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Docket Management
Room PL-401
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March 23, 2001

Re: Docket No. NHTSA 2001-8677; Notice 1 RIN 2127-AI25

Johnson Controls, Inc. ("Johnson Controls") submits these comments in response to the National Highway Traffic Safety Administration's ("NHTSA") Advance Notice of Proposed Rulemaking ("ANPRM")[1] on implementation of the "early warning reporting requirements" of the Transportation Recall Enhancement, Accountability, and Documentation ("TREAD") Act.[2]

Johnson Controls is a multinational supplier of automotive interior systems and other automotive components. It supplies those systems and components directly to automobile manufacturers for incorporation into new vehicles according to the vehicle manufacturer's specification. In addition, certain of its systems and components are sold to distributors other than vehicle manufacturers as replacement parts for aftermarket vehicles.

I. EXECUTIVE SUMMARY

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[1] *Standards Enforcement and Defect Investigation; Defect and Noncompliance Reports; Record Retention*, 66 FR 6532-01, Advanced Notice of Proposed Rulemaking, Docket No. NHTSA 2001-8677; Notice 1, RIN 2127-AI25 (Jan. 22, 2001) ("ANPRM").

[2] Transportation Recall Enhancement, Accountability and Documentation Act, Pub. L. No. 106-414 (2000).

For original equipment, NHTSA should require only vehicle manufacturers to provide the agency with aggregate reports of the number of claims for limited categories of subsystems or components that have a demonstrated recall history. In order to avoid duplicate reporting, equipment manufacturers who supply original equipment or sell replacement equipment through vehicle manufacturer channels should be directed to assemble and hold similar aggregate data i.e. self report on their components for later review as requested by the agency in connection with investigations.

Replacement equipment manufacturers should be required to provide the agency with aggregate reports for the same limited categories of subsystems or components as vehicle manufacturers, and self report on components that are not part of the same limited categories of subsystems or components. This assures that information on components is available when requested.

The automatic reports, whether reported to the agency or self reported, should be retained by vehicle and equipment manufacturers for the retention period prescribed in Part 576. All such reports should be considered presumptively confidential.

A chart outlining the suggested reporting methods is attached as Appendix A.

Johnson Controls comments are organized as follows:

A. Automatic Reporting should only apply to claims for harm. [3]

[3] "Automatic reporting" is used here and throughout this comment as it is used in ANPRM at 6533 i.e. to denote periodic reports not in response to NHTSA's information requests under which information is required as part of an investigation.

B. Where claims data is likely to be reported by the vehicle manufacturer, or is on components that do not have historical recall experience, equipment manufacturers should self report only

C. Claims should be reported as a cumulative count by quarter and by component and, in the case of original equipment, by vehicle and model year

D. Equipment manufacturers should not be required to automatically report if their reports would duplicate those of the motor vehicle manufacturers.

E. The record retention requirements of Part 576 should extend to motor vehicle equipment manufacturers.

F. Thresholds should be established to prevent reporting on components that have not been subject to regulatory intervention.

G. Automatic reporting under TREAD is presumptively confidential.

H. Early warning data reported should not be the basis for an investigation unless there is a statistically significant difference in the frequency of claims reported.

II. COMMENTS

Automatic data reporting is appropriate if such data allows NHTSA to make timely and quality decisions on allocation of its product investigation resources. Johnson Controls's comments here are directed to the nature, handling and use of data that would support this early warning objective. Appendix B is a review of data which Johnson Controls considers appropriate to product investigations and is to be distinguished from data appropriate to early

warning reports. Appendix C is Johnson Controls's review of the requirements of the TREAD Act that are the basis for these comments.

A. Automatic Reporting should only apply to claims for harm.

Johnson Controls opposes any proposal which calls for an overly expansive automatic reporting requirement. To satisfy the early warning objective of the TREAD Act, automatic reports must provide an objective basis for agency decisions on whether an investigation should be commenced. To assure a manufacturer's compliance with automatic reporting, a precise definition of what must be reported is necessary. This is particularly important where violation of reporting requirements can result in both civil and criminal penalties.

