees with the assertions of the consumer/claimant after conducting its analysis, the manufacturer must still report the complaint or claim....¹⁷

This is significant, because it clearly indicates NHTSA's intent to require a report on the initial information that a manufacturer receives, as it represents the "early warning" of a potential product defect. Subsequent information received about a claim or complaint was not necessary at this point of reporting. Implicit in this was a recognition that it becomes difficult and burdensome for a manufacturer to have a process to continually track and update each claim or complaint for reporting purposes.

However, consideration of the burdens of updating was more than a mere implication from NHTSA's statements. The Final Rule adopted a specific regulatory provision to address this and limit the manufacturer's duty to update. The discussion by NHTSA about this when the regulation was adopted is as follows:

¹⁶ 67 Fed. Reg. 45822, 45834, July 10, 2002.

¹⁷ Interpretation of March 2003, [ALLIANCE \(nhtsa.gov\)](http://ALLIANCE(nhtsa.gov)).

Several commenters addressed the issue of whether NHTSA will require updating of reports of incidents involving death or injury if there are changed circumstances or if the manufacturer was not aware of certain relevant information at the time the report was initially submitted to us. We are adopting Section 579.28(f) to address this issue. We recognize the burden associated with tracking the progress of claims and litigation to identify a broad range of newly discovered information. However, some information that may not be known to the manufacturer at the time of the initial report is so vital that we need to receive it if it subsequently becomes available. If a manufacturer indicates in its initial report that no system or component has been identified in a claim or notice and later becomes aware that a specified system or component allegedly contributed to the incident, the manufacturer must submit a supplemental report regarding that incident in the report covering the reporting period in which the information was obtained.

In addition, if a vehicle manufacturer is not aware of the VIN, or a tire manufacturer is not aware of the TIN, at the time the incident is originally reported to us, the manufacturer must submit a supplemental report regarding that incident in the report covering the reporting period in which the VIN or TIN is identified. No other updating will be required. For example, if a manufacturer has reported an incident to us involving an injury and the injured person later dies, we will not require a supplemental report. This last scenario was specifically identified by several commenters as possibly creating a significant burden. (Emphasis added.)¹⁸

The Final Rule, therefore, limited the duty to update to only the most “vital” information: (1) the component code, but only when a system or component was not specified as defective in the initial claim and was coded “unknown”, and (2) the VIN (or TIN in the case of a tire). This is consistent with the policy of requiring only “early warning” information.

Subsequently, the updating requirement was limited even further in a 2007 revision to the regulation. In 2006, NHTSA had had several years of experience in receiving early warning information from manufacturers. It decided to reassess several aspects of the original rule, one of which was the updating requirement. A further change was made to limit the reporting obligation to a maximum of four reporting quarters after the initial report. In explaining this in the Final Rule adopting the change, NHTSA said:

In the [2006] NPRM, we proposed to limit the requirement to update to four calendar quarters or less after the submission of the initial report. Based on over two years of EWR data, after one year following the initial EWR report, the likelihood of obtaining missing information on the VINs/TINs and the systems and components that allegedly contributed to the incident diminished substantially. As indicated in the NPRM, under this approach, the EWR program would not be adversely affected by the absence of the information that would no longer be received after one year. The proposed amendment would reduce some of the burden on manufacturers to provide updates. We also stated that manufacturers that identify a missing VIN, TIN or component later than one (1) year after the submission of the initial report may submit an updated report of such incident at their option. In advancing this proposal, we declined to follow the initial recommendation of the Alliance to eliminate entirely the requirement to update after the initial report. As explained in the NPRM, updating information on deaths and injuries is important to

¹⁸ 67 Fed. Reg. 45822, 45862, July 10, 2002

provide complete and accurate information relating to death and injury incidents as an early indicant of a potential safety-related trend. (Emphasis added.)¹⁹

As will be discussed further, the proposals to create a new reporting schema, together with the movement of property damage claims from aggregate reporting to be the same as death and injury reporting, along with a requirement for continual updating, will create a substantial increase in reporting burden that was not discussed anywhere in the Report to Congress.

B. NHTSA Indicates Its Proposal To Treat Property Damage Claims The Same As Death/Injury Claims and Notices More Than Doubles The Data Set, But Does Not Provide Any Consideration Of Utility Or Burden Of This Increase.

The proposal to extend the reporting on incidents involving claims of property damage (DI1) would result in significantly increased burdens in terms of business processes, additional personnel, and supporting IT infrastructure. For calendar years 2018-2022, a total of about 45,000 property damage claims were reported to NHTSA, based on data collected in a survey conducted by Auto Innovators of its members.²⁰ During that same five year period, 1603 death claims/notices and 43964 injury claims/notices were reported.²¹ In the Report to Congress, NHTSA states that adding property damage claims will more than double the data set, and Auto Innovators' survey data confirms NHTSA's conclusion, even with the caveat that property damage claims noted in this comment are likely undercounted for the reason explained in the prior footnote.²² NHTSA makes no mention of this burden increase in its brief discussion of its proposal. Nor is there any discussion of the relative value of property damage claims for early warning purposes compared with death or injury data.

NHTSA's proposal notes that property damage claims include matters "such as non-injury collisions and fire loss claims." But the definitions of both "property damage" and "fire" in Part 579 are much broader.²³ For example, given the broad definition, a property damage claim could include an allegation of an oil leak damaging a driveway. Similarly, a "fire" is defined broadly to include "fire-related phenomena such as smoke and melt" even if no flame is present. Such matters likely would not be useful for a more detailed data submission that a fatality claim might warrant. Non-collision injury claims and fire loss claims are often the subject of field reports, copies of which must be submitted; the agency has not analyzed whether such existing submissions will fulfill the purpose of this proposal without creating the additional significant burdens that will result.

