Consumer Federation of America

Written Testimony of
Joan Claybrook, President, Public Citizen,
Laura MacCleery, Deputy Director, Auto Safety Group, Public Citizen,
and
Rachel Weintraub, Director of Product Safety & Senior Counsel,
Consumer Federation of America,
before the
Senate Judiciary Committee, United States Congress,
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Thank you for providing this opportunity to submit testimony to the written record for the hearing on March 10, 2006, on the criminalization of acts which endanger human life due to identified hazards in products. Both Public Citizen and the Consumer Federation of America strongly support the addition of criminal penalties for these acts, which claim human life and cause suffering equal to acts long viewed as criminal under law.

We would like to take this opportunity to address the objections to such a provision that were raised at the hearing and to supplement the record on key areas of interest to our organizations. We believe that there are strong affirmative arguments for criminal penalties and that these are a much-needed compliment to existing protections in regulation and product liability common law. We also support a Sunshine in Litigation Act for federal courts, to reduce the use of settlement orders that require concealment of dangerous defects, on the condition that the Act not override laws currently available in some state courts to accomplish a similar result.

Our testimony raises the following points:

1. The committee should add a "savings clause" to any proposed legislation on this subject to ensure that there is no preemptive effect from the bill on remedies available under state law;
2. As a general matter, criminal penalty provisions are both morally warranted and economically efficient. Furthermore, they would enhance rather than hamper manufacturing competitiveness;
3. The TREAD Act criminal provision on false statements falls far short of the mark and is in fact no substitute for a general criminal provision on product liability;

4. The evolution of safety concerns about products makes a criminal penalty for knowing introduction of defective or hazardous products a logical next meaningful step in safeguards to protect society from needless harm;
5. Regulatory safeguards, such as those available from the Consumer Product Safety Commission (CPSC) and the National Highway Traffic Safety Administration (NHTSA) are often undermined and are insufficient to protect consumers.

As a threshold issue, some commentators raised objections to the notion of a criminal penalty provision on the grounds that it was "vague" or "subjective," rather than "objective." We agree that elements of a crime should be as specific as possible, although we note that the inconsistency of verdicts under a jury system for murder, for example, has never been cited as a cause to abandon its prosecution.

In development of the most enforceable and clear statute, however, we would recommend that the committee consider enactment of a "duty to correct" statute. This would provide that criminal penalties attach when a person receives information that serious bodily injury or death may occur as a result of a product introduced into interstate commerce and fails to take corrective action, including warning consumers and regulators and recalling the product. Possible language for such a crime could be as follows:

> Any person who learns that a defect in a product introduced into interstate commerce can cause death or serious bodily injury to a person because of that defect and who knowingly or recklessly fails to act to correct the harm by warning both the public and federal regulators in a manner likely to inform virtually all persons at risk from that harm and taking all feasible steps to reduce the risk of harm, including but not limited to, a product recall or other remediation, shall be fined under this title, imprisoned for a term of up to 15 years, or both.

Many, if not most, of the cases considered by the committee contained these elements. In those cases, not only did company executives learn of the potential for serious or deadly harm; most reprehensibly, even after such information was available, they failed to warn the public or take steps to prevent the harm from occurring.

We also observe that efforts should be made to clearly define "defect" for the purposes of the statute to minimize confusion, and express our confidence that a clear definition of terms will avoid much of the difficulty described in detail by hearing witnesses opposed to enactment of criminal penalties. The definition of "defect" should specify that it is capable of repetition and that a defect may exist in a product regardless of its recognition by federal regulation or its conformance to existing standards for product safety.

The argument that federal regulators' failure to determine whether a defect exists was crucial, for example, in the exoneration of executives in the notorious case involving the Ford Pinto. While evidence that a product conforms to applicable safety standards may certainly be relevant to a jury's determination of whether a defect exists, it should not be viewed as determinative. Federal regulators have many competing demands upon

their time, and federal standards may be utterly obsolete. Many minimum vehicle safety standards have not been updated since they were first issued over thirty years ago, and mere compliance with those standards does little to assure consumers that a product is not defective. Compliance standards are the minimum safety assurances that allow a product to be sold, and are no substitute for the informed engineering judgment of company executives regarding whether a product is actually safe.

