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Subject: Comments on Early Warning System Advanced Notice of Proposed Rulemaking (Docket No. NHTSA 2001-8677; Notice 1) - 27

Dear Administrator:

Nissan North America, Inc. (NNA), on behalf of itself and with the consent of its parent company, Nissan Motor Company, Ltd. (NML), (collectively Nissan) is pleased to have this opportunity to provide comments to the National Highway Traffic Safety Administration's (NHTSA's or the Agency's) Advanced Notice of Proposed Rulemaking (ANPRM) regarding Early Warning Systems (EWS). NNA is the distributor of Nissan and Infiniti vehicles in the continental United States and the final manufacturer of certain Nissan models at its plant in Smyrna, Tennessee. NML is the original manufacturer of Nissan vehicles with headquarters in Tokyo, Japan. Nissan is committed to working with the Agency in developing and implementing this important rulemaking.

As the Agency is aware, the EWS rulemaking was mandated by section 3(b) of the Transportation Recall Enhancement, Accountability and Documentation (TREAD) Act. This provision specifically required the Secretary of Transportation to initiate rulemaking proceedings to establish early warning reporting requirements for manufacturers of motor vehicles and motor vehicle equipment. This provision also outlined three major categories of information that should be addressed by the rulemaking: (1) "warranty and claims data," (2) "possible defects involving serious injury or death," and (3) "other information." See TREAD Act Section 3(b), Pub. L. No. 106-414.

On January 22, 2001, NHTSA published in the Federal Register an ANPRM that provides the Agency's initial approach to an EWS regulatory scheme and seeks input from interested stakeholders. 66 Fed. Reg. 6532 (2001). As part of the Agency's proposal, NHTSA suggests requiring the submission of a broad range of information including: "claims or incidents involving reports of serious injury or death," "warranty information," "consumer complaints," "campaigns" of various types, "field reports," "design changes," "internal investigations," "technical bulletins," "claims for property damage," and "reports of fire, fuel leaks, or rollovers." Nissan is concerned that the range of information sought by NHTSA is overly broad under the TREAD Act and goes beyond the express language and intent of the Act and the guidelines set forth by Congress on the kinds of information subject to early warning reporting requirements.

Nissan's detailed comments regarding the EWS ANPRM are provided in the attached comment. In summary, Nissan believes that:

- (1) In enacting the EWS provisions of the TREAD Act, Congress intended NHTSA to develop a well-balanced process to capture the types of information that would best assist NHTSA in identifying potential safety-related defects earlier in the process than currently provided under the National Traffic and Motor Vehicle Safety Act without additional undue burden on manufacturers. The TREAD Act was not intended to encompass all information regarding motor vehicles or motor vehicle equipment.
- (2) In light of the express language of the TREAD Act and the underlying Congressional intent, NHTSA's ANPRM appears to seek more information than necessary or appropriate to meet its requirements. NHTSA's requested scope of information would result in a deluge of irrelevant data and documents that would overwhelm the Agency and place an undue burden upon manufacturers, particularly overseas manufacturers. Nissan believes that only specific information that will actually assist NHTSA by providing early warning in a meaningful and cost-effective manner should be reportable.
- (3) NHTSA's ANPRM proposals also appear to expand the scope of the information Congress intended the Agency to automatically receive under the EWS provisions through inappropriate definition of key terms such as "substantially similar" vehicles, and information "in the possession" of manufacturers. Nissan believes NHTSA must define and interpret these terms within the context of the plain language and intent of the TREAD Act.

Based on these comments, Nissan believes that NHTSA needs to more narrowly define the scope of information manufacturers will be required to automatically report as part of the early warning regulatory scheme as this rulemaking proceeds.

Nissan looks forward to working constructively with the Agency on this important rulemaking and would be pleased to meet with NHTSA to further discuss our positions. Should you have any questions regarding this comment, please feel free to contact us.

Sincerely,



Noburo Fujii, Director
Government Affairs
Nissan North America, Inc.

**Nissan's Comments to
the National Highway Traffic Safety Administration's
Advanced Notice of Proposed Rulemaking:
Standards Enforcement and Defect Investigation; Defect and
Noncompliance Reports; Record Retention
66 Fed. Reg. 6532 (2001)**

**Docket No. NHTSA 2001-8677; Notice 1
March 23, 2001**

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I. INTRODUCTION

Nissan appreciates the opportunity to submit these comments to NHTSA's Advanced Notice of Proposed Rulemaking (ANPRM) regarding Early Warning Systems (EWS) under the TREAD Act. Nissan also generally supports the comments submitted by the Alliance of Automobile Manufacturers (the Alliance) and the Association of International Automobile Manufacturers (AIAM). Nissan is a member of these trade associations. Our comments address issues discussed by the associations, and also some important practical concerns that are presented by an early warning rule. Nissan hopes that these comments will assist the Agency in understanding the importance of having a focused and well-defined rule to ensure it is effective but yet minimizes the potential impact and burdens it will have on both NHTSA and manufacturers.

II. LEGISLATIVE INTENT OF TREAD ACT

The TREAD Act was a direct response to the Ford/Firestone situation in which Ford Motor Company (Ford) and/or Bridgestone/Firestone Corporation (Bridgestone/Firestone) were believed to have actual possession of information that would have helped to identify potential problems with certain Firestone brand tires mounted on Ford Explorer vehicles. This information reportedly included claims for accidents involving serious injuries and/or death, warranty data and information regarding recalls conducted in Saudi Arabia and Venezuela where the same vehicle/tire combination as offered in the United States were sold. Congress intended that the EWS provisions of the TREAD Act prevent future Ford/Firestone situations by serving as a means by which NHTSA would be able to have information necessary to help identify safety defects in vehicles or vehicle equipment sold or distributed in the United States earlier than may otherwise occur under the National Traffic and Motor Vehicle Safety Act. In stating the intent of the EWS provisions, Congress explicitly provided that:

The [EWS] rule must include requirements for [motor vehicle and motor vehicle equipment] manufacturers to report, periodically, or upon request by NHTSA, information that the manufacturer has in its possession that would help identify defects in motor vehicle and motor vehicle equipment safety in the United States. Such reports are to be limited to claims data submitted to the manufacturer for serious injuries, aggregate statistical data possessed by the manufacturer on property damage from alleged vehicle or equipment defects, and information on the manufacturer's customer satisfaction campaigns, consumer advisories, recalls and other programs for the repair or replacement of defective vehicles or equipment. NHTSA may include additional reporting requirements for manufacturers that it determines are necessary to identify defects related to vehicle and equipment safety in the United States. (emphasis added).

H. Rep. No. 954, 106th Cong., 2d Sess. 13 (2000). As demonstrated by the foregoing provisions in the House Report, Congress understood that certain types of information would help identify potential safety defects better than others. Congress expressed this understanding through the enumeration of specific types of information that should be reported to NHTSA. Of course, Congress also wished to allow the Agency discretion in selecting additional types of information to be reported, but only if that information was "necessary" to identify safety defects. These provisions clearly outline Congress' intent that the kinds of information reported must be of the type that would help to identify defects related to safety, not all defects.

Congress also intended that this reporting requirement strike a balance between NHTSA's authority to seek useful information and the burdens on manufacturers to produce that information.

NHTSA may not impose requirements that are unduly burdensome to a manufacturer, taking into account the manufacturer's cost of complying with such requirements and NHTSA's ability to use the information it seeks in a meaningful manner to help identify motor vehicle safety defects. (emphasis added).

Id. at 14. Through this language, it is clear that Congress intended to specify the scope of the EWS rulemaking. Congress directed the Agency to require the automatic reporting of only information that is not unduly burdensome for manufacturers to provide and that is meaningful to help identify safety defects. This scope is for the automatic reporting rulemaking. Nothing in the Act changed the existing provisions of the Safety Act that authorize NHTSA to conduct investigations and request other information from manufacturers as part of a specific investigation.

Congress' intent to seek only that information which would help identify safety defects earlier was also evidenced in House debates. Speaking in support of the House version of what is now the TREAD Act, Representative Dingell noted that the type of information sought by the TREAD Act was the same type of data that would have potentially alerted NHTSA to the Ford/Firestone issue before the deaths of over 100 people in accidents allegedly caused by the defect. Representative Dingell stated,

. . . this legislation requires manufacturers to give NHTSA claims data and other information that proved to be so important in the Firestone case.

Cong. Rec. H9628 (daily ed. Oct. 10, 2000) (statement of Representative Dingell). The information Representative Dingell referred to includes recalls of the same Ford/Firestone combinations in the United States as those used overseas, as well as claims regarding accidents involving serious injuries and deaths allegedly caused by the Ford/Firestone combination. Representative Dingell and the rest of Congress did not intend, however, for the EWS provisions to serve as a mandate or direction for NHTSA to require the automatic submission of all vehicle and vehicle equipment information to the Agency.