¹⁹ 72 Fed. Reg. 29435, 29440, May 29, 2007.

²⁰ Most AFAT members responded to this survey, but it does not reflect the exact number of total claims received by all manufacturers subject to the EWR rules. Presumably NHTSA has this information available.

²¹ This information was obtained from NHTSA's website ([Early Warning Reporting | NHTSA](#)) and is for all reporting entities, meaning that it is not exactly comparable to the property damage claim data reported above, which reflects information collected from Auto Innovators' members (the total for all reporting entities would obviously be greater). The "data search" feature was used to obtain the data. For death and injury reports, it is the number of "matters" or reports of claims and notices for deaths and injuries; multiple deaths or injuries in a report is counted as one matter. Fourth quarter data from calendar year 2023 have not yet been reported, so that data for last year are incomplete and not included here.

²² It is not possible to obtain the precise number of property damage claim matters from the aggregate data on NHTSA's website, as the numbers are reported by component code and more than one code could apply to a single matter. Footnote 18 in NHTSA's Report to Congress states: "Volumes are expected to more than double from the addition of property damage claims and the increases to the scope of vehicle and equipment reporting ages." Proposal GN1 to increase the data set from 10 to 15 years will also increase the numbers of death, injury, and property damage matters.

²³ 49 CFR § 579.4

The reason property damage claims are currently included in aggregate data is so that potential trends can be tracked and followed up on by the agency, as appropriate. Adding a requirement to provide significant amounts of extra data for these matters will waste resources and make the amount of data to be reviewed that much larger. The agency has not provided sufficient justification for why this proposal would be beneficial in identifying defects compared to the additional burdens created. Any new rules should be clearly written to target reporting of meaningful data in an objective way that eliminates the need for reporting of less relevant data, reducing burden of reporting unnecessary information.

C. The New Schema For Death, Injury, and Property Damage Claim Data Greatly Expands Reporting, The Utility/Burden For Which Has Not Been Explained, and Some Elements Are Not Objectively Defined.

NHTSA proposes to add at least 6 elements to the existing 10 (for death and injury) in reporting of death, injury, and property damage claims (DI2). These include: type of claim or notice (e.g., lawsuit, subrogation claim, customer contact), type of incident (e.g., crash, fire, non-crash injury, or death), injury severity, availability of supporting evidence (e.g., reports, photographs, videos, or event data), status of manufacturer-initiated investigation, and other, but unspecified, “structured and unstructured data fields that would assist NHTSA’s evaluation of the claims.” NHTSA indicated it “will also develop criteria for conditions that require submitting amended responses (e.g., receipt of new evidence).”

No attempt was made to explain why any of these further elements was included other than a conclusory statement that it is “information that could be used to identify or help assess the defect condition(s) alleged in the claim or notice.” For example, it is unclear how the type of claim (lawsuit, subrogation claim, etc.), can be used to assess the existence of a defect. And no corresponding assessment of the utility to NHTSA compared with the burden of creating such reports has been made. For other elements (e.g., “status” of investigation” and “other structured and unstructured data fields”) more specificity or objective definition is not provided.

Without a more detailed understanding of the proposed new elements and any reporting processes, it is difficult to comment meaningfully about them. Nonetheless, we expect that this new schema would require major changes to current processes, data collection, and reporting methods. This will also require much more manual processing and greater involvement of the company’s in-house and outside counsel, who will have to review and provide advice about potentially privileged information. We therefore urge NHTSA to maintain a more simplified reporting structure that prioritizes information most relevant and does not seek to arbitrarily add new data elements that may be of limited utility or have minimal benefits. Each new data element proposed should include corresponding utility/benefit analysis to support its inclusion as part of any future regulation.

As discussed previously the proposed new schema make it crystal clear that NHTSA intends to greatly expand a manufacturer’s duty to update previously submitted information, which under current requirements, is quite narrow and consistent with the policy and intent of obtaining “early warning” of potential defects. To state in the proposal that “receipt of new evidence” is a “criteria for conditions that require submitting amended responses” is merely another way of saying that the current limited and narrow duty to update will no longer exist. Together with (1) the proposed expansion to report on models from 10 to 15 years, (2) the doubling of the data set with the addition of property damage claims, and (3) the expanded schema, the proposals in the Report to Congress, if adopted, represent a fundamental and expansive shift in early warning reporting policy and process. NHTSA has not attempted to quantify the

burdens of such proposals or justify the reasons for such dramatic policy changes from the careful balancing that was done when the current regulations were adopted.

In past discussions, agency staff has indicated they are not asking manufacturers to change their business processes, and only initial system set-up would require new resources. They do not believe resources would be needed to maintain on-going reporting compliance. We believe this represents a complete misunderstanding of the effects these proposals will have, if adopted. This will be explained further in the next section.

D. The Changes Outlined In The Proposed Death Or Injury Incident Section of the Report To Congress, Including A Change From Quarterly To Monthly Reporting, Would Require A Substantial Shift In The Policy and Reporting Of Early Warning Information and Be Enormously Burdensome.