Such a provision would reward prompt action to alert the public of hazards in products while punishing to those who evince a clear disregard for human life by knowingly or recklessly covering up known hazards. It would be likely that legislation embodying this language would drastically reduce the number of "cover-ups" of defective products and dramatically alter the calculus of executives who, like those at Guidant, replace the informed consent of the public with their own judgments about risk and the likely harm to the economic interests of the corporation.

The Bill Should Include a Clear Statement that It Does Not Preempt State Law

As members of the hearing panel observed, the legislation should include an unambiguous statement that the bill does not undermine or threaten to undermine remedies available to consumers under state tort law. There would be little sense in enhancing federal enforcement in one area of the law at the cost of further limitations on state civil justice access for individuals who have been personally harmed.

A Criminal Penalty Is Both Morally Warranted and Economically Efficient

Criminal sanctions are an essential code of conduct for desired action within a society and both express and enact a shared set of moral values. It is difficult, if not impossible, to derive any principle which would distinguish between actions which are normally described as second-degree murder and act of an executive who is made aware that a product may cause death to an unidentified individual and who chooses not to disclose the risks or prevent the death. Indeed, criminal law has historically been deemed an appropriate sanction to address harm to individuals – even individuals unidentified at the time of the crime, such as when a person fires indiscriminately into a crowd.

Criminal penalties are distinct from civil penalties not only in their seriousness for individuals but because they are not compensatory in function and are intended instead to make clear that some actions are reprehensible to society. Enactment of such a penalty provision would also address the class bias which pervades our categories and recognition of criminal acts, in which crime which occurs in suites is treated as less significant than crime which occurs on the street.

Moreover, a criminal sanction would provide a uniquely strong deterrent that cannot easily be accommodated into corporate balance sheets that monetize the risk imposed on others. History shows that fines and monetary penalty for corporations or executives will merely be input for cost-benefit calculations. Yet harm to individuals is personal, physical, visceral and ongoing.

Criminal sanctions would enhance justice by addressing distributional inequities between risk decision makers and those unable to give informed consent to risks imposed upon them by others. As one observer has noted, "[t]here is an ethical difference between falling and being pushed — even if the risks and benefits are the same."[1] To the extent that the public's unwitting and unwilling exposure to unreasonably risky products is a function of an information disparity between the industry and consumers, a duty to correct provision may help restore public autonomy and the public's right to informed consent.

While the moral argument is strong, criminal penalties, as a supplement to the civil liability system, are also economically efficient and empirically justified. First, they would yield economic efficiencies by encouraging harm prevention**.** The incentive to prevent harm should be most acute for those with the knowledge and authority to prevent it because it is far cheaper and more moral to prevent harm than to remedy consequences after the fact. Strong incentives to correct a defect before it harms anyone are therefore highly efficient.

Second, criminal sanctions would reduce externalization of costs by corporations and produce a more accurate social accounting of harm to individuals. Numerous examples, from the Ivey memo to the recent Guidant debacle, show that corporate decision making does not in fact consider social costs (that is, the total cost of likely harm to the public) but merely calculates the likely costs to the corporate entity (cost of liability exposure and compensation to identified victims), weighing those against the cost of the fix.

Yet costs to the corporate entity are far smaller than – likely only a fraction of – the total social costs of harm. Most injured victims do not litigate to recover damages, and most recoveries, when litigation occurs, compensate victims for only part of the costs of injury, meaning that victims will go without needed care or will depend on the government for care-related expenses.[2] There is therefore a fundamental asymmetry in cost-benefit calculations done by corporate entities, an asymmetry which externalizes a majority of the actual social costs of preventable harm and can only be addressed with the strong deterrence of a criminal sanction.

Third, incentives to do the right thing to remedy a defect have likely been even further diminished by the increasing mobility of corporate decision-makers and the fluidity of corporate structures, conditions which demand a form of personal accountability that will follow individuals over time. Indeed, corporate penalties are likely to be far more efficient as a deterrent in the context of corporate crime than in the case of the more typical common law offense because corporate executives, with their

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[1] Mark Sagoff, The Economy of the Earth 46 (1988).