A clear indication of the narrower, more balanced approach adopted by Congress can be seen through a comparison of the original House and Senate versions of the TREAD Act. Senate Bill S. 3059 originally contained broad provisions regarding the kinds of information NHTSA would be directed to seek as part of an EWS regulatory scheme. In fact, these provisions were very similar to what the Agency currently seeks in its ANPRM. The broad and far ranging Senate Bill was rejected, however, in favor of H.R. 5164, a bill with a much more focused scope regarding EWS information. It was this more focused, more directed bill that eventually became the TREAD Act. Based on this legislative history, it is evident that Congress intended that the EWS provisions be construed to require the regular reporting of only that information which, when added to current information reported to NHTSA, would reasonably increase the Agency's ability to identify earlier potential safety-related defects in motor vehicles or motor vehicle equipment offered in the United States.

Nissan provides its comments to NHTSA's ANPRM consistent with this legislative history. In responding to the Agency's request for comments on the ANPRM, Nissan focuses on Congress' purpose for enacting the TREAD Act by first determining whether information sought by the Agency would be of assistance as part of an EWS (i.e., value of the information). Nissan then focuses upon the burden associated with gathering such information. Keeping this benefit/burden balance in mind, Nissan provides its recommendations regarding whether or not certain types of information should be part

of an EWS. Nissan believes that such an approach is in keeping with the purposes of the TREAD Act, which intended not to require automatic reporting of all information that may have any relation to product issues, but instead merely to heighten the Agency's ability to identify potential safety defects in a timely manner.

III. INFORMATION SOUGHT IN THE ANPRM

Nissan believes that if NHTSA attempts to obtain unfocused and overly broad categories of information, as appears to be outlined in the ANPRM, the sheer volume of information would overwhelm the Agency and detract from efforts to identify and resolve legitimate safety issues. Instead, Nissan recommends that NHTSA selectively require the reporting of only the kinds of information most likely to identify safety defects as intended by the TREAD Act. Otherwise, the scope of information sought will be too broad and overly burdensome to the Agency and manufacturers.

The apparent global nature of information sought by the Agency is particularly burdensome. Nissan vehicles are sold in over 170 markets throughout the world by distributors in each market, many of which are completely independent from Nissan. Some are no bigger than an individual dealership. Their business operations are uniquely suited to the nature of the local markets in which they operate, the customs and practices in those markets, and the attitudes of consumers in those markets. The nature and form of the information in those markets and whether it is maintained or sent to Nissan depends on the nature of the operations of each of the distributors. As a result, such information may not even be available, much less easily compiled or integrated with information on vehicles sold in the United States. Also, it is questionable how helpful such information may be, given the unique customs and practices that may have arisen to address local market conditions.

In addition to information availability issues, language barriers present another level of difficulty and burden to reporting. Specifically, information collected by distributors is usually in the native language of the originating country. If an issue emerges, the notification may be in the originating country's language, depending upon the distributor's location and size. Under the EWS regulatory scheme, if information is required by the final rule, this information will first have to be translated into Japanese or English to ascertain whether it is subject to reporting. Thereafter, the information would have to be translated into English for reporting purposes. This would cause an extraordinary burden to Nissan and also result in considerable delays in providing the information to NHTSA, if required.

This significant burden need not, however, prevent NHTSA from obtaining information from such localities that is actually of the type expected by Congress. The information Nissan believes will be of use to NHTSA from the overseas markets are those claims stemming from accidents where defects are alleged that lead to serious injuries or death, and recall and other safety campaigns authorized by Nissan. Such information would be sufficient to meet the express provisions and intent of the Act. Nissan's views on the specific types of data that should be reported is provided in detail in subsection B below.

Two other significant issues raised by NHTSA's ANPRM that must be kept in mind while determining what information should be reported are the definition and application of the terms "substantially similar" vehicle and information "in the possession of the manufacturer." As explained in the legal analysis appendix to this comment (see Appendix A), Nissan agrees with the Alliance that NHTSA should define "substantially similar motor vehicle" as a vehicle that is in substantial compliance with the federal motor vehicle safety standards and that has the same platform and body shell, same engine displacement, and an engine within the same engine family. Nissan also notes that the TREAD Act's early warning "substantially similar" vehicle provisions are limited to reporting incidents involving

fatalities or serious injuries allegedly caused by a possible defect and foreign recalls. NHTSA should not expand other early warning reporting requirements by applying the “substantially similar” vehicle concept where Congress did not deem it appropriate.

With limited exceptions, the use of “substantially similar” should also only be applied to motor vehicles—not motor vehicle equipment. Attempting to define and track “substantially similar,” or even identical, components in different vehicles around the world would be nearly impossible for vehicle manufacturers. Specifically, components interact uniquely with each different type of vehicle. Attempting to track identical components in completely different vehicles is virtually impossible, because existing systems do not easily do this, and huge matrices (considering that vehicles typically are composed of 10,000 to 15,000 separate parts) would have to be developed and constantly updated to administer such a system. Moreover, relevant safety related information important as part of an early warning system would be captured by reporting requirements pertaining to substantially similar and identical vehicles without the burdens of attempting to do so at the component level. Therefore, reporting by vehicle manufacturers should be done at the vehicle level without regard to whether a component is “identical” or “substantially similar” (although as will be discussed further below, for some types of information, NHTSA should focus its rule on major safety systems first to determine if reporting is workable and meaningful).

With regard to the term “possession,” the TREAD Act limits the scope of reporting to that information in the possession of the manufacturer. In its ANPRM, NHTSA interprets “possession” to include “constructive possession.” Nissan believes NHTSA’s interpretation, however, may be broader in scope than Congress intended. Nissan certainly agrees that it would be improper for a manufacturer to attempt to avoid reporting responsibilities by dispossessing itself of information the manufacturer actually receives. Existing NHTSA records retention requirements would prohibit this practice. Clearly, a manufacturer that actually receives information and delegates the responsibility for that information to someone else would still “possess” that information.

If NHTSA intends a broader, “legalistic” view to suggest that a manufacturer is in “constructive possession” of information it never actually received, we believe this would be both impractical and inconsistent with the TREAD Act. As a legal concept, “constructive possession” generally imputes knowledge or possession to a person or entity by operation of law where actual notice or possession has not occurred. A fact-intensive, retrospective analysis is done in the context of a particular matter (for example, it may apply in one context but not in another even though the underlying facts are the same). To apply this concept to an EWS rule makes little sense—a manufacturer should not be presumed to know something that it actually does not know and then be expected to automatically report it pursuant to the regulation. To conclude otherwise would be neither fair nor reasonable given the penalties imposed for non-reporting. Nissan does not believe that Congress would have included express language in the Act about “possession” and “actual notice” if it intended manufacturers to be deemed to have information in their possession solely by operation of law.

A. Who Is Covered By The New Reporting Requirements?

Nissan supports the Alliance position that, with certain exceptions, vehicle manufacturers should be responsible for reporting issues relating to original equipment on their vehicles. The exceptions to this reporting are:

- 1) Tires – warranted by the tire manufacturers.

- 2) Heavy-duty vehicles due to repair/warranty by major component manufacturers.
- 3) Non-OEM accessories and service parts supplied by the aftermarket and installed after the vehicle has been manufactured.
- 4) Registered importers (i.e., gray market importers) may import models that a manufacturer does not distribute in the U.S. Because manufacturers may not be aware that certain vehicles are in the country, they cannot be held responsible or be expected to report incidents on gray market vehicles.

Justification for the above position is based upon the responsibility for repairs and the availability of information. Other than the exceptions listed above, the National Traffic and Motor Vehicle Safety Act places responsibility for repairs of safety related defects and noncompliances upon the vehicle manufacturers. In addition, at least in the early life of a vehicle, most repairs are made at the vehicle dealership using parts authorized by the manufacturer. Customers generally turn to the vehicle manufacturer for assistance with their vehicles. Because of these factors, any early warning system based upon in-use information should be the responsibility of the original vehicle manufacturer. If both the vehicle and component manufacturer were required to supply information on the same parts, NHTSA could face multiple counting of the same incident. Moreover, component manufacturers are often aware of issues with their parts only after the vehicle manufacturer notifies them. As a result, Nissan believes that vehicle manufacturers are in the best position to provide information regarding components installed on their vehicles, with the exceptions listed above.

The vehicle manufacturer's responsibility as primary source for reporting would not, however, eliminate the need for reporting by equipment manufacturers in certain circumstances. Nissan believes that items such as tires and child restraints should still be reported by equipment manufacturers where information is not available to the vehicle manufacturer. Existing regulations already cover those safety-related components that need to comply with Federal standards. Any attempt to directly regulate parts manufacturers at the component or material level beyond what is already required is not realistic based upon the number of suppliers. Such duplicative reporting would also require NHTSA to "filter" multiple reports of the same incident from multiple sources before it could obtain an accurate understanding of whether the information is important enough to conduct an investigation.