For death, injury, and property damage claims, NHTSA proposes to increase the frequency from quarterly reporting to monthly reporting (DI4). There was no discussion analyzing the practical utility and burdens of such a change, but it would have a significant and compounding effect when considering the updating obligations that are also part of the agency's proposals. A monthly cadence for certain data (e.g., fatality claims and notices) may not be unreasonable if that is the only change to existing requirements, but continual updating of submitted information, as proposed, is unreasonable, impractical, and represents an enormous shift in policy and process. If updating is required, the extreme burden of such a requirement cannot be overstated. Moreover, NHTSA has not explained why changing from a quarterly reporting cadence would be justifiable under the Paperwork Reduction Act implementing regulations, which ordinarily require an agency to refrain from imposing any requirements for respondents to report to the agency more often than quarterly, unless it can show a "substantial need" for the more frequent reporting cadence. See 5 C.F.R. § 1320.5(d)(i2)(i).

The TREAD Act and existing regulations are designed to provide "early warning" to NHTSA so the agency can review and analyze the submitted data and follow-up with manufacturers, as necessary. This provides a fair balancing of utility and burden that has been a required and essential element of the Part 579 requirements. In the case of fatality and injury claims and notices under the current regulations, follow-up requests on selected matters²⁴ are typically made by NHTSA 30 or more days after the end of the quarter in which they are submitted. The Death & Injury Information Request (DIIR) asks for a copy of the initial documents from the claim or notice, a copy of a police accident report, a copy of any EDR reports from the post-incident vehicle, and the company's assessment of the allegations made. At the time of the response, the company provides whatever information is available, but it at times is too early for an investigation to progress to the point where responses to all questions can be made. In some cases, information is not available because a vehicle cannot be inspected, or a police report is not available. The manufacturer provides the available information in its response. That satisfies its obligation, and no further supplementation is required. If NHTSA seeks more information at a later time, it will make another request.

Responding to DIIRs on the matters selected by the agency is already manually intensive, requiring significant technical and legal resources to review and summarize available data. To our knowledge,

²⁴ Footnote 17 in the Report to Congress indicates that it requests information on all fatality reports and 18% of injury reports each quarter.

NHTSA has never sought or obtained OMB approval under the Paperwork Reduction Act for the DIIR process, even though it is posing identical questions to more than 9 respondents each calendar quarter. Although we have not previously objected to the fact that the DIIR process does not have OMB approval, changing this process for death and injury claims, and further addition of property damage claims, would have dramatic and burdensome consequences that should be identified and justified to OMB, particularly since the proposed requirements will not improve NHTSA's ability to receive actual "early warning" of potential defects.

In fact, for some claims, the identified information is not contemporaneous with an incident. A vehicle fatality, for example, is a tragic and emotional event for a family that can take weeks or months for the family to process and from which to begin to recover. It is only then when the family can move forward to more deeply consider how the death might have occurred and whether a product defect or malfunction may have allegedly caused it. If a notice is received earlier, it may be more of a request by the family to determine if something about the product may have contributed to the fatality rather than an affirmative claim for compensation.

In either situation, details are often sparse for a report that is relatively close in time to the incident, and, for later reported incidents, details are not "fresh", and a manufacturer's investigation (if one is initiated at all) will take longer. The latter circumstance can be particularly true if the claim is made in the form of a lawsuit. A lawyer retained by a family will likely undertake a due diligence investigation before submitting a claim or filing a lawsuit (a lawyer may not want to proceed with expensive litigation if an investigation indicates a case has little or no merit). This process may include fact gathering and consultation with technical experts. Generally speaking, state statutes of limitations for bringing a lawsuit can range from one to three years.²⁵ Therefore, for some fatality claims, the first receipt of the claim or notice will be years after the initiating incident; a vehicle could be of a model year several or many years prior to that. The investigation by the manufacturer will also likely take months or even years due to the seriousness of such matters and, in many cases, as a result of the involvement of counsel for both the claimant and the company. Injury and property damage claims in some instances can also be submitted long after the incident occurs and take significant time to investigate.

For these reasons, a reporting process that has a monthly instead of a quarterly reporting cadence will often result in reporting where much of the proposed additional schema will not be available or known. To provide more complete information would require many more months or even years of reporting (for example, after a lawsuit is received, the court-administered "discovery" process can take months or years, which limits a manufacturer's ability to know the specific claim details and make any case assessment difficult). If unlimited updating is required, the practical effect of this would be to have a growing list of claims and notices that would have to be continually monitored to meet reporting requirements. Most elements of the schema would require monitoring and updating to determine every time new or revised information is received. This would involve constant manual review, as it is unlikely that systems could be developed to enable the monitoring and updating to be done on an automated basis.

²⁵ [Wrongful Death Lawsuits: 50-State Survey | Personal Injury Law Center | Justia](#)

To put this in context, here is a table of death, injury, and property damage counts²⁶ from calendar year 2018-2022:²⁷

Report Year	Approximate PD Claims	Death Claims/Notices	Injury Claims/Notices
2018	10400	357	11634
2019	10700	370	11134
2020	9000	292	7831
2021	7700	280	6909
2022	6600	304	6456
TOTALS	Approx. 44400 (yearly average= approx. 8900)	1603 (yearly average=320)	43964 (yearly average=8792)

From 2018 to 2022, the yearly average of claims and notices for deaths from all reporting manufacturers (total 1603) is 320, and the yearly average for injury claims and notices (total 43964) is 8792. Under the current DIIR process, about which NHTSA staff has indicated involves selected requests for information on all death claims/notices and 18% of the injury claims/notices, based on the 5-year average, there would be about 1902 matters (320 death claims/notices + 1582 injury claims/notices [18% of 8792]) requested yearly across the industry. Assuming the proposals in the Report to Congress are adopted, the yearly number of deaths and injuries to be reported on using the new and expanded schema would be 9112 (320 death claims/notices + 8792 injury claims/notices), nearly 5 times the number for which follow-up information is currently sought.