[2] Factors that affect whether compensation is available include: whether the risk and manufacturer is identifiable; whether the plaintiff will be interested in litigation and persist in such intention; whether they will prevail; whether the verdict will be appealed and be maintained on appeal, and many other factors. *See* Malcolm E. Wheeler, "The Use of Criminal Statutes to Regulate Product Safety," *The Journal of Legal Studies*, Vol. 13, No. 3 (1984), at 605.

access to risk assessment resources, are the consummate "rational actors." In their case, a direct and informed response to any specific deterrence regime creating a new statutory duty to inform the public and regulators of incipient defects is virtually assured.

Fourth, criminal penalties would avoid, insofar as is reasonable, harm to others within the corporate structure and encourages disclosure. Civil liability, even for corporate officers, can be insured against, the costs of which are nearly uniformly paid by the company (and its shareholders), rather than the individual. Similarly, both civil and criminal fines are levied against the corporation, which in turn penalizes shareholders. A criminal investigation of conduct by individuals, on the other hand, would be more likely to reveal whether a single individual or set of bad actors within the company are responsible for the harm, thus enabling actual accountability for decisions and encouraging disclosure by others within the corporate structure to avoid sharing in criminal culpability.

While hearing witnesses suggested that criminal indictments would be devastating for companies, it seems far more likely that it would only be the case if a large number of indictments were filed against a single company. In that case, a company's poor reputation might be deserved. Yet any indictment, given the higher burden of proof in criminal investigations and the need to find accountable individuals against whom to bring charges, is far more likely to focus narrowly on the few decision-makers who committed the criminal acts. If it is a case of a few "bad apples," a criminal process is far more likely to assure that they do not ruin the whole bushel because it points the finger at individuals, rather than at the corporation as a whole.

Hearing witnesses also raised several objections of a more practical or procedural nature, all of which were meritless. As several witnesses pointed out, the likelihood for abuse of a criminal provision is significantly reduced by the higher evidentiary burden of "beyond a reasonable doubt."

Moreover, we find claims that industry will cease to analyze product risks or produce engineering analyses under the threat of criminal sanctions dubious at best. First, it is a core function of company engineers to test, analyze and monitor product use, quality and other similar issues and they have not stopped doing this job even in contexts in which there are criminal and civil penalties currently on the books. It seems far more likely that corporations would generate more data and be more diligent in documenting safety testing, leading to the introduction of safer products. By this argument, any law to enhance corporate oversight on virtually any topic would merely create additional incentives for manufacturers to cover up wrongdoing rather taking more pains to avoid the culpable act.

Arguments that criminal prosecution would endanger the civil recovery of injured victims or hamper the discovery of defects by creating an oppositional process are similarly unavailing. The criminal process is far faster, generally speaking, than the civil caseload in the courts and is attended by speedy trial and other protections which assure this outcome.

Discovery processes for federal prosecutors are also far more efficient and are limited only by the Fourth Amendment rather than by the complex and burdensome discovery rules that apply among parties to a civil claim. While some indicted individuals may refuse to self-incriminate, as is their right, others may cooperate far more fully than in the civil context due to the strong leverage of a reduction in their sentence. While some witnesses suggested that information would also be less available to prosecutors than to plaintiffs due to resort to a subpoena, federal prosecutors are far more likely, once a valid case is before them, to pursue any means necessary to collect evidence. Collection of documents and other materials, of course, regardless of ownership, is not barred by the Fifth Amendment, which applies only to speech.

Due to the higher burden of proof, evidence assembled in the service of a criminal trial would be an invaluable and efficient predicate to a speedy civil recovery for damages. It would likely spur settlements and avoid the years-long wait most plaintiffs now experience who go through a trial and even, perhaps, one or more appeals. As just one timely example, a criminal sentence in the trial of Jack Abramoff could be decided in one case in a Florida court as early as the end of this month.