B. Types of Reportable Information

Nissan does not have a single worldwide system through which all vehicle information flows. There is no single Nissan entity that receives all information and that can retrieve and analyze the information. For example, NNA and NML may not receive information in a situation where a foreign distributor determines that no assistance is required for addressing an issue raised by a dealer. In any event, NNA does not receive information for vehicles manufactured and sold outside the United States. Correspondingly, NML does not receive all information on vehicles manufactured and sold outside of Japan. In some cases Nissan licenses independent companies that manufacture vehicles. These independent companies locally source components for such production, and in-use information about these vehicles is not routinely provided to Nissan because the local manufacturer is the entity in the best position to monitor and resolve in-use issues. Notwithstanding Nissan's general worldwide presence, information is generated from a variety of sources in numerous countries that may or may not be transmitted back to Nissan, depending on the issues involved and the need for assistance.

On a worldwide basis, Nissan uses different systems for transmitting, storing and analyzing information. These systems include a variety of manual and electronic systems that may or

may not be compatible. As a result, the method and ability to retrieve information from these different sources varies widely. For example, the electronically based U.S. warranty system can be searched using coding. This coding, however, is not completely common among all Nissan distributors worldwide due to vast market differences. In the case of the electronic consumer complaint system in the U.S., a word search for information must often be done because such information is text based with limited coding. These types of searches are very difficult and time consuming. In other areas of the world distributors may use manual and paper systems which suit the needs of the local market and which make researching issues for use beyond those local markets much more difficult.

Regardless of the wide ranging methods of information gathering and retention, Nissan agrees that certain types of information may prove useful as part of an EWS. Nissan's views on each type of information is provided below in greater detail. In order to address each type of information, Nissan first provides suggested definitions of key terms. Nissan notes that defining such terms is necessary in order to provide meaningful comments. For example, the terms "field reports," "internal investigations," and "consumer complaints" as used in the ANPRM are not clear and may have different meanings for different manufacturers or for the Agency.

As noted by the Alliance, NHTSA needs to clearly define all of the terms that are being used for the various types of information being considered as part of any final rule. Enhanced civil penalties and newly enacted criminal penalties heighten the need for objectivity and certainty in understanding what is required of manufacturers. Precision and clarity are essential so that there is a common understanding among diverse companies with widely different systems and ways of doing business. Setting forth precise definitions of key terms is also necessary so that foreign-based persons know exactly what must be reported and when such information must be reported. The Agency should not assume that regulated entities will clearly understand their obligations under the new regulations unless the terms susceptible to multiple meanings are explicitly defined.

1. "Warranty Information"

Definition. Nissan assumes that "warranty information" is meant to refer to a collection of "warranty claims." "Warranty claims" must, therefore, be defined. Nissan supports the following Alliance proposed definition:

Warranty claims means claims submitted by a manufacturer's franchised dealer or other manufacturer-authorized repair facility to that manufacturer that results in reimbursement by the manufacturer for repairs made under the manufacturer's express product warranty.

Discussion. Nissan believes that warranty data reporting as part of an early warning rule must be adopted in such a way as to be meaningful for the Agency and feasible for manufacturers, because warranty claims alone are not useful to identify safety defects. As a general matter, warranty systems contain a large amount of data regarding warranty claims. For example, NNA processes in excess of one million warranty claims per year. Warranty claims do not contain sufficient information to discern whether they may be safety related. Due to the sheer volume of information and inherent limitations, any potential safety-related information that may exist is not easily identified within the warranty system. If NHTSA plans to use warranty data as a part of an EWS, such data must be submitted in a manner that allows accurate comparison among companies.

In order to accomplish the goal of using warranty data as part of an EWS, NHTSA must address a number of important issues. Such issues would have to be resolved before the Agency may consider reporting thresholds or reporting outside of the United States. Examples of these issues include:

1. Should warranty claims data be normalized relative to vehicle population? The answer appears to be yes. The total number of claims would not be meaningful when comparing vehicles with different production and sales volumes.
2. Should the warranty data be normalized relative to vehicles manufactured or to vehicles sold? The answer to this question can have a major impact on thresholds that might be considered. For example, within Nissan the distributor-based systems typically utilize sales databases and hence normalize to vehicles sold. Basing thresholds on vehicles sold is probably more accurate in most cases. It requires, however, the capability to merge sales and warranty databases. While this is done in the U.S., the availability of sales information in other markets varies greatly as vehicles move from different manufacturing facilities to different distributors (many of which are independent) to dealers and ultimately to customers in 170 markets around the world. Systems based upon manufacturing may not have access to actual sales data and hence will normalize to vehicles produced. This would not allow meaningful comparisons to warranty data normalized to sales. Other manufacturers may have still different systems.
3. Should data be normalized to vehicles with similar components? For example, should claims on turbochargers be normalized only to vehicles with turbochargers. Similar questions apply for engine size, brake type (e.g. rear drum vs. disc), transmission type, etc. While this approach is more accurate than a broad comparison to all vehicles, developing thresholds on this basis would not be possible without extraordinary systems modifications. Such modifications would require long lead times prior to implementation and would place significant burden and expense upon manufacturers.
4. How should manufacturers account for the vehicle warranty period? A single Nissan brand vehicle is covered by eight different warranty periods depending upon the components. When establishing thresholds for comparative reporting, the corresponding warranty period is a significant factor that must be considered.
5. How do manufacturers determine the information to be reported? Should the information be submitted by part (part code), system, or symptom? The most likely scenario is to provide this information by a system that would then require a complete and precise definition of the parts to be included in the system. Should adjustments to parts be included or only parts replacement? Should the information include the primary failed part or for all parts replaced? For example, if a wiring harness incident caused an alternator replacement, should that be reported as an alternator, wiring harness or both? It is most likely that the definition of systems will vary from manufacturer to manufacturer and from the Agency's definition. For example, for warranty claims submissions, Nissan includes brake lights in its electrical system section, not the brake system section. The body harness for brakes also services many other functions. Where should the line be drawn, and what computer systems modifications would be required to provide data in the format required?

Nissan believes that significant lead time and effort will be required in order to address the foregoing issues for an EWS that could equitably be applied to warranty information for all manufacturers. Once these issues have been resolved, the subject of thresholds can be addressed. Until the underlying methodology and the details are defined, thresholds have no meaning.¹

¹ NHTSA has asked whether California's emissions warranty reporting thresholds may be a valid model for EWS purposes. Under the applicable California Air Resources Board (CARB) regulations, manufacturers must report California warranty data when an emission related component's warranty

In addition to the sheer volume of data and the problems of attempting to normalize this data, an even more fundamental difficulty with warranty data is availability. With distributors and dealers serving 170 markets, Nissan's warranty data is not completely standardized by content or format, nor is such data available at a single location. Therefore, Nissan recommends that if warranty information is to be used as part of an EWS, such data be initially limited to the U.S. market for the following reasons:

1. The complexity of warranty reporting is significantly greater as the number of markets is increased. Because warranty systems are primarily designed to pay dealers to perform repairs, and such payments are generally attributed to the production facilities located in the respective world markets, there was no business need to integrate the systems worldwide, and it may not be feasible, practical or meaningful to do so. The burdens of attempting to integrate systems for the purpose of this rule far outweigh the value from an early warning reporting standpoint.
2. The U.S. warranty contains 100% of warrantable repairs made in the U.S. – it is not just a statistical sample. In fact, in terms of its relation to global warranty information, it would be a rich statistical sample for reportable vehicles sold globally due to the volume of claims and the diverse operating conditions in the U.S. market. There are different warranty periods for different components in overseas markets than in the U.S.
3. Potential safety issues are difficult to identify using warranty information alone. Attempting to use data from sources outside the U.S. which involve different vehicles used in different cultures and environments with different warranties will further complicate this difficulty.

Based on the foregoing reasons, Nissan supports the Alliance and AIAM positions that if warranty reporting will be part of an EWS rule, such data should be limited to the U.S. market. The reporting system must be carefully designed so that the data submitted are meaningful and, at the same time, feasible and practical for manufacturers so as to avoid the potentially significant burdens discussed above.