Because reporting is proposed to be monthly rather than quarterly, and because there may no longer be a limit on the duty to update, each of the 9112 matters will have to be reviewed at least 12 times each year for any revised or previously unavailable schema information and to determine if there is sufficient information to provide a “status update”. By contrast, quarterly reporting currently ends with each death/injury claim/notice report (except for VIN, TIN, or “unknown” component code for up to one year). And, DIIR reporting if requested, which is a manual process, also ends with each response.

As discussed above, it is rare for information on death/injury claims/notices to be complete when a claim or notice is first received. For most matters it can take months or years to obtain information. If it is assumed that it takes, on average, two years to obtain the schema information and assess a matter, for any two-year period, on average, there would be 18224 (9112 x 2) death and injury matters being reviewed, updated, and reported on, presumably on a monthly basis. Over the course of the two years, there would be a need to review or “touch” in some manner this group of matters 437,376 times (18224 x 24 months) to update the schema. Due to the nature of the schema, companies would be unlikely to be able to develop software for this largely manual matter processing.

²⁶ As noted above, death and injury counts are taken from the NHTSA website for all reporting manufacturers, but property damage counts reflect input from Auto Innovators’ members and are thus undercounted, since not all members responded to the survey and not all manufacturers subject to EWR reporting are members of Auto Innovators.

²⁷ See footnote 21 above. It is suspected that the counts for 2020, 2021, and perhaps even 2022 were affected by the COVID-19 pandemic, which caused significant changes in driving patterns.

As noted above, Auto Innovators' survey data confirmed NHTSA's estimate that including property damage claims in the type of reporting done for deaths and injuries would more than double the number of claims to be reported under the new schema. This would further greatly increase the burdens and be an exponential increase in burden compared to the aggregate reporting for property damage in the current regulations. For the same period (2018 -2022) approximately 44400 property damage claims were received by NHTSA from Auto Innovator's members alone, an average of 8900 per year. Assuming a two-year period to monitor and obtain the schema for these claims, there would be a total of 17800 (8900 x 2). Adding this to the average yearly death and injury claims/notices above (17800 + 18224= 36024), the number of required monitoring "touches" would be 864,576 (36024 x 24) over two years. Because these property damage numbers are from only a subset of all reporting manufacturers, the overall industry burden would be even greater.

This analysis is based on the existing data set, which is limited to 10 model years of vehicles and 5 years of vehicle equipment. If the data set is expanded to 15 years as proposed (GN1), this would further increase the monitoring and updating burdens by as much as 50%.

There are enormous policy and process implications of NHTSA's Death or injury Incident proposals that will create burdens that are not mentioned in the Report To Congress. Once considered, we believe that a utility/burden analysis will demonstrate that the proposals are inappropriate and require a total reassessment.

E. The Proposal To Require The Submission Of Field Reports and Event Data For All Death, Injury, and Property Damage Claims Is Confusing and Largely Unnecessary.

A further proposal in the agency's Report would require submission of "all field reports and EDR reports related to investigations of crashes, fires, injuries, or deaths." Concerning field reports, this does not make sense, as there are existing requirements for such reports in Part 579.²⁸ It is, therefore, not clear what limitations in current regulations that the agency is attempting to address.

Concerning EDR reports associated with such field reports, if such reports are included as part of the investigation leading to the preparation of a field report, the issue would appear to be one relating to field report attachments. Due to limitations within NHTSA's initial EWR data collection system, and the policy of minimizing burdens on manufacturers to submit attachments, this information is not currently required. If NHTSA decides that it needs such information, it can (and does) request it. If NHTSA desires to revise this policy and practice, a careful evaluation of the benefits of receiving all EDR data and the burdens of adopting a new process should be undertaken. The proposal contains no discussion of a proposed new system to accomplish this in a practical way and how such a system can be designed to minimize burdens. Moreover, the evaluation of this proposal must take into account the fact that EDR data belongs to the vehicle owner, and may not ordinarily be downloaded without consent of the owner, subject to certain exceptions, some of which preclude further sharing of the information in order to protect the privacy of the vehicle owner. NHTSA does not identify the privacy issues associated with EDR data in its Report to Congress, nor does it discuss how it would propose to ensure the protection of that data from disclosure after the agency receives it.

²⁸ See, for example, § 579.21 (d) for manufacturers of 5,000 or more light vehicles annually.

The Report to Congress contains additional proposals about field reports that raise significant concerns for Auto Innovators and will be discussed in Section IV. below.

F. The Proposal To Develop Injury Severity Classification Was Previously Considered and Found To Be Impractical; Any New Requirement Must Overcome Prior Concerns That A Classification System Could Not Be Established That Is Objectively Defined and Practical For Manufacturers To Implement.

NHTSA's Report to Congress proposes the development of injury reporting "thresholds" and "include a field to indicate injury severity" for injury claims and notices (DI5). We have significant concerns regarding the feasibility and practicability of ensuring any definition is objectively defined. We also have concerns regarding the extent to which any definition could be reasonably implemented, as it is not appropriate for the agency to require manufacturers to make a medical judgement on the severity of a given injury, particularly in cases where medical records are either incomplete or any severity determination made by a medical professional does not fully align with any potential NHTSA definition. Without more specific, objectively defined criteria based on an actual medical evaluation, this could lead to potentially large numbers of cases being incorrectly classified.