Hearing witnesses also suggested that manufacturing competitiveness would be negatively impacted by new criminal sanctions. This pessimism about the state of executive decision making appears to us to be unwarranted. In fact, most of the evidence on environmental and safety protections points in the opposite direction. Just as pollution wastes resources, unchecked harm to society is a squandered opportunity to prevent injury or save lives. We all pay, in terms of higher insurance and medical costs, in lost worker productivity and illness, and even in traffic delays. As just one example, the annual cost of all traffic crashes in the U.S., which take more than 42,000 lives and inflict more than 3 million injuries every year, is more than $230 billion in 2000 dollars, or $800 for every man, woman and child in the U.S.[3]

A criminal penalty would likely enhance competitiveness by encouraging beneficial innovation, stimulating product evolution, and enhancing accountability. Innovation from enhanced government oversight results in cleaner, higher quality products with more consumer appeal and export value, and creates new industries and jobs (*i.e.*, in recycling, manufacturing pollution abatement technologies, antilock brakes, or air bags). Rules that internalize the real costs of activities connect cause with effect, focus attention on mitigation at the source, and generate useful information about inefficiencies. While in theory this brings the price of goods closer to the actual resource costs, in practice it often does even better by stimulating greater efficiencies – both improving quality and reducing harm. They also prevent damage to company reputations and save the cost of later recalls or other consumer remedies.

In fact, stimulating investment in safer practices is a core government function that also benefits industry**.** According to the "Porter hypothesis," a theory authored by Michael Porter of Harvard's Kennedy School of Government which posits that well-

[3] L. Blincoe *et al*., "The Economic Impact of Motor Vehicle Crashes 2000," NHTSA Report No. DOT HS 809 446, May 2002.

crafted regulations lead to economic growth, the stimulation effect is far greater when regulations are more rather than less stringent. This is because growth from such "innovation offsets" can encourage true progress: extraordinarily creative measures which leap-frog industrial practices to new levels of quality, utility, environmental responsibility and societal well-being.[4]

Criminal Penalties in the TREAD Act Are No Substitute for the Proposed Criminal Sanctions

Although much was made of them at the hearing, even the National Highway Traffic Safety Administration (NHTSA) is on record as stating that the TREAD Act's criminal penalty provisions are ineffective and will likely rarely, if ever, be invoked. As NHTSA noted in its interim final rule on the provision, little use, if any, is expected to be made of the provision, which is already a virtual dead-letter:

> We believe that there will be very few criminal prosecutions under section 30170, given its elements. Accordingly, it is not likely to be a substantial motivating force for a submission of a proper report.[5]

Under the law, TREAD-related penalties would apply only to persons who violate section 1001 of Title 18, an existing criminal statute, and they apply to only a very small class of actions. To prosecute under the TREAD provision, the state must prove that someone: 1) violated 18 U.S.C. 1001 (meaning that the lie or cover-up to the government was both knowing *and* willful); 2) violated 18 U.S.C. 1001 in reporting as required by the early warning rule; 3) had "the specific intention of misleading the Secretary" about a motor vehicle or motor vehicle equipment safety defect (not noncompliance with a safety standard or recall directive); and 4) the defect *had already* caused death or grievous bodily harm to someone at the time of the false report or failure to report. In addition, the law created a huge safe harbor, providing that no penalties will apply if the perpetrator "corrects any improper reports or failure to report within a reasonable time."[6]

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[4] The leading article in this line of study is the justly famous Michael E. Porter & Claas van der Linde, *Toward a New Conception of the Environment-Competitiveness Relationship*, 9 J. Econ. Perspectives 97 (1995). Other important studies include the following: Ebru Alpay, Steven Buccola & Joe Kervilet, *Productivity Growth and Environmental Regulation in Mexican and U.S. Food Manufacturing*, 84 Amer. J. Agr. Econ. 887 (2002) (finding that Mexican food manufacturers developed improved efficiencies in operations as a result of increasing stringency of environmental regulation); Eli Berman & Linda T.M. Bui, *Environmental Regulation and Productivity: Evidence from Oil Refineries*, 83 Rev. Econ. & Stats. 498 (2001) (finding that L.A. Air Basin oil refineries achieved improved operations directly because of heightened environmental standards); Eban Goodstein, *Polluted Data*, Amer. Prospect, Nov.-Dec. 1997, at 64 (charting many cases in which regulations resulted in innovations that significantly offset the initial cost of compliance); Stephen Meyer, *Environmentalism and Economic Prosperity: An Update* (MIT, Feb. 1993) (finding that states with stronger environmental protections tended to have higher GDP growth than states with laxer regulation); Office of Tech. Assessment, U.S. Cong., Gauging Control Technology and Regulatory Impacts in Occupational Safety and Health: An Appraisal of OSHA's Analytical Approach (Rep. No. OTA-ENV-635, Sept. 1995), *available at* <http://www.wws.princeton.edu/~ota/disk1/1995/9531_n.html>.