2. “Claims And Incidents Involving Serious Injury Or Death”

Definition. Consistent with the language and intent of the TREAD Act, Nissan fully supports the Agency's intention to require reporting of claims or other incidents involving serious injury or death alleged or proven to be caused by a defect. For purposes of this section, Nissan agrees with the following Alliance proposal:

replacement reaches certain levels (e.g., 1%). NHTSA discusses the CARB requirements in the ANPRM. See 13 C.C.R. § 2144(a)(3). Directionally, this may be a useful model. The CARB warranty reporting, however, is very different from the issues being considered in the ANPRM. Specifically, the CARB regulations are limited to emission-related components which all function to maintain vehicle emissions below an established limit. Safety, on the other hand, is not easily defined. Different components affect safety in different ways. In addition, the warranty periods for emission-related components are mandated by regulation. The usefulness of the CARB model is that it strongly supports the need for precision in defining the elements and limitations needed to adopt a threshold-based system. With this in mind, Nissan recommends that any warranty reporting be limited to major safety systems such as brakes, steering, restraints and fuel systems in the United States. These systems, along with a defined list of components to be included, will be an appropriate starting point to determine if it is possible to set up and define a meaningful early warning system using warranty information.

A claim or incident involving serious injury or death is any written demand, complaint, subrogation request or lawsuit received by a manufacturer from or on behalf of the person seriously or fatally injured that (a) involves “serious injury”, as further defined, or death, (b) alleges that a product defect was, at least in part, a contributing cause of the serious or fatal injury, and (c) contains sufficient information to identify the motor vehicle or item of motor vehicle equipment involved.

Discussion. As discussed in section II above, information involving serious injury or death allegedly caused by a potential defect is exactly the type of information Congress intended to capture with the Act. Nissan believes that such information should be reported where a “claim” as defined has been actually received by a manufacturer and involves a vehicle identical or “substantially similar” to vehicles sold in the U.S. as provided for under the Act. “Substantially similar” vehicles are those covered by Nissan’s earlier comments.

“Serious injury” must also be defined. Nissan supports NHTSA’s proposal to define the severity of injuries under a system like the Abbreviated Injury Scale (AIS) where “serious injuries” would be those injuries rated to 3 or greater. Nissan does not believe that a straight AIS system would be desirable, as often times data on injuries is limited, and familiarity and coding expertise is not available worldwide. Therefore, Nissan would propose to NHTSA the formation of a joint industry/government taskforce to develop a table based on AIS that would allow the ranking of injuries in order to define “serious injury” with the limited information typically available to manufacturers when a claim is first received. Such a system must also be user-friendly. The system should not be overly complex for application in the U.S. and in areas of the world where the identical or “substantially similar” vehicles are sold and a “claim” may be received. Under this AIS-type system, a manufacturer would then report any claims involving serious injury under this definition when it receives information sufficient to make such a determination under the timeframe noted below.

Although Nissan supports the definition of serious injury as being one with a rating of 3 or higher using a simplified system similar to AIS, Nissan would also support flexible regulations that would allow a manufacturer the option to report all injury “claims” if the manufacturer so desired, especially for matters outside of the U.S.

As mentioned previously, the AIS rating system is not well known outside the United States (e.g., Japan), and, therefore, any system based on AIS would not be familiar to foreign entities. In fact, Nissan is not aware of any universal equivalent injury rating system used by countries outside the United States. Moreover, requiring manufacturers overseas to adopt the AIS system or one based on or similar to the AIS system would be overly burdensome in that such manufacturers would be required to collect medical information not normally obtained (if available at all), codify the information and then apply that information to a system new to them. As a result, Nissan would propose to provide information regarding “claims” involving serious injury of 3 or higher under an AIS-like system for the United States where there is more familiarity with coding, but report all injury claims outside the United States. Allowing such flexibility in the EWS regulatory scheme would result in the submission of meaningful data to the Agency while limiting reporting burdens to manufacturers, especially those overseas.

With regard to formatting and timing, Nissan agrees with the Alliance that reporting should be required quarterly following the receipt of the “claim” or when there is sufficient information available to provide an AIS or AIS-like rating. Such a reporting scheme would ensure that information submitted to NHTSA was sufficient to provide effective early warning of any potential safety-related problems in applicable vehicles. More frequent reporting is unnecessary, because most such “claims” are

made several months (or in the case of lawsuits, a year or more, depending on the statute of limitation:) after an accident occurs.

3. Lawsuits

With respect to lawsuits, Nissan believes that lawsuit information would be included under “claims” listed in subsection B.2. above. As stated in the prior subsection, lawsuit information is generally not “early warning,” because cases are not filed until long after an accident occurs. Automatically reporting detailed information about lawsuits, such as case name, case number, and jurisdiction, is, therefore, not of great benefit. The Agency can always obtain more details with focused requests as necessary, and this will avoid needless data compilation and burden on manufacturers.

4. “Claims For Property Damage”

Definition. “Claims for property damage” can cover a wide array of issues. As such, a precise and understandable definition is essential. Nissan agrees with the following proposed Alliance definition:

A claim for property damage is any written demand, complaint, subrogation request, or lawsuit received by a manufacturer from or on behalf of the person who suffers the property damage, including a person’s insurer, that (a) alleges property damage as a result of a crash, tire failure, or fire, (b) alleges that a product defect was, at least in part, a contributing cause of the property damage, and (c) contains sufficient information to identify the motor vehicle or item of motor vehicle equipment involved.

Discussion. The Agency’s proposed definition in the ANPRM is too broad and unmanageable. Specifically, NHTSA defines this type of claim as a “communication requesting restitution” to distinguish it from a “consumer complaint” (to be discussed below). Nissan believes that this proposal is unworkable. A “communication requesting restitution” could cover incidents that would include warrantable, non-warrantable, or out of warranty claims. For example, a customer may seek restitution for a seized engine caused by either lack of maintenance on the owner’s part or the failure of an engine component. Property damage (to the engine) has occurred, and a claim for restitution has been made. But the potential relation to a safety issue is remote at best, and the burden on manufacturers to attempt to catalogue and automatically report such information would be immense. Most of the information of this type (i.e., the seized engine) would likely be in consumer complaint records. In reality, when consumers contact a manufacturer to make complaints about vehicles, they usually are seeking a free repair or a reimbursement for a repair they paid for, so it is not possible to distinguish a “customer complaint” from a “communication requesting restitution.” And as is discussed below, consumer complaint systems are not easily searchable for most types of information that would be suited to an automatic early warning reporting system.

Many states have so-called “lemon laws” which require manufacturers to repair vehicles under warranty within a specific number of repair attempts or within a specific number of days. A lawsuit brought under such a law could be considered a “communication requesting restitution,” but these matters usually do not involve safety-related issues. This further demonstrates the need to more specifically define this category so that an overly broad definition does not render an entire category of information unmanageable and meaningless.

Because of the wide range of possible matters that could be included, Nissan believes that reportable property damage claims should be limited to those claims received from vehicle owners, owner representatives, or insurance companies, which involve a crash, tire failure or fire where there is an allegation of defect which may have caused the crash, tire failure or fire. Specifically excluded would be communications requesting restitution for mechanical breakdown or improper operation such as the example of the engine that fails due to lack of maintenance. Nissan believes such qualifications are necessary because many property claims, such as paint damage due to acid rain, water leaks, etc., have no safety significance and would create extreme burdens on manufacturers to include in an automatic reporting system. Narrowing the scope of reportable property damage claims would also ensure that NHTSA receives only those claims potentially related to safety, and exclude claims regarding non-safety related issues.

Under the TREAD Act, reporting of this information appears to be on the basis of “aggregate statistical data.” This will also have to be defined. Nissan does not “aggregate” “property damage claims” in any particular manner—they are evaluated as they are received. New systems or procedures may be required, depending on the nature of the reporting requirements. Until this is better defined, Nissan is not certain about the feasibility issues and burdens that may result. Therefore, Nissan suggests that the Agency first promulgate focused rules in this area to assure that meaningful information is reported in a feasible way and that undue burdens are not created. Selecting specific safety systems as proposed by the Alliance (brakes, steering, restraints and fuel systems) is a reasonable approach. This focus could then be expanded as both manufacturers and NHTSA gain experience with the usefulness of this type of information as part of an early warning system.

In order to properly define the scope of “property damage claims,” based on “aggregate statistical data” required for reporting, Nissan believes that reporting thresholds utilizing a set category of components/systems and symptoms relating to major safety systems may be appropriate. Nissan also agrees with the Agency that a threshold in the magnitude of claims should be established. Nissan recommends that reporting of property damage should be limited to those claims that exceed a specific dollar amount (i.e., \$1,000/claim), if this information is known (if the information is not known, the manufacturer would have the option of reporting even lesser amounts).

Like warranty claims, Nissan also encourages the Agency to limit “property damage claims” to U.S. claims only. Nissan believes that this is necessary because the propensity to make claims for property damage is significantly different among different countries. In addition, information in the U.S., while often limited, would likely be of a much greater quality than in other areas of the world. Until experience with reporting of these types of data is gained, Nissan agrees with the Alliance and AIAM that reporting be limited to U.S. claims only.