NHTSA's 2001 Notice of Proposed Rulemaking (NPRM) for the Early Warning Reporting rule contained a lengthy discussion of its consideration for attempting to define "serious injury."²⁹ For example, the agency considered and rejected the use of the Abbreviated Injury Scale (AIS) as too complex and that it required background and training to use. NHTSA considered using a definition from the U.S. Consumer Product Safety Commission, but found that to be susceptible to subjective determinations, leading to inconsistencies and the potential for under-reporting or unwarranted delays. In its explanation of its decision not to define "injury" in the 2002 Final Rule, NHTSA stated:

NHTSA chose not to define "serious injury" because of difficulties in objectively defining "serious injury," concern about manufacturers' delays in reporting the information as a result of the need to assess seriousness in the absence of necessary information, and the need for subjective determinations on the part of the manufacturers. We also wanted to ease manufacturers' fears that their decisions would be second-guessed and reduce the burden on them that continued monitoring to consider newly received information would require. In addition, Honda's suggestion would require manufacturers to hire expert staff to make assessments.

.....

Several manufacturers raised concerns regarding claims related to environmental exposure to toxic substances, such as asbestos. We have addressed those concerns in our discussion of the definition of "claim." (Emphasis added.)³⁰

NHTSA found it too difficult to objectively establish a "threshold" for reporting so as to define what injuries to report. Most manufacturers do not have staff that are trained to review injury information and make judgments about whether it might be considered "serious" by some medically related criteria. NHTSA also recognized the concerns about manufacturers being second-guessed about its judgments, and

²⁹ See 66 Fed. Reg. 66190, 66197, December 21, 2001.

³⁰ 67 Fed. Reg. 45822, 45840, July 10, 2002.

possibly being made subject to enforcement penalties for making the wrong judgment. Even if some thresholds were adopted, most companies would simply report any injury allegation whether or not it could be identified as “serious” by some definition, so as to reduce exposure to enforcement proceedings for incorrect judgments. And the agency reiterated the concern that adopting injury severity classification would create the need for constant monitoring to consider newly received information, which was contrary to the “early warning” policy of the TREAD Act and the regulations subsequently finalized.

As a practical matter, injury allegations are often not specific enough to be able to make judgments about them. For example, a claim might be received where it is alleged that the claimant was taken to the hospital, but the details of any treatment or length of hospital stay are not known. Transportation to a medical facility is not always a reliable indicator of a more severe injury, as such actions may be simply precautionary. Conversely, a crash in which an injury does not appear to have occurred and is not included in a police accident report that may have been prepared, could later be found to have caused a subsequently discovered medical condition that turns out to be serious. It would be extremely burdensome to have to continually monitor potentially hundreds of matters, waiting for the information that might trigger the reporting obligation. Also, a manufacturer’s ability to investigate an injury claim or notice can depend on the nature of the injury and whether counsel is involved. Serious injuries, like fatalities, can take months or years to investigate due to the nature of the legal system.

A corollary concern to the definitional problem is the fact that NHTSA considered, but rejected any attempt to define “injury” at all when it adopted the original rule in 2002. For example, some commenters believed that non-physical injuries should be excluded from reporting obligations. The agency rejected such concern:

We have considered the commenters’ concern that reporting incidents involving non-physical injuries may indicate the existence of a defect trend when there is none. However, the comments have not demonstrated that non-physical injuries would not necessarily be indicative of a defect trend. At a minimum, we believe the reporting of some non-physical injuries may be desirable under the early warning rule.³¹

Given the current rule that reflects NHTSA’s desire to obtain all manner of injury—whether serious, minor, or even non-physical—there is no effort to consider the significant effects its DI proposal will have.

As with many other proposals in its Report, this requires a careful utility/burden analysis, which has not been done. The agency should provide additional justification as to the basis for its changed rationale.

“Field Reports” (FR) Proposals³²

The agency is proposing four recommended changes related to field reports. These include establishing schema for electronic reporting of field report data (FR1); revising the definition and scope of reportable field reports to include dealer field reports (FR2); provide summaries and other information for field

³¹ *Id.*

³² NHTSA Report to Congress page 22.

reports covered by attorney-client privilege or work production exclusion (FR3); and changing the reporting frequency for field reports from quarterly to monthly (FR4).

IV. The Combination of Proposed, Yet-To-Be Specified Schema and Submission Processes, The New Requirements for Dealer Field Reports, The Attempt To Intrude Into Privileged Matters, and The Change To Reporting Frequency Creates Enormous Burdens That Have Not Been Considered.

A. The Establishment Of New, But Undefined Schema For Providing Field Report Data Needs Significant Clarification and Utility/Burden Analyses Before A Proposed Rule Is Issued.

NHTSA's proposal to establish new schema for providing field report information (FR1) in its Report to Congress at first glance would seem to be focused on revising the method of delivery of such data from manufacturers to the agency. Assessing the practical utility of any such changes and the additional burdens that could be created will depend on details which are not provided and must be considered in future rulemaking. However, in considering the proposal as it is, deep concerns are presented.