Consistent with Section 30166(m)(3) of the TREAD Act, JOHNSON CONTROLS proposes that "claims" known to the manufacturer be subject to early warning reporting. The definitional structure would be as follows:

- **claim** is defined as notice of a specific incident involving harm that is alleged to have been caused by a possible defect in a manufacturer's motor vehicle or motor vehicle equipment.

- **harm** is defined as bodily injury or property damage

- **bodily injury** is defined as injury sustained by a person, including death .

- **property damage** is defined as physical injury to tangible property but does not include damage to the subject motor vehicle or motor vehicle equipment.

This formulation for automatic reporting has several advantages. First, automatic reporting on claims is consistent with the threshold requirement in Section 30166(m)(3)(A) and

Section 30166(m)(3)(B) of the TREAD Act that early warning information ". . . assist in the identification of defects relating to motor vehicle safety..." because the reporting is confined to incidents that involve actual injury or demonstrated injury producing potential. Second, it includes those incidents involving fatalities or serious personal injury that are required to be reported under Section 30166(m)(3)(C). Third, the "claim" definition provided is consistent with the coverage of most casualty policies involving product risk and therefore provides a potential source for data to be reported. Casualty loss run data is potentially helpful in identifying foreign incidents. Finally, the information proposed for automatic reporting is exactly the type of early warning data that the agency was unaware of prior to the February 2000 TV report involving Firestone ATX tires.

If the objective of early warning is to be served, then aggregate reporting of claims on a periodic basis, as received, is the most timely solution. Johnson Controls is proposing that all bodily injury claims be reported including "serious bodily injuries" because information concerning the seriousness of an injury is not received concurrent with claim notice.[4] While such reporting goes beyond the Act's plain terms, it would relieve manufacturers of making subjective (and potentially incorrect) judgments for early warning purposes and would satisfy NHTSA's interest in timely safety monitoring.

Johnson Controls believes that automatic reports should facilitate the identification of potential problems. As demonstrated by the Firestone ATX matter, claims information reported on an aggregate basis can be a valuable early warning indicator. Other types of information

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[4] Subject to applicable privileges, Johnson Controls notes that the agency retains the ability to receive information in possession of the manufacturer on the seriousness of the injuries involved on an "as requested" basis.

suggested by NHTSA in its notice, while appropriate for other purposes (such as problem analysis), do not have a clear relationship to the identification of potential safety defects absent a demonstrated potential for bodily injury. A further review of these types of data is contained in Appendix B attached.

B. Where claims data is likely to be reported by the vehicle manufacturer, or is on components that do not have historical recall experience, equipment manufacturers should self report only

Section 30166(m)(3)(C) provides the Secretary with the discretion to direct the form and manner of reporting of early warning data for deaths and serious personal injuries and Section 30166(m)(3)(A)-(B) allow the agency to obtain information sought "on request". The agency should exercise this discretion to allow self reporting in circumstances where automatic reporting to the agency would be duplicative of reporting by the vehicle manufacturer or involve components that have limited recall experience.

Johnson Controls believes equipment manufacturers who supply either original equipment or replacement equipment through vehicle manufacturer distribution chains will have data that is duplicative of that possessed by vehicle manufacturers. Under those circumstances, equipment manufacturers should be required to prepare cumulative claims data by quarter on claims for their equipment, but to store and hold i.e. self report such data for later forwarding to the agency should NHTSA request that information.

For other replacement equipment manufacturers, reporting should be limited to self reporting unless the equipment involved is in one of the limited categories of systems or components on which automatic reporting is required.

C. Claims should be reported as a cumulative count by quarter and by component and, in the case of original equipment, by vehicle and model year

Johnson Controls supports the view that reportable claims data should be submitted in aggregate numeric form only. Original records should be retained for further examination for the period prescribed in Part 576 in the event the agency initiates an investigation. TREAD gives the agency the discretion to dictate the method and means of reporting. Aggregate data compilations provided on a quarterly basis will permit the agency to promptly spot evolving potential failure trends and to proceed to the next level of inquiry when it is justified by the data.[5] See one illustration of a statistical methodology that can be used to justify further inquiry is in Comment II. H..