5. “Field Reports”

Definition. “Field reports” are generally understood by Nissan to be reports submitted by Nissan personnel assigned to travel to dealers or otherwise collect information concerning the in-use performance of a particular vehicle. We do not consider these to include reports from dealers. However, as with other types of information, this could have different meanings among manufacturers and by the Agency. Therefore, the term “field report” must first be clearly defined. Nissan agrees with the Alliance that the definition should be as follows:

Field Report means a (a) non-privileged technical report prepared by a manufacturer’s technical staff involving (b) a single incident in the field or several similar incidents in the field, (c) a covered vehicle system, and

(d) a vehicle (or vehicles) that has been sold to a purchaser for purposes other than resale.

Discussion. “Field reports” provide technical information regarding issues pertaining to the in-use performance of specific vehicles. Most of the other systems support the analysis and investigation of such data. Nissan supports the submission of field report information to the Agency as part of the EWS. The definition suggested above, however, specifically excludes privileged reports. Nissan believes that including reports prepared at the request of counsel would be inappropriate when a manufacturer’s representative investigates a vehicle that is the subject of actual or threatened litigation. Nothing in the TREAD Act requires a manufacturer to waive privileges, and we assume NHTSA does not intend this. Nissan believes, however, that this will not mean that the Agency will not have access to the underlying information. NHTSA would be informed of the matters generating “privileged” “field reports” through the claim and lawsuit reporting requirements discussed earlier.

Nissan believes that the scope of such reports should be focused in order to provide the Agency with only data relevant to issues that may truly impact vehicle safety. Nissan agrees with the Agency’s suggestion in the ANPRM to limit reporting of “field reports” to only those systems or components that have a direct correlation to vehicle safety (e.g., brakes, steering, restraints, fuel systems) and matters of a safety-related nature (e.g., crashes, fires, rollovers, fuel leaks).

Nissan agrees with the Alliance that manufacturers be required to submit counts of field reports from the United States only or, at most, from what the Alliance terms the International Reporting Region. Automatically providing copies, particularly of reports outside of the U.S., is problematic and the resource burden on manufacturers would be enormous. Specifically, as previously mentioned, Nissan sells vehicles in 170 markets worldwide by many separate distributors, who largely operate independently of Nissan. As such, each distributor has its own method for gathering information. Nissan does not have any single entity or system responsible for gathering and storing all such reports. In addition, foreign field reports are often in the language of the originating country. As a result, translation imposes major burdens. NHTSA can make more specific requests of manufacturers for copies of field reports as appropriate, and unnecessary and burdensome translation could be avoided. Therefore, Nissan believes counts of field reports should be limited to the U.S. only, or, at most, to the major markets proposed by the Alliance.

Nissan does not believe “dealer reports” (i.e., technical reports from franchised dealer technical staff as noted by the Alliance) would provide significant additional information as part of an early warning system. In the U.S., any such reports from dealers would largely be duplicative of warranty information which the Agency will be receiving, because the vast majority of this information relates to repairs that are made under the applicable warranties. In most markets outside the U.S., Nissan does not receive dealer reports directly, but to the extent deemed important, such dealer reports will result in the preparation and receipt of field reports from Nissan technical staff. Specifically, if a particular dealer report is of an important nature requiring communication to Nissan, a field report containing the information in the dealer report will be generated for transmittal to Nissan. This system will ensure dealer reports of significance will be counted and reported to NHTSA as part of the field report counting. NHTSA should issue rules that avoid unnecessary duplication of information that only creates extra work for the Agency and manufacturers without any benefit.

Nissan also believes that “field reports” should be limited to reports pertaining to vehicles identical to vehicles sold in the United States. The plain language and the meaning of the TREAD Act were intended to capture this information as it pertained to identical vehicles.

6. "Consumer Complaints"

Definition. "Consumer complaints" cover a broad category of information that Nissan believes would not be of significant value to the Agency, especially when balanced against the burdens on the manufacturer to catalogue and automatically report such information and on NHTSA to review and process the information (given confidentiality concerns about consumer privacy). Nissan, therefore, does not offer a definition, because a specific and meaningful one is difficult to provide. In addition, Nissan directs NHTSA to the discussion above relating to "claims for property damage."

Discussion. In the U.S., Nissan receives 450,000 consumer contacts each year as a result of our promotion of communication with customers. These include written or verbal contacts from customers or prospective customers with requests for information; complaints about vehicles, dealers, parts availability, or other concerns; compliments about products or services they have received; and other comments or questions that may arise and relate in some way to vehicle ownership. These contacts are noted as they are received in electronic files.

Nissan's Consumer Affairs function is not intended to serve as a primary product information system. As such, the value of such information as part of an EWS is doubtful. Instead, the systems have been developed to help satisfy customer's requests for assistance in all areas of the automotive business process. To meet this goal, the coding of the information in the electronic files is generally based upon what the customer is requesting. For example, if the customer is requesting a loaner car due to lack of availability of a part, the request will be coded for loaner car or parts availability. It would not necessarily be coded for the product issue, if any, that led to the contact. Searching databases for specific product information, therefore, is very difficult and time consuming.

In addition, Consumer Affairs information is input by non-technical staff, and the ability to code the information based upon consumer description is very difficult. Oftentimes a similar complaint can be described in several different ways. If such information is, for example, requested in the course of an Agency investigation, searches are made using text-based criteria that require intense screening (consider the text search for a seat belt complaint which discloses a complaint where the owner has concerns about a seat and fan belt; or a text search for a fuel leak complaint which discloses one involving a fuel economy issue and a water leak; these are not unusual outcomes for such text searches). In addition, as noted previously, consumer complaint information in other areas of the world is organized and retained differently, and the ability to automatically report complaints that may be in many different languages creates nearly insurmountable problems and burdens. For these reasons, Nissan does not believe that consumer complaint information should be generally part of an automatic EWS reporting requirement.

Nissan does not believe that lack of reporting of this information will be detrimental to an EWS. Important consumer complaint information would be reported through other means. For example, Nissan believes that claims for property damage in the U.S. received through Consumer Affairs would be included with other claims for property damage and be part of the aggregate data reporting. Injury claim reports received through Consumer Affairs would be included with other claims for death and serious injuries and reported according to the same criteria. Accordingly, consumer complaint information would provide little additional value to NHTSA as part of an EWS, especially given the burdens of attempting to report such information and the Agency's responsibility to review and process it. In fact, such efforts may take away Agency resources and attention from more valuable sources of information.

7. “Customer Satisfaction, Consumer Advisories, Recalls And Other Activities Involving The Repair Or Replacement Of Motor Vehicle Or Items Of Motor Vehicle Equipment”

Nissan addresses this issue under two categories. First, we discuss campaigns of all kinds under which customers are advised to have a vehicle repair made. Next, we address technical bulletins, which are communications made to dealers concerning vehicle repair or other service-related issues. As an initial matter, Nissan believes that NHTSA should provide a clear definition of “customer satisfaction campaigns,” “consumer advisories,” “recalls” or “other activities involving the repair of motor vehicles or motor vehicle equipment.” As with other types of information mentioned in connection with an EWS rule, the foregoing terms do not have universal meanings in the motor vehicle industry.

i. “Campaigns”

Definition. The concept of a “campaign” is ambiguous. Manufacturers in the U.S. and abroad use the term differently to describe different actions. Based on one circumstance that caused Congress to pass the TREAD Act (i.e., notices to customers of a tire replacement offer in other countries but not for customers in the U.S.), we believe the appropriate definition, as suggested by the Alliance, is as follows:

Customer satisfaction campaigns, consumer advisories, recalls, or other activity involving the repair or replacement of motor vehicles or items of motor vehicle equipment shall mean those actions, other than foreign recalls or other safety campaigns as further defined, undertaken or authorized by a manufacturer in which a class of affected owners of motor vehicles or items of motor vehicle equipment are notified of an offer to repair or replace the vehicle or equipment or to extend any applicable vehicle or equipment warranty.

Discussion. The concept of a “campaign” could cover a wide spectrum of activities from a local dealer or distributor offering goodwill assistance to a customer to a more formal activity such as a recall campaign. The customs and market practices in the 170 markets worldwide in which Nissan vehicles are sold (most often by independent distributors and dealers) vary greatly, and the conducting of “campaigns” is often a local market issue that may or may not be known to Nissan. Therefore, Nissan believes that reportable “campaign” information should only include that information which results in more formal activity by, or authorized by, the original vehicle or equipment manufacturer. Nissan has already agreed to supply information to NHTSA on these types of formal “campaigns” conducted on “substantially similar” vehicles in overseas markets and supports submission of this information as part of the proposed EWS regulations. However, Nissan believes that the Agency must make clear that reporting of “campaigns” under early warning must only apply to those “campaigns” of which the manufacturer’s head office or U.S. distributor is actually aware. Such a requirement would include all “campaigns” conducted by such manufacturer’s offices but would not include any “campaigns” conducted independently by a local dealer or distributor in a foreign country not known or authorized by the manufacturer. Nissan believes that requiring any additional information beyond formal campaigns or other information actually known to a manufacturer would be outside the scope of the TREAD Act and create undue burdens on manufacturers.

ii. Technical Bulletins

Nissan already supplies NHTSA with all technical bulletins and service manuals provided to Nissan dealers in the U.S. Nissan would support expanding this provision to provide NHTSA

with electronic access to the service information systems accessible by franchised dealers. Nissan does not, however, support the concept of providing foreign technical bulletins or their equivalent from foreign markets to the Agency.