The agency notes that the current process of receiving copies of non-dealer field reports "requires manual review, coding and dispositioning of every field report" of both "structured" and "unstructured" data. In some unspecified manner, a new submission process through the EWR portal will remedy this. Auto Innovators is concerned that this simply means that the manual processing which NHTSA wishes to avoid will be transferred to the manufacturers themselves without consideration of the extraordinary burdens, IT infrastructure impact, and business process changes that would be required. This could require a full revamping of a manufacturer's field reporting structures and mechanisms and also impact its ability to analyze and use the data. The new schema also suggests that NHTSA wants manufacturers to organize field reports in a new way to make it easier for NHTSA to process. This may reduce burdens for NHTSA, but, overall, would not have enough practical utility to outweigh the reporting burdens on industry.

In discussing potential changes about non-dealer field reports, Trends Analysis Division staff indicated that some proposals were designed to "level" (or standardize) the information received from manufacturers, suggesting that field reports from some manufacturers were "better" than others. Even if this is true, the Part 579 regulations should not be used to make all manufacturers do field reporting in the same way, as this is only one part of a business process that greatly varies by company and is designed to, in some cases for large manufacturers, fit into global processes of analyzing field data from a variety of markets. Field reports may be important data inputs for some manufacturers, but others may use different analytical methods to achieve the same goal. A new regulation should not be used to change such processes and practices to "level" or standardize information for NHTSA.³³

Staff has also indicated that it believes non-dealer field reports can easily be transferred electronically from a manufacturer to NHTSA. The assumption appears to be that field reports are all in an electronic

³³ Several years ago NHTSA circulated a field report "template" for manufacturers to use as a "best practice," but many manufacturers indicated it would not be practical given varying business processes, field organizations, and other factors. This appears to be an attempt to revive that effort.

database and are all downloaded into PDF files for submission under the current requirements, and that the data could simply be transferred directly to NHTSA from the data base.

We do not understand the basis for staff's assumption. The manner of creating and storing field reports differs substantially from company to company. In many companies, field reports are stand-alone reports, often created in Word or other document formats. The information contained in those reports is not taken from a "master" database, nor are the reports transferred by a manufacturer into data fields in some "master" database after the reports are created. Such reports can also use different templates, depending on the nature of the matter being reported. Non-dealer field reports can encompass many issues not in any way related to safety, but rather to potential quality concerns. For example, reports can be generated to provide information on an engine that does not operate smoothly and has drivability concerns that could prove to be caused by the environment in which it is used and have no safety implications at all. An inoperative interior dome light or prematurely worn seat fabric could be the subject of field reports that are submitted without any safety relevance. Even for field reports that report on allegations of a malfunction that resulted in a crash and injury, the reporting forms can be different if the allegation is one of brake failure as opposed to an allegation involving an air bag non-deployment.

Non-dealer field reports can also encompass reports from fleets, which may be in emails or other non-standard formats, copies of which are also required to be provided quarterly. "Product evaluation reports" are also non-dealer field reports that only are required to be counted in the aggregate reporting.³⁴ Transferring individual data elements from disparate forms of field reports into a database solely for the purpose of transferring it to the agency would be extraordinarily burdensome. A new regulation adding such an electronic transfer requirement would be a significant change in a company's business process and be of little use in its analysis of field data.

It is not reasonable for NHTSA to require manufacturers to redesign their IT infrastructure to match any NHTSA developed schema, nor is it practical for each manufacturer to build a mechanism to "translate" internal records so that these can be submitted in a standardized format to the EWR portal. Such an approach would require significant post-processing review for accuracy and consistency, assuming records could even be readily mapped to a reporting schema that remains vague and without definition.

It has also been suggested by agency staff that updating non-dealer field reports could and should be easily done. It is not clear the basis for this assertion or the reason this should be an issue. There are instances in which multiple field reports can be prepared about the same vehicle and the same technical concern by different reporters, but this does not represent an updating process. If multiple reports are prepared, under current requirements, each is submitted under the current rule. The suggestion that some type of updating might be proposed raises the same burden concerns that have been previously discussed in this comment.

The limitations NHTSA is attempting to address in its field report proposals may not be the result of the form in which data are collected, but a problem of receiving too much data that has little or no practical utility. This may, in part, be due to deficiencies in how the current regulation is written, overly broad or

³⁴ In footnote 20 of the Report to Congress, NHTSA has indicated "product evaluation reports" would be excluded from this proposal.

non-objective definitions, and a lack of focus on information that is truly needed to fulfill the original policy goals of the TREAD Act. Rather than proposals that revise and expand practices for the submission of the same data and that will simply increase burdens, the agency should be more selective in what data will best balance the safety benefits of receiving it and the burdens associated with submitting it. The proposal to increase overall data collection from 10 to 15 years (GN1) reinforces the need to engage in such an analysis.

B. The Proposal To Require Dealer Field Reports To Be Treated The Same As Non-dealer Field Reports Further Exacerbates The Concerns and Burdens On Manufacturers Without Any Substantive Discussion Or Analysis Of Its Effects.

In addition to proposing new reporting schema and reporting processes for copies of non-dealer field reports, the agency proposes an enormous change to require literally millions of copies of dealer field reports rather than just providing aggregate counts. The Report to Congress justifies this on the basis that some companies have business models that do not produce reportable non-dealer field reports, thus creating a reporting “gap” for those companies. Trends Analysis Division staff confirmed that the requirement to submit copies of dealer field reports would be part of the “leveling” or standardizing process previously discussed.