This type of reporting system will reduce the burden on government and industry and permit resources to be devoted to the real task of finding early data trends, and it will avoid the need for numerous government and private sector employees to "process paper." Just as the Paperwork Reduction Act requires the government to reduce the paperwork burden on citizens, NHTSA should work with industry to develop the means to avoid the needless shipment of claim documents.

Johnson Controls suggests that aggregate data should be reported for each type of injury (bodily injury and property damage) and by component type, and, in the case of original equipment, by vehicle model and model year in which it is installed. This type of submission is able to be generated with widely available spreadsheet software and would provide a clear depiction of the type of trend information that is useful in determining whether any further investigation is necessary. In this format, the data could easily be submitted to the agency electronically.

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[5] *See* 49 U.S.C. § 30166(m)(4)(A)(ii).

D. Equipment manufacturers should not be required to automatically report if their reports would duplicate those of the motor vehicle manufacturers

Where motor vehicle equipment manufacturers provide components as original equipment, as opposed to replacement equipment other than that sold through the vehicle manufacturer, the potential for dual reporting exists. If equipment manufacturers are required to automatically report such claims data, their reports will be duplicative and generally a subset of what the original equipment manufacturers have already provided. Duplicative reporting is a burden to both manufacturers as well as the agency and does not provide any corresponding meaningful data that benefits the cause of safety.

Where motor vehicle equipment is incorporated as original equipment or as replacement equipment sold through the motor vehicle manufacturer, Johnson Controls supports making the automatic reporting of claims the responsibility of the motor vehicle manufacturer and not requiring automatic reporting by the motor vehicle equipment manufacturer. Motor vehicle equipment manufacturers should continue to compile the data required for automatic reporting and have it available as requested by the agency as suggested in Comment II.B..

E. The record retention requirements of Part 576 should extend to motor vehicle equipment manufacturers

To synchronize the record keeping requirements of equipment manufacturers with their potential reporting obligations under the TREAD Act, Johnson Controls supports extension of Part 576 requirements to motor vehicle equipment manufacturers. This would also harmonize the records retention requirements currently applicable to motor vehicle manufacturers with those applicable to motor vehicle equipment manufacturers. Extending the Part 576 requirements to equipment manufacturers will assure that data which is self reported is available for agency request or investigation for the time period prescribed in Part 576.

F. Thresholds should be established to prevent reporting on components that have not been subject to regulatory intervention

At least as an initial matter NHTSA should limit automatic reporting to those component systems that are most safety-sensitive and that are historically most subject to regulatory intervention. Thus, Johnson Controls generally concurs in the approach, suggested in the ANPRM, of initially limiting automatic reporting to certain specified classes of original equipment and replacement parts that are most likely to warrant regulatory intervention based on historic data.

G. Automatic Reporting Under TREAD is Presumptively Confidential

1. Distribution Of Such Sensitive Early Warning Information Could Bias An Investigation

Section 30166(m)(4)(C) of the TREAD Act states:

> None of the information collected pursuant to the final rule... shall be disclosed pursuant to section 30167(b) unless the Secretary [of Transportation] determines the disclosure of such information will assist in carrying out sections 30117(b) and 30118 through 30121.

As noted during House debate of the TREAD Act, this special disclosure section for new early stage information is not intended to hide from disclosure information which under current law may be disclosed.[6] If the Secretary deems the release of certain information to be in the public's best interest, the Secretary is empowered to release that information.[7] However, contrary to the

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[6] *See* 146 Cong. Rec. H9629 (daily ed. Oct. 10, 2000) (statements of Reps. Markey and Tauzin).

[7] *See* 49 C.F.R. § 512.9(a) ("Information that has been claimed or determined to be confidential business information under §§ 512.4, 512.6, or 512.7 may be disclosed to the public by the Administrator notwithstanding such determination or claim if disclosure would be in the public interest..."). The Secretary would most likely take such action in matters involving defects or when an automobile does not comply with an applicable motor vehicle safety standard. *Id.* The TREAD Act does not affect the right of a manufacturer to ask for a determination that information it reports be kept confidential. *See* ANPRM at 6544.