First, all technical bulletins are not “campaigns” even under the broadest of definitions. Such a bulletin could simply announce a new repair procedure, discuss a new feature or part that was adopted as part of a vehicle content upgrade, or provide servicing or diagnostic tips for existing components to improve the technician’s ability to “fix it right the first time” for optimum consumer satisfaction. Nissan believes that the Agency is interpreting the “other activities” language of the Act too broadly as applying to any technical bulletin, when, in fact, the context of “other activities” relates back to the “customer satisfaction campaigns,” “consumer advisories” and “recalls,” all of which would involve some type of owner notification. Nissan agrees that the Act expands the requirements of 49 CFR 573.8 in part as it may pertain to notices and communications sent to more than one purchaser, but to interpret it more broadly goes beyond the circumstances that caused Congress to include this provision in the Act in the first place.

Second, technical bulletins supplied in foreign markets are usually provided in the native languages of that country. Translating these bulletins from a foreign language to English would be a major burden on manufacturers. Moreover, Nissan believes that this foreign information would have no significant benefit to NHTSA compared with the undue burdens of obtaining and translating the bulletins. If the information is significant to the U.S. market, then the information will be included in the U.S. technical information supplied to the dealers. As noted earlier, the TREAD Act was only intended to capture that information of relevance to vehicles and motor vehicle equipment located in the United States.

In addition, Nissan believes that the technical bulletins already include the background of why the bulletin is being issued. This is described as the customer symptom that the bulletin addresses. Automatically supplying additional information on the background and facts that led to the bulletin, as NHTSA suggests in the ANPRM, would be an unnecessary burden on manufacturers that will not provide any additional benefit to the Agency. Reporting such information would require the creation of documents that otherwise do not exist and, therefore, is not well suited to an automatic reporting system under the TREAD Act. As is the current practice, if the Agency has questions about a bulletin it receives, NHTSA requests additional information from manufacturers. We believe this is the appropriate way to balance the benefits of the information with the burdens of an automatic reporting requirement

8. “Internal Investigations”

“Internal investigations” are not susceptible to meaningful definition, and, therefore, Nissan cannot offer one in comment to this ANPRM. Investigations are a continuous process, not a defined event. They are reviews and analyses of data that will already be submitted to the Agency as part of an EWS rule. Many engineers and service personnel of Nissan have as part of their responsibilities to review, investigate and evaluate information received concerning the in-use performance of Nissan vehicles, so this “internal investigation” process does not have a well-defined beginning or well-defined end, considering that new information is potentially received continually and must be evaluated. To seek information about such “investigations” is to seek information regarding everything the responsible engineers and service personnel do on a daily basis. This is not manageable, and is exactly what Congress intended to avoid when it included provisions in the Act to prevent undue burdens on manufacturers.

Because NHTSA will have information used by the manufacturer in the Agency’s ongoing investigation process, NHTSA will be able to do its own investigation and analysis of this

information and can follow up by requesting additional information from the manufacturer as necessary. For these reasons, Nissan does not support the submission of undefined "internal investigation" material as a requirement of the EWS regulations.

9. "Design Changes"

"Information" about "design changes" is not defined by NHTSA in the ANPRM. Nissan does not believe that design changes (i.e., changes to components and service parts) should be reportable as part of an EWS, regardless of definition. Vehicles contain many thousands of components, and manufacturers continuously make design changes for a variety of reasons, including quality improvement, new suppliers, customer satisfaction and many others. These changes ordinarily are not for safety-related reasons. As a result, requiring reporting of all design changes would be of little value to NHTSA. Furthermore, such a requirement would be an unnecessary burden upon manufacturers and the Agency. For example, last year approximately 36,000 changes were made at Nissan's technical center in Japan. Moreover, notes of design changes made in Japan are largely in Japanese, requiring translation if submitted. Accordingly, Nissan does not support providing design change information to NHTSA as this would be a major burden and would likely result in the submission of an unmanageable amount of information to NHTSA.

If the submission of some type of change information is required, Nissan supports providing NHTSA with dealer parts catalogs which would provide service part number changes by production periods. Generally, a significant part change will be reflected in a new part number. Such information would be more readily managed by NHTSA as well, because if the Agency wanted parts catalogs, such data could be made available on computer disk. Data submissions would be limited to U.S. parts catalogs only, because there would be no benefit to NHTSA in supplying this information for foreign markets, as most of the information is generated from the same database as the U.S. data. Should NHTSA wish to see foreign parts catalogs, Nissan would be willing to provide the catalogs. Overseas versions are available in Japanese, English, German, French and Spanish.

10. Remedy Failures

Nissan supports the Alliance and AIAM views that remedy failures are outside the scope of the TREAD Act and should not be separately reported.

11. "Reports of Fuel Leaks, Fires and Rollovers"

Definition. Nissan believes that, if defined clearly in other sections, information regarding fires and rollovers will be reported under other categories of reportable EWS information. To the extent they are not, Nissan does not object to obtaining fire and rollover information from other U.S. sources of information that may be received. We believe some information concerning fuel leaks will also be covered by other sources of information, but have concerns about further reporting as will be discussed below. Concerning fires and rollovers, Nissan agrees with the following Alliance definitions:

A reportable fire is a report received by a manufacturer that (a) alleges property damage to a motor vehicle or item of motor vehicle equipment resulting from exposure to flame, (b) contains an allegation that the flame was, at least in part, caused by a product defect, and (c) contains sufficient information to identify the motor vehicle.

A reportable rollover is a report received by a manufacturer that (a) involves a dynamic event in which a motor vehicle overturns, (b)

contains an allegation that the rollover was, at least in part, caused by a product defect, and (c) contains sufficient information to identify the motor vehicle.

Discussion. The foregoing proposed definitions are necessary to assure that manufacturers have a clear understanding of the reporting requirements and to prevent reporting of unnecessary information. The proposed definitions assure that incidents constituting a reportable event are clearly understood. Further, a fire or rollover event does not automatically involve a safety defect or even an allegation of one. In fact, most such events are associated with other causes. For example, a report may be received where the only allegation is brake failure that caused a vehicle to strike a large, sharp object in the road that cut a hole in the fuel tank and caused a fire that damaged the vehicle. It would be appropriate to report the incident as an alleged brake failure, but not as a fire, because there is no allegation of a causal connection between the fire and a defect.

While fires and rollovers, when properly defined, should generally be manageable as part of an EWS rule, Nissan is concerned that “fuel leaks” create an entirely different set of problems that would create undue burdens on manufacturers. Fire and rollover reports will most likely be contained in the “claims” categories of information (both “serious injury/death” and “property damage”) and in the “field reports” category. However, “fuel leaks” are much harder to define. For example, in Nissan’s experience, consumers’ descriptions of “fuel leaks” are often inadvertently misleading. The human nose typically can detect the odor of gasoline at a level of 30 parts per million (ppm). A complaint of a fuel smell during refueling is often described as a “fuel leak,” when, in fact, no leak is present. Because many consumers are not technically familiar with vehicles, exhaust smells are also sometimes described as “fuel smells.” Therefore, we suggest that NHTSA not attempt to create a separate category for “fuel leaks.” The Agency will have access to warranty information and “field reports” involving “fuel leaks” that are noted by a manufacturer’s representative or dealer during a vehicle repair. Under this approach, the power of NHTSA to seek “fuel leak” information in the context of a specific investigation is undisturbed by the Act.

For the reasons stated above with regard to several other categories of information, we support the Alliance position and believe that fire and rollover information be limited to the U.S. market, except to the extent that it is included in another category (for example, one involving serious injury or death, which will include information known to manufacturers from foreign sources).

C. Format of Reportable Information

1. When Should Information Be Reported?

In general, Nissan supports the report timing suggestions of the Alliance and AIAM. Nissan suggests that the submission timing be reviewed when information criteria and format is proposed in the forthcoming Notice of Proposed Rulemaking (NPRM).

The timing of reporting will largely depend on the scope and depth of the reporting requirements. It is difficult to provide detailed comments until more concrete proposals are outlined in the NPRM.