This justification make no sense for several reasons. First, it essentially “penalizes” companies that prepare and submit non-dealer field reports, without the “gaps” that concern staff, forcing them to revise their business processes. It is also contrary to discussions with staff who insist that these proposals are not intended to require companies to change business processes. As long as companies have reasonable processes without obtaining or relying on field reports to investigate and remedy safety-related defects, the agency should not force it to use other methods, particularly in a way that causes those companies that utilize field reports to make significant changes to fill a perceived “gap” that does not exist.

NHTSA has long recognized the differences between dealer reports and non-dealer reports. This difference justified the submission of non-dealer reports and the requirement to provide only counts of dealer field reports. In the 2002 Final Rule establishing Part 579, NHTSA said:

The NPRM would not require copies of reports that are prepared by dealers or their employees. This reflects an effort to focus on what are now, in general, the more technically rich documents (i.e., the manufacturer-as opposed to dealer-generated documents) and to reduce burdens. (Emphasis added.)³⁵

To now propose a major change to require the submission of millions of dealer reports known to be of lesser value than the “technically rich” manufacturer reports simply to fill a “gap” that may exist for an unspecified number of companies demonstrates the inadequate utility/burden analysis for the proposal.

The same issues described in discussing non-dealer field reports would apply to dealer field reports, although the burdens would be significantly greater. Auto Innovators surveyed its members to compare

³⁵ 67 Fed. Reg. 45822, 45855, July 10, 2002.

the number of non-dealer field report copies³⁶ submitted in calendar years 2018-2022 to the counts of dealer field reports in the aggregate reporting. The table below shows the results from participating members:

Report Year	Dealer Field Reports	Non-dealer field reports (submitted in hard copies)
2018	1,551,571	64,279
2019	1,558,683	65,446
2020	1,383,312	79,567
2021	1,402,129	84,367
2022	1,320,540	78,547
GRAND TOTAL (5 YEARS)	7,216,235	372,206
ANNUAL AVERAGE	1,443,247	74,441

The total number of such reports will be greater for all reporting manufacturers. As can be seen, the number of such dealer reports for our members is nearly 20 times greater than the number of non-dealer field reports. Submitting copies of dealer field reports in the same manner and using the same schema will tremendously expand the burdens that would result from the adoption of the agency's proposal.

The burdens associated with dealer field reports may be even greater than these numbers suggest, however. First, most dealer field reports arise in the context of repair and service. The component code categories through which they are reported are quite broad, with up to 26 categories used, including codes such as 06 "engine and engine cooling system" and 11 "electrical system," just to name a few. Due to the breadth of the coding, most dealer field reports relate to quality rather than potential safety concerns.

Further, dealer field reports can come in a variety of forms. Some manufacturers have more formal report forms that are used by dealers. Many have processes to record contacts from dealers who reach out to technical representatives about real-time issues being encountered by technicians who are repairing and servicing an owner's vehicle. Email or other means could also be a way for a dealer to provide a field report.

If NHTSA is considering an expanded standardized schema and an electronic submission system for such disparate forms of dealer field reports, most of which are not safety relevant, it would be incorrect to assume that systems already exist that would allow common data elements from such reports to be easily aggregated and transferred in a yet-to-be-defined manner to the EWR portal. The value of doing so for information that is more quality than safety focused is highly questionable and would likely require resources to be diverted to useless reporting instead of using them for potential safety-related investigations. It will be essential for the agency to demonstrate that this major data expansion will truly be practical and minimize burdens rather than just be a way to fill "gaps" in data with information that is not "technically rich" in content.

³⁶ "Product evaluation report" counts are excluded.

C. Proposing Requirements For Matters That Are Legally Privileged Is Not Appropriate and Simply Creates Undue and Unnecessary Burdens.

NHTSA has long recognized that the attorney-client privilege and work product protection are fundamental to U.S. law and relevant to administrative regulations. These protections are equally available to the agency as well as to those it is responsible for regulating. It is inappropriate to attempt to circumvent such legal protections by seeking identification of privileged documents or requiring summaries of privileged information.

The exclusion of documents protected by the attorney-client privilege and the work product doctrine was specifically and carefully considered during the rulemaking process leading to the TREAD Act's implementing regulations. The agency said when issuing the 2002 Final Rule:

Nevertheless, although we do not believe that the proposed definition would cause the range of problems asserted by Ford and GM, we are concerned about inhibiting the manufacturers' ability to consult with outside counsel. Therefore, we are specifying in the final rule that a field report "does not include a document contained in a litigation file that was created after the date of the filing of a civil complaint and relates to the vehicle, component, or system at issue in the litigation." (Emphasis added.)³⁷

This was broadened and reaffirmed in a subsequent Final Rule granting a Petition for Reconsideration, adopting the definition of field report which "does not include a document covered by the attorney-client privilege or the work product exclusion."³⁸

As a result of that process, NHTSA agreed that, by definition, field reports should exclude any documents covered by attorney-client privilege or work product doctrine. There is no reason to revisit those considerations, and the current definition should continue to be reflected in any future rulemaking. Even the fact of the existence of certain privileged reports is likely to be protected information under state and federal evidence rules, and mandatory disclosure of those facts could compromise the confidentiality and potentially be interpreted as a waiver of any privilege claim. In addition, the identification of privileged reports in government submissions could prejudice manufacturers in product liability and class action litigation. Opponents in litigation will soon learn that potentially relevant field reports are catalogued through EWR submissions, and that catalogue could be obtained and thus leveraged through discovery in civil litigation.