[5] *See* "Motor Vehicle Safety: Criminal Penalty Safe Harbor Provision." 65 F.R. 81417, Dec. 26, 2000.

[6] *See* 49 CFR 578.7.

In short, while the section increases the rarely-applied maximum penalty for a violation of federal law concerning reports made to the government, at the same time it completely undercuts this new authority by prohibiting application of criminal penalties if the person who lied eventually recants. Because prosecutors always retain the ability to grant immunity, and to place case-specific limits on that immunity for witnesses or participants to secure testimony, the broad language of the "safe harbor" provision creates a much larger window for illegal activity than previously existed under the law. In addition, this law requires a request from the DOT to the Justice Department prior to prosecution, a highly unusual potential pitfall for enforcement of any criminal liability.

This provision now in law was written into the House bill. It is no substitute in practice for the Senate version of the TREAD Act's very workable approach to a new criminal penalty authority for NHTSA. That provision was far superior because there was no additional form of immunity, and would have been a real deterrent to the failure to remove dangerous products from the market by penalizing the cover-up of dangerous defects. In contrast, the language in the TREAD Act, as NHTSA makes clear, accomplishes very little, if anything.

Criminal Penalties Are a Logical Evolution in the Development of Safeguards

To effectively prevent consumers from being harmed by unsafe products the existence and enforcement of adequate legal tools must be available. These legal tools are created by the symbiotic relationship of civil and criminal law. However, history has shown that civil and criminal laws alone have not adequately protected consumers from hazards posed by products. In fact, beginning in the early 1970's an evolutionary process began to better protect consumers from product hazards. This evolutionary process must continue to develop.

The creation of the U.S. Consumer Product Safety Commission provides an illustrative example of the existence of an evolutionary process to better protect consumers from risks associated with product hazards. In 1967 the National Commission on Product Safety (NCPS) was created by an Act of Congress to study the existing measures employed to protect consumers from the risks associated by "household" products.[7] The NCPSC completed its final report in 1970[8] and its recommendations led to the eventual passage of the Consumer Product Safety Act,[9] which created the U.S. Consumer Product Safety Commission.

The final report found that "federal law to curb hazardous products was virtually nonexistent, and state and local laws were an unenforceable "hodgepodge of tragedy-inspired responses . . . . The common law (product liability) was unreliable in restraining product hazards. Rather it was concerned primarily with providing consumers post-

[7] Pub. L. 90-146, (1967), 81 Stat. 466.
[8] *Final Report of the National Commission on Product Safety,* Library of Congress Card No 76-606753 (June 1970).
[9] Consumer Product Safety Act, Pub L No 92-573, 86 Stat 1207, 15 USC §§ 2051-2082.

injury remedies."[10] Thus, the creation of the U.S. Consumer Product Safety Commission was based upon the failure of the existing civil and criminal legal systems to adequately protect consumers from unsafe products.

Congress gave two tools to CPSC to enforce its laws: civil and criminal penalties. Section 20(a) of the CPSC provides CPSC with the ability to assess civil penalties against any person who knowingly violates provisions of CPSC's statutes of jurisdiction.

However, the current cap on civil penalties is woefully inadequate. The current civil penalty is capped at $7,000 for each violation up to $1.65 million. A "knowing violation" occurs when the manufacturer, distributor or retailer has actual knowledge or is presumed to have knowledge deemed to be possessed by a reasonable person who acts in the circumstances, including knowledge obtainable upon the exercise of due care to ascertain the truth of representations. Knowing violations often involve a company's awareness of serious injury or death associated with their product. There is a dire need to eliminate this cap as elimination would encourage manufactures to recall products faster and comply with CPSC's statutes in a more aggressive way. Importantly, the elimination of the cap will act as a deterrent to non-compliance with CPSC's regulations.