NHTSA is considering requiring the reporting of serious injury and fatality information within two weeks of receipt of information. Nissan does not support this proposal because two weeks is an insufficient amount of time for review and processing, especially with regard to information from foreign sources. In addition, such claims are often received many months (or sometimes years in the case

of lawsuits) after an event occurs, so the longer submission schedule is not significant in terms of early warning information for the Agency.

2. How Should Information Be Reported?

The potential volume of information that may be requested under the forthcoming regulations would suggest that an electronic submission format is necessary. NHTSA should develop a simple spreadsheet format for the data to help ensure reporting consistency among manufacturers. Nissan supports the Alliance proposals in this regard.

3. Timing Considerations

Nissan supports the views of the Alliance and AIAM that reporting should be based on the most recent five years. This is a reasonable balance between the benefits and burdens of obtaining and reporting information. It is also consistent with NHTSA's current record retention rules.

Also, application of the EWS rule should be prospective only. In addition to being questionable under the TREAD Act, it would be extremely burdensome to go back five years to research information and report it under a new rule.

Depending on the scope of the final rule, there may be leadtime considerations if new systems must be developed. A phase-in of the requirements may be necessary. We discuss this further in the next section below.

D. Cost to Manufacturers

With regard to burden and cost to manufacturers, Nissan cannot quantify the costs of reporting at this time until more specific proposals are outlined in the NPRM. However, we have serious concerns that the comments and questions in the ANPRM suggest that Nissan will be unable to deal with EWS reporting without significant and costly changes to existing systems.

In general, information from the U.S. market will be easier and less costly to provide than information from other markets. Information that can be downloaded from current systems will be much easier and less costly than information that is currently not well coded or computerized. Moreover, information from the U.S. market is directly relevant to U.S. concerns. Specific information from global markets, such as campaigns, will be easier and less costly than general information such as warranty data.

Depending on the scope of the final rule, there will be burden and cost associated with setting up new systems, or modifying existing ones, and on-going burden and cost associated with processing and providing information automatically within the timeframes established. For example, if the reporting requirements for warranty information are relatively straightforward and limited to U.S. data, with the issues outlined in our earlier comments well-defined and relatively simple, existing systems may be used without major modification or cost. However, expansion of reporting to multiple and complex parameters, and further expansion to systems outside of the U.S., will likely result in the need to make major systems changes that could cost in the millions, or even tens of millions of dollars. The changes could be in programming or software, but if the reporting becomes overly complex, hardware changes could be required as well. It is very difficult to provide further information until the requirements are clarified and analyzed to determine exactly what impact there may be on existing systems.

New systems might also be required to deal with data that typically is not in easily retrievable electronic format. We earlier described burdens associated with information such as "design

changes” and “consumer complaints,” which are large in number, but which would require intensive review and processing to include in an automatic EWS reporting system. In the short time we have had to comment on the major issues presented by the ANPRM, we have not been able to begin to consider the potential ramifications of having to process information of this nature on personnel and systems.

We have indicated earlier the potential language translation burdens that may be faced depending on the scope of the final rule. We are not in a position to quantify the costs that may be involved and cannot do so until we have a better understanding of the potential requirements. Suffice it to say that large amounts of information exist in languages other than English, and in most cases there is no existing business need to have the information in any language other than the language in which it was created originally. Translating documents is expensive and time-consuming, so the EWS rule should be designed in such a way to minimize the need to translate information for automatic submission and the need to translate at the review and processing stage to determine if submission is required.

Nissan welcomes the opportunity to provide additional comments on burden and cost as the EWS rulemaking proposals are more precisely defined.

In order to determine whether particular reporting requirements were “unduly” burdensome, Nissan believes that NHTSA is required by the TREAD Act to take into consideration not only the effort by the manufacturer in producing the data, but NHTSA’s ability to review and utilize the data as well. There is no benefit in supplying data that cannot be easily processed or utilized by the Agency.

IV. CONCLUSION

Nissan supports NHTSA’s attempts to implement an EWS rule, but believes that the Agency’s ANPRM needs to be better tailored to seek meaningful information that is neither unduly burdensome to provide nor overwhelming for the Agency to use. Nissan believes that the proposed reporting requirements go beyond the scope of information NHTSA is authorized to obtain under the early warning provisions of the TREAD Act. In addition, much of the information NHTSA seeks is voluminous in nature or stored in ways or in languages that would be unduly burdensome for manufacturers to obtain, and time-consuming for NHTSA to review.

Instead, Nissan recommends that the Agency concentrate on only that information which would be truly useful as part of an early warning system. Nissan believes that the approach suggested by Nissan in these comments will provide NHTSA with the information the Agency seeks as part of an effective early warning system without imposing undue burdens upon not only the manufacturers, but NHTSA as well.

APPENDIX A LEGAL ISSUES

In addition to the information provided above, Nissan believes there are several key issues raised in the ANPRM that must be addressed as part of the EWS rulemaking. These issues include the definition of “substantially similar” and NHTSA’s proposal to require the reporting of data in the “constructive possession” of manufacturers. Each of these issues is addressed below in greater detail.

A. “Substantially Similar”

1. Definition

Section 30166(l) and (m)(3)(C) of the TREAD Act’s reporting requirements are contingent on whether the subject motor vehicle or motor vehicle equipment in a foreign country is identical or *substantially similar* to a motor vehicle or motor vehicle equipment offered for sale in the United States. In the ANPRM, NHTSA stated that the Agency would regard as “substantially similar” any model of motor vehicle sold in a foreign country if the same model with only minor differences is FMVSS-certified and sold in the United States. 66 Fed. Reg. at 6540. According to NHTSA’s discussion, the Agency’s working definition of “same model” means “same exterior body shell and family of engines.” *Id.* From Nissan’s experience, a more accurate definition of “substantially similar motor vehicle” would be a motor vehicle in substantial compliance with the federal safety standards that has the same platform and body shell, same engine displacement, and an engine within the same engine family. Nissan believes that these additional qualifiers are necessary in order to ensure that a vehicle is, in fact, “substantially similar.”

The foregoing recommended definition is consistent with NHTSA’s past interpretation of the term “substantially similar.” Specifically, the term “substantially similar” appears in NHTSA’s “gray market” program. Pursuant to Section 30141 of the Motor Vehicle Safety Act and 49 C.F.R. § 593.5, a motor vehicle not originally manufactured to comply with federal safety standards may be imported into the United States if NHTSA decides that the vehicle is substantially similar to a motor vehicle certified for domestic sale, and is capable of being readily modified to conform to all applicable federal safety standards. The term “substantially similar” is not defined in the gray market statute or regulations, but NHTSA has published a limited number of decisions in the Federal Register that offer some guidance. In general, NHTSA’s gray market “substantially similar” decisions turn on whether the petitioner can demonstrate that the foreign vehicle is substantially similar to its U.S. counterpart in the way that the two vehicles comply with the federal safety standards. The critical components that must be analyzed are those that influence FMVSS compliance, and NHTSA will not find that the vehicles are “substantially similar” if they respond to the FMVSS factors in a different manner. 65 Fed. Reg. 48278 (2000); 65 Fed. Reg. 35419 (2000); 62 Fed. Reg. 18385 (1997); 62 Fed. Reg. 14501 (1997); 60 Fed. Reg. 49040 (1995); 60 Fed. Reg. 16699 (1995); 59 Fed. Reg. 41812 (1994); 57 Fed. Reg. 34607 (1992); 57 Fed. Reg. 19964 (1992). Thus, Nissan believes that the appropriate definition of a substantially similar vehicle is one that includes substantial compliance with applicable FMVSS’s as well as having the same platform and body shell, same engine displacement, and an engine within the same engine family.

Subsections 30166(l) and 30166(m)(3)(C) also reference substantially similar motor vehicle equipment. NHTSA will receive its most valuable information under the substantially similar *vehicle* aspect of these provisions, and should limit the equipment-specific analysis to those items of motor vehicle equipment that should have separate EWS reporting requirements and that are the responsibility of the equipment manufacturers. In Section III(A), *supra*, Nissan recommended that

NHTSA identify these items of motor vehicle equipment as: 1) tires; 2) major components of heavy-duty vehicles; and 3) non-OEM accessories and service parts installed in the aftermarket. For the same reasons discussed in Section III(A), the equipment manufacturers, and *not* the vehicle manufacturers, should be required to report information regarding any such substantially similar motor vehicle equipment.

Any expansion of the reporting requirements for substantially similar motor vehicle equipment, beyond the separately-reportable items identified above, would be extremely burdensome for vehicle manufacturers, and of little value to NHTSA. Even identical components can respond very differently in different types of vehicles. If there is any possibility that a defective component would affect motor vehicle safety in the United States, reportable incidents are almost surely to arise in identical or substantially similar vehicles in other countries. If such components are not causing reportable incidents in identical or substantially similar vehicles in other countries, they are extremely unlikely to cause motor vehicle safety concerns in U.S. vehicles. In addition, Nissan does not have, nor is Nissan aware of, a system that can adequately track identical or substantially similar components throughout Nissan's international product lines. Such a system would have to be composed of enormous matrices capable of tracking and cross-referencing 10,000 to 15,000 separate parts per model. Given the questionable value of this information, such a system cannot be justified.