If such a proposal were to be adopted, new processes will be needed for identification of privileged reports (not currently required to be submitted), which we anticipate being both manually and legally time intensive. The preparation of privilege logs to identify that there are privileged documents, which NHTSA would not have access to in any event, simply creates additional burden without any benefit. The overall burden can also be significantly affected by any duty to update changes that might be made as discussed at length above.

³⁷ 67 Fed. Reg. 45822, 45855, July 10, 2002

³⁸ 68 Fed. Reg. 18136, 18138, April 15, 2003

D. The Effect of The Proposal To Move From Quarterly To Monthly Reporting Must Be Further Assessed In Combination With Other Changes For Utility and Burdens Before It Is Be Adopted.

In general, we anticipate the proposal to accelerate reporting frequency (FR4) will add a significant burden in addition to the changes to the field reporting requirements outlined above. Significant process changes will be needed to accommodate a shorter reporting period, with the time taken to process the data and perform any necessary quality checks will essentially be tripled. Many, if not the majority, of field reports are due to quality or customer satisfaction issues that are unrelated to safety. Rather than indiscriminately increasing both the volume and frequency of reporting, the agency should ensure the number of data elements to be reported is sufficiently streamlined to minimize the net burden created, if this more aggressive reporting schedule is adopted.

“Manufacturer Communications” Proposals³⁹

The agency is proposing several changes related to manufacturer communications. Those of interest to Auto Innovators include requirements for revised schema when submitting communications (MC2); specifying requirements for reporting over-the-air updates (MC3); and amending the required reporting frequency (MC4).

V. The Scope and Detail of Changes In Submission and Schema of Manufacturer Communications Must Be Provided To Enable Evaluation of The Objectivity of Definitions and An Appropriate Analysis of Practical Utility and Burden That Is Required When Revising Regulations.

The proposal to revise reporting schema when submitting communications (MC2) adds an unnecessary burden to the process, as all relevant information is already being provided under the existing rules (i.e., the actual manufacturer communication). New schema remain unclear and undefined, and the Report provides no analysis as to whether this will provide any substantive benefit. If NHTSA needs manufacturer communications to be classified into more discrete categories, this function should be performed by the agency to ensure uniformity and more consistent coding, rather than imposing additional data requirements on manufacturers, who have no need for such classifications. The utility and burdens of any new schema requires further analysis if revisions to the existing rule are to be made.

Concerning the over-the-air (OTA) updates proposal (MC3), it will be essential to more fully define the universe of OTAs that the agency contemplates. Criteria must be understandable and objective; without clarity in identifying the type of OTA communications that need to be submitted, together with undefined new schema, additional burdens could be substantial. We urge NHTSA to focus on OTAs that involve vehicle systems and issues that are safety related. Reporting OTAs on non-safety related systems or issues has no benefit for EWR, given the potential burdens associated with potentially dozens of routine updates with no safety relevance that are performed now and that will potentially increase in the future as vehicle systems and capabilities continue to evolve.

³⁹ NHTSA Report to Congress page 27.

The proposal for bi-weekly instead of monthly reporting (MC4) provided no discussion of the utility of such a change or the burdens it may create, especially in light of the additional and undefined proposals relating to new submission schema and OTAs.

“Aggregate Data” (AG) Proposals⁴⁰

The agency is proposing changes related to aggregate data. These include revising the definition of reportable warranty claims to exclude claims for completion of service campaigns (AG1) and revising component codes to cover electric vehicle energy storage systems and address concerns with current components that are too broad (AG2).

VI. The Scope and Detail of Changes In Submission and Coding of Aggregate Warranty and Other EWR Data Must Also Be Provided To Enable Evaluation Of The Objectivity of Definitions and An Appropriate Analysis of Practical Utility and Burden That Is Required When Revising Regulations.

The agency’s proposal to remove service campaign claims from aggregate warranty claim reporting (AG1) will require systems changes but is not otherwise a major concern. However, revising reporting codes (AG2) must consider how those changes may affect not only warranty claim aggregate data, but also the coding and submission of other EWR data categories.

NHTSA has not provided any details on what additional codes might be proposed or how it proposes to modify coding that it believes is too broad. The agency must provide specific information on the scope and need for additional component codes and analyze the expected utility of the data against the burdens of any changes. Any new codes must be objectively defined so that they can be easily used by manufacturers.

We have no further comments at this time concerning other proposals in this section of the Report.

Future Work⁴¹

NHTSA describes several areas that it believes should be the subject of continued study “for future enhancements to the scope, scale, content, and modernization of NHTSA’s EWR data collection.” Auto Innovators has no specific comments at this time concerning those areas, but some of them appear to be studies that must be done first in connection with the 24 specific proposals in the Report to assess whether they are, in fact, “improvements” when considering their practical utility against the burdens that may be associated with them.

⁴⁰ NHTSA Report to Congress page 29.

⁴¹ NHTSA Report to Congress page 31.

For example, evaluation of the revisions and data sources in the Report must be appropriately assessed and justified before assuming they will yield benefits and be a guide for evaluating future ones. Rigorous utility and burden analysis of the current proposals may eliminate the need for future ones. As outlined in these comments, major changes to existing regulations can have enormous impacts that must be understood before proceeding with them. Considering future changes before current proposals are sufficiently vetted simply detracts from the shared goal of maximizing safety for the driving public. And, considering that any new rules in this area will likely require substantial investment in IT infrastructure and other resources, Auto Innovators urges NHTSA to decide at one time what changes it wishes to make to this program, and not stagger its proposals (and new rules) over a period of years.