Freedom of Information Act ("FOIA"), which requires agencies to provide the public with all responsive records unless the records are protected from disclosure, Section 30166(m)(4)(C) creates a statutory presumption that TREAD-related information will be withheld from the public unless a FOIA request is made and granted by NHTSA.[8] In other words, no TREAD-related submissions should be automatically filed in the public docket or posted on the Internet. It is unfair to manufacturers, and contrary to Congress' intent, to have this sort of sensitive and, often times, proprietary data being broadly distributed to the public. Moreover, widespread distribution of such sensitive information at the early warning stage could inadvertently bias the any investigation undertaken by NHTSA, thwart any ability for statistical evaluation, or call the public's attention to an alleged defect when no such defect exists. Premature reporting of alleged automobile defects can and has caused substantial unnecessary public concern and artificial spikes in customer complaint rates.

In *U.S. v. General Motors Corp.*, the U.S. Court of Appeals for the D.C. Circuit held that a high rate of consumer complaints regarding rear-wheel lock-up were insufficient to establish a defect in an automobile's braking system, within the meaning of the National Traffic and Motor Vehicle Safety Act.[9] The court maintained that the number of complaints could, in fact, be attributed to arguably unfair adverse publicity surrounding an automobile's braking

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[8] Johnson Controls is cognizant of the fact that such an interpretation of the TREAD Act's disclosure provision conflicts with the opinion of NHTSA's Chief Counsel, Frank Seales, Jr., who after reviewing the provision concluded "... that it will have no effect on the disclosure of documents received by NHTSA." *See* Memorandum from Frank Seales, Jr., Chief Counsel, NHTSA, to Rosalind A. Knapp, Acting General Counsel, NHTSA (who concurred with the Chief Counsel's decision) (Oct. 27, 2000). Given the express language of Section 30166(m)(4)(C), Johnson Controls respectfully disagrees with the conclusions derived by NHTSA

[9] *U.S. v. General Motors Corp.*, 841 F.2d 400.

system that the court characterized as "inherently provocative."[10] The film clip upon which the court based its decision "was witnessed by an estimated 53 million viewers on network television."[11] According to the court, the X-car was driven on a slippery surface in a way calculated to cause the cause to the car to skid. The driver was required to refrain from modulating the brakes or steering in response.[12]

Public release of early reporting data carries the real prospect of causing subsequent waves of complaint data on the same product, introduces media influences and renders the agency's early warning database scientifically unreliable for the purposes which Congress intended.

2. Judicial Precedent Dictates That NHTSA Weigh A Variety Of Factors Before Releasing Tread Submissions To The Public

Relevant case law establishes that NHTSA has an obligation to take considerable care before releasing confidential proprietary information. There are two legal tests that NHTSA must consider when deciding to disclose confidential information. Application of the proper test depends upon how the information is submitted to the agency. If submitted voluntarily, such information must be treated confidentially if it is the kind of information that would customarily not be released to the public by the person from whom it was obtained.[13] If a party is required to

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10 *Id* at 414, n. 17.

11 *Id* at 413.

12 *Id.*

13 *Critical Mass Energy Project v. Nuclear Regulatory Commission, et al.*, 975 F.2d 871 (D.C. Cir. 1992) (en banc) (holding that information voluntarily provided by industry group to Nuclear Regulatory Commission was "confidential," and thus exempt from disclosure under FOIA exemption for financial or commercial information).

submit information to NHTSA, such information must be kept confidential if disclosure would impair the government's ability to obtain necessary information in the future or have the effect of causing substantial harm to the competitive position of the person from whom the information was obtained.[14] Under either test, NHTSA would be wise to err on the side of caution and withhold confidential information, unless releasing the information would unequivocally be in the public's best interest.