The Senate actually passed an increase on the cap on civil damages from $1.65 million to $20 million in 2003, but the House filed to act and the current cap remains the legal limit. These limitations are laughable in terms of the value of the companies that product products under CPSC's jurisdiction and fail to create a meaningful deterrent for violation of product safety laws and the introduction of unsafe products into the market place.

Section 21 of the CPSA sets forth the criminal penalties that CPSC can assess against any person who knowingly and willfully violates CPSC statutes. However, this provision can only be assessed after the person received notice of noncompliance from the CPSC. Thus, an entity can be in knowing violation of CPSC statutes dozens of times but unless notice was received by that entity from the Commission alerting that entity of non-compliance, no entity can be assessed. Given its complexity, this provision has been rarely utilized by the Commission. For example, according to CPSC's Web site, CPSC has assessed criminal penalties or jail time 21 times since 1993 and no records are indicated for years before 1993.

A number of examples of CPSC penalties show how inadequate they are in preventing the infiltration of unsafe products into the market place. CPSC fined Cosco, a Canadian company, the largest children's product manufacturer and distributor in the United States, $725,000 in September 1996 for failing to report 96 known toddler bed and guardrail entrapments and one death associated with its toddler beds. In 2001, CPSC again fined Cosco and Safety 1st a record fine of $1.75 million after failing to report two deaths and 303 injuries to CPSC. However, these companies never admitted wrongdoing and obviously the penalty did not deter non-compliance with the reporting requirements.

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[10] Lemov, Michael R., *Consumer Product Safety Commission, Regulatory Manual Series*, Shepard's/McGraw- Hill, Colorado Springs, CO, February 1983, p 1-12 (*citing the NCPS Report).*

In March of 2005, CPSC levied a record $4 million civil penalty against Graco Children's Products Inc., of Exton, Pa., now owned by Newell Rubbermaid, for failing to inform the government in a timely manner about more than 12 million products that posed a danger to young children nationwide. From 1991 through 2002, Graco and Century, now Graco, failed to report defects in juvenile products that the Commission said could create substantial product hazards or unreasonable risks of injury or death to young children.

According to the CPSC, the company failed to report hundreds of incidents and injuries involving 16 different products. The products, all used by young children, include infant carriers, high chairs, infant swings, strollers and toddler beds. The injuries ranged from contusions and fractures to strangulation and included fatalities.[11] The products for which Graco filed to report were previously subject to at least seven recalls. While this civil penalty was the largest levied by CPSC in its history, it did not come close to the cap which would have allowed an assessment of $26.4 million. Graco was previously subject to a civil penalty of $100,000 in 1991 for failure to report defects and injuries associated with a children's stroller.[12]

The statutory limits on civil penalties, the size of the companies that CPSC regulates, the notice provision required before an assessment of criminal penalties, and a limited and shrinking CPSC budget, show that a need for the further evolution of product safety law.

Regulatory Safeguards Are Insufficient to Protect Consumers

Due to the disparate power of industry forces and consumers, decisions by regulators do not always reflect the balance of social costs and risks inherent in a defective product. A recent example is provided by NHTSA's response to a mandate enacted in the wake of the Ford/Firestone tragedy as part of the Transportation, Recall Enhancement, Accountability and Documentation (TREAD) Act.

The TREAD Act's new authority for NHTSA to collect "early warning" safety defect information was the result of a clear determination by Congress to make the automotive industry publicly accountable for past decisions not to recall dangerous and defective vehicles by mandating disclosure of potential safety defects to both the agency and public.

The law followed shocking media and Congressional revelations of secret company memoranda and actions, including communications to dealers in foreign companies and foreign recalls that should have been given to U.S. regulators. Congress also called in the NHTSA Administrator for hard questions, upset that the federal auto

[11] U.S. CPSC Press Release, "Record Civil Penalty Levied Against Graco Children's Products Inc. *CPSC, Graco announce new recall of 1.2 million toddler beds*," March 22, 2005, available on the Web at http://www.cpsc.gov/cpscpub/prerel/prhtml05/05138.html

[12] U.S. CPSC Press Release, "Graco Pays $100,000 To Settle Alleged Reporting Violations," February 6, 1991, available on the Web at http://www.cpsc.gov/cpscpub/prerel/prhtml91/91036.html.

safety watchdog was asleep on the beat. A State Farm investigator had given the agency more than 20 fatal cases from Ford/Firestone rollovers in 1998, but the agency had done nothing to investigate. Nearly 300 people died and 700 people were badly injured from the defects in the U.S. alone.