2. Application

With regard to application of the requirement of reporting on "substantially similar" vehicles, Nissan believes that any reporting under the EWS regulations must be limited to foreign recall information and information actually received by a manufacturer regarding incidents involving serious injury or fatalities allegedly caused by a possible defect in a motor vehicle or an item of motor vehicle equipment that is substantially similar to a vehicle or component sold in the United States. The reporting requirements for substantially similar vehicles were not intended to expand beyond this specific type of information. Reporting for information not involving serious injury or deaths allegedly caused by a potential defect (i.e., warranty and other data) was, instead, intended to be limited to only those incidents involving the same vehicle.

The limitation on reporting of foreign recalls and incidents involving serious injury or death in substantially similar vehicles is wholly consistent with the statutory provisions of the TREAD Act and Congressional intent. Congressional intent in limiting reporting on substantially similar vehicles is embodied in both the general intent of the TREAD Act and the explicit omission of these reporting requirements in other portions of the EWS provision. With regards to the general intent of the TREAD Act, as presented in detail in section II above, Congress clearly intended that the reporting requirements of an EWS be sharply focused. Specifically, the TREAD Act was only intended to capture those items of information that would best provide early warning of potential safety-related issues in motor vehicles and items of motor vehicle equipment. Congress was especially concerned about information that may have alerted NHTSA to the Ford/Firestone situation, including foreign recalls and incidents involving serious injury or death allegedly caused by a potential defect. Both such items of information were available in the Ford/Firestone case, but were not reported to NHTSA. For this reason, the TREAD Act explicitly requires the reporting of such information on identical vehicles as well as substantially similar vehicles. Congress also recognized the limited usefulness of such information in other contexts and the burden associated with expanding such reporting to other items of information such as warranty and claims data generally. For this reason, Congress did not include the substantially similar vehicle language in the other provisions of the EWS section. The requirement for reporting on substantially similar vehicles for warranty and claims data and data other than incidents involving serious injury or death allegedly caused by a potential defect or foreign recalls were intentionally omitted as Congress did not intend for those categories of information to include substantially similar vehicles.

The foregoing interpretation is wholly consistent with rules of statutory construction applied by courts. Specifically, an express statutory requirement in one place, contrasted with statutory silence in another, is presumed to show intent to confine the requirement to the specified instance. See: Bates v. United States, 522 U.S. 23 (1997); Field v. Mans, 516 U.S. 59 (1995); Independent Bankers Ass'n of America v. Farm Credit Admin., 164 F.3d 661 (D.C. Cir. 1999); Halverson v. Slater, 129 F.3d 180 (D.C. Cir. 1997). In the case of the TREAD Act, Congress expressly limited expansion of reporting requirements for particular kinds of information to substantially similar vehicles in only two instances: foreign recalls and incidents involving serious injury or death allegedly caused by a potential defect as part of an early warning system. Such provisions were explicitly not included in reporting of warranty data, claims information not involving serious injury or death and other data the Agency may find useful as part of an EWS. Accordingly, Nissan believes that the reporting provisions for substantially similar vehicles must be limited in the final EWS rules.

B. Actual Possession

The TREAD Act's early warning reporting requirements include Section 30166(m)(4)(B), which provides:

INFORMATION IN POSSESSION OF MANUFACTURER.—The regulations promulgated by the Secretary under paragraph (1) may not require a manufacturer of a motor vehicle or motor vehicle equipment to maintain or submit records respecting information not in the possession of the manufacturer.

Pub. L. No. 106-414, § 3(b) (to be codified at 49 U.S.C. § 30166(m)(4)(B)). In the ANPRM, NHTSA stated that the Agency interprets “in the possession of the manufacturer” to include “constructive possession and ultimate control of information, such as information in foreign countries, or information possessed by outside counsel or consultants.” 66 Fed. Reg. at 6543. This interpretation is contrary to the intent of Congress. Possession means possession, and Congress specifically included this section to make it clear that manufacturers would not be required to collect records or information that the manufacturers do not already have.

Congress even reinforced this intent in Section 30166(m)(3)(C), which dispels any notion about constructive possession:

The manufacturer of a motor vehicle or motor vehicle equipment shall report to the Secretary, in such manner as the Secretary establishes by regulation, all incidents of which the manufacturer receives actual notice which involve fatalities or serious injuries which are alleged or proven to have been caused by a possible defect . . . (emphasis added).

Pub. L. No. 106-414, § 3(b) (to be codified at 49 U.S.C. § 30166(m)(3)(C)). Under the clear terms of the statute, therefore, NHTSA's regulations cannot require manufacturers to report defect-related incidents involving death or serious injuries unless the manufacturer receives actual notice of such incidents. This provision, along with Section 30166(m)(4)(B), is evidence that Congress did not intend the TREAD Act reporting requirements to force manufacturers into collecting information that the manufacturers would otherwise not have obtained.

Further evidence of such Congressional intent comes from the TREAD Act's legislative history. Senate Bill 3059, which Congress did *not* enact, included language that would have required manufacturers to *collect*, as well as report, information:

In carrying out this subsection, the Secretary shall require manufacturers to *collect and report* to the Secretary periodically, or upon request by the Secretary, the following information derived from domestic and foreign sources:

Motor Vehicle and Motor Vehicle Equipment Defect Notification Improvement Act, S. 3059, 106th Cong. § 6(d)(3)(A) (2000) (emphasis added). Congress, however, rejected this bill in favor of H.R. 5164, which does not require manufacturers to *collect* any information. Rather, the TREAD Act requires only that manufacturers *report* certain information already in the possession of the manufacturers.

While the early warning regulations cannot impose a requirement of collecting information from a wide variety of international sources outside of the manufacturer's actual control, the regulations should ensure that manufacturers do not avoid reporting information by dispossessing themselves of information *actually received*. NHTSA could accomplish this goal by applying its reporting requirements to "information in the possession of the manufacturer," and defining that phrase to mean information *actually received* by the manufacturer, whether or not the information remains in the manufacturer's actual possession.

In contrast, the term "constructive possession" is subject to an interpretation that goes too far. The term can be used to create a legal fiction that imputes knowledge or possession to a person or entity that in fact does not have – and never did have – such knowledge or possession. In certain circumstances involving disputes over specific pieces of information, this legal fiction may be justified. In those cases, the issues are often painstakingly resolved by a fact-specific inquiry involving a wide variety of considerations. In the context of the EWS rule, NHTSA should not create such a situation. The EWS rule must operate automatically after a manufacturer receives certain information. It cannot depend on case-specific document requests and dispute resolutions, and it should not create penalties for failing to report information that the manufacturer never knew existed. Rather, NHTSA should recognize that Congress intended the TREAD Act to cover only such information that is in the possession of manufacturers, meaning such information that manufacturers actually receive in the normal course of business.

Another issue involved in the interpretation of the phrase "in the possession of the manufacturer" is the definition of "manufacturer." The TREAD Act's early warning reporting requirements apply to manufacturers of motor vehicles and motor vehicle equipment. Pub. L. No. 106-414, § 3(b) (to be codified at 49 U.S.C. § 30166(m)(1)). The TREAD Act does not change the National Traffic and Motor Vehicle Safety Act's definition of "manufacturer," which provides that a manufacturer is either a person "manufacturing or assembling motor vehicles or motor vehicle equipment" or "importing motor vehicles or motor vehicle equipment for resale." 49 U.S.C. § 30102(a)(5). Neither the United States Congress nor NHTSA, consistent with international law, should attempt to regulate entities without a sufficient nexus to the United States. Therefore, NHTSA and industry members alike have always considered the National Traffic and Motor Vehicle Safety Act's definition of "manufacturer" to extend only to persons either manufacturing, assembling or importing motor vehicles or motor vehicle equipment from within the United States, or to such persons outside of the United States who intend their motor vehicles or motor vehicle equipment to be shipped to and sold within the United States.

The TREAD Act's new requirements do not change this analysis. NHTSA should avoid unnecessary issues of international law, along with practical enforcement obstacles, by continuing to limit its reporting requirements to manufacturers who produce or import motor vehicles or motor vehicle equipment for the purpose of sale in the United States.

With the definition of “manufacturer” discussed above, information actually received by such domestic and foreign manufacturers will include a very broad scope of data derived from, and located in, foreign countries. Manufacturers would not be able to escape reporting requirements by storing information in foreign countries or with consultants and/or counsel, because such information would still have been actually received by the manufacturer.