The public availability of information in that case would have saved lives and prevented a catastrophic loss of faith in both the industry in general and the reputation of Ford and Firestone specifically. The solution in the TREAD Act was to require automakers to submit information as it develops to a new NHTSA early warning database showing the industry knowledge of, and the consumer's experience with, vehicle safety. Like adverse drug reaction information collected by the Food and Drug Administration, the information was intended to be available to the public.

While the bill was pending in the House of Representatives, Rep. Markey (D.-Mass.) conducted a colloquy on the subject with Rep. Billy Tauzin (R-LA) on the floor of the House during debate on the bill. In that colloquy, Rep. Tauzin affirmed Rep. Markey's statement that the "special disclosure provision for new early stage information is not intended to protect [information] from disclosure that is currently disclosed under existing law."[13] In addition, when signing the law on November 1, 2000, the President stated that he was directing NHTSA "to implement the information disclosure requirements of the [TREAD] Act in a manner that assures maximum public availability of information."

The agency's advance notice of proposed rulemaking (ANPRM) contained a brief section on the disclosure provision under TREAD, in which the agency noted that "we believe that section 30166(m)(4)(C) will have almost no impact." Although the early warning rule expanded the universe of information available to NHTSA, principles governing its disclosure would be similar to those applying to information already collected in the course of defect investigations, which is routinely disclosed by NHTSA.

The agency's notice of proposed rulemaking (NPRM) on early warning also unequivocally supported the public disclosure of early warning information:

> Historically, these types of information generally have not been considered by the agency to be entitled to confidential treatment, unless the disclosure of the information would reveal other proprietary business information, such as confidential production figures, product plans, designs, specifications, or costs.

The agency continued "[a]ccordingly, the agency does not expect to receive many requests for confidential treatment for submissions under the early warning requirements of the TREAD Act."

Perhaps because the early warning docket was rife with statements upholding disclosure, the agency pulled a bait and switch. Without any notice in the early warning docket, and prior to issuing the final rule on early warning, on April 30, 2002, NHTSA

[13] *See* 146 Cong. Rec. H9629 (Oct. 10, 2000).

published a notice in the federal register concerning the agency's *sua sponte* plans to amend the procedures that it uses to process confidentiality requests under 49 CFR Part 512.

At first glance, this arcane rulemaking notice barely appeared to affect the early warning rulemaking, as the discussion of the rule was virtually non-existent. Yet the manufacturers seized upon this opening as an opportunity to argue that the information collected as a part of the early warning rule should be kept from the public. And in marked contrast to its notice, NHTSA's final confidentiality rule focused almost entirely on the secrecy of the early warning database, and announced the agency's policy that all the information – with the exception of deaths and injuries – will remain secret and be withheld from the public even after a specific request under the Freedom of Information Act (FOIA).

Members of Congress who authored portions of the TREAD Act, including Rep. Henry Waxman (D.- Calif.), have indicated that the agency's decision to maintain this information in secret gravely undermines the law. This novel use of FOIA to undermine information about public health and product safety is the subject of a petition for reconsideration by consumer groups, which was recently denied by NHTSA, and is now the focus of a lawsuit currently pending in federal court and brought by Public Citizen.

While the lawsuit has been pending for the past several years, not even the death and injury information that was to be released according to the terms of the final rule has been made available. The outcome? The Congressional mandate in TREAD for an early warning database has resulted in little or no new information being released publicly to assist consumers in identifying dangerous defects in vehicles.

Ever since the Ford Pinto case in the late 1970s highlighted the deeply cynical nature of the industry in measuring costs against saving lives, the public has been all too well aware of the practice of bean-counting by manufacturers. Indeed, consumers have been injured, maimed and killed by repeated incidents in which the cost of the fix, rather than the seriousness of the safety defect and the risk it poses to human life, determines the industry's decisions on dangerous defects and remedies. Providing strong incentives for disclosure of risk, such as criminal penalties, would greatly supplement the all-too-predictable failure of regulators to act in the public interest by bringing information about risks quickly to light.