3. Should A FOIA Request Be Made For A Tread Submission, NHTSA Must Strictly Abide The Procedures Prescribed In 49 C.F.R. § 7.17

Should a FOIA request be received for information that has been designated by the submitter as confidential commercial information, NHTSA must strictly abide by the procedures prescribed in 49 C.F.R. § 7.17.[15] Among other things, NHTSA must expeditiously provide notification of the FOIA request and provide the submitter of the information with an opportunity to object to the information's release. Note that much of the data that could be reported under the Act falls in the category of trade secrets under the Trade Secrets Act[16] and may not be disclosed without an opportunity for the company to appear and contest production. Specifically, Johnson Controls maintains its claims data in the strictest confidence and does not release such data to the public or to entities outside the company except on an express agreement

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[14] *National Parks and Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (holding that in order for information to be within the commercial or financial information exemption of the Freedom of Information Act, disclosure must impair the government's ability to obtain necessary information or cause substantial harm to the competitive position of the person from whom such information is obtained).

[15] *See* 49 C.F.R. § 7.17.

[16] 18 U.S.C. §1905.

of confidentiality. Because release of such information could cause Johnson Controls competitive harm, it is entitled to protection from public release.

4. NHTSA Should Consider How Other Government Agencies Handle Confidential Submission

Many other government agencies have already acknowledged the sensitivity of the information they collect and limit public disclosure accordingly. By way of example, the Federal Communications Commission "... engage[s] in a balancing of the interests favoring disclosure and non-disclosure."[17] Accordingly, the FCC only releases information falling within FOIA Exemption 4 in very limited circumstances, such as where a party placed its financial condition at issue in a Commission proceeding,[18] or where the Commission has identified a compelling public interest in disclosure.[19] Even in such circumstances, the Commission does not automatically authorize public release of such information. Rather, the FCC has adhered to a policy of not authorizing the disclosure of confidential financial information "on the mere chance that it might be helpful, but insists upon a showing that the information is a necessary link in a chain of evidence" that will resolve an issue before the Commission.[20]

In short both the TREAD Act and relevant case law highlight the presumption that confidential information, like that which will likely be submitted by manufacturers pursuant to

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[17] *Chrysler Corp. v. Brown*, 441 U.S. 281, 291-92 (1979).

[18] *See e.g., The Western Union Telegraph Company*, 2 FCC Rcd 4485, 4487 (1987) (citing *Kannapolis Television Co.*, 80 FCC 2d 307 (1980).

[19] *See e.g., MCI Telecommunications Corp.*, 58 R.R. 2d 187, 190 (1985).

[20] *See e.g., Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, Report and Order, ¶8 (1998).

the TREAD Act, must remain confidential. The only exception to this principle is when disclosure of such information would clearly be of benefit to the public's safety. Failure to uphold this legal obligation could result in legitimate governmental and private interests being harmed, not to mention the well-intentioned objectives of the TREAD Act.

H. Early warning data reported should not be the basis for an investigation unless there is a statistically significant difference in the frequency of claims reported

Section 30166(m)(4)(A) requires the agency to specify how early warning data will be used by the agency. The purpose of the early warning data is to provide an objective basis for making decisions on allocation of agency investigation resources. In order to assure that those resources are properly allocated, a scientifically justifiable criterion for starting the investigation should be used.

Johnson Controls has previously suggested an aggregate basis for compilation of early warning claims data. That type of report gives indication of when trends in the data are changing. A statistical method should be used to determine whether changes are significant since, in any quarterly reporting system, there will be quarter by quarter differences in the frequency of claims.

Johnson Controls suggests the following as an example of a method which can be used in determining whether a significant enough difference in frequency exists to warrant an investigation:

- Determine the number of claims reported for the current quarter
- Determine the number of claims reported in each of the past three quarters
- Establish the mean and standard deviation of the data points for the past three quarters, and using that, establish a $\mu + 3\sigma$ value

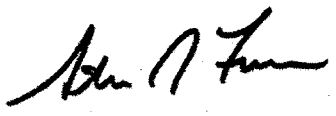
- If the number of claims for the current quarter is above that value, there is a significant difference in claim frequency and cause for an investigation. If the number of claims for the current quarter is less than or equal to $\mu + 3\sigma$, there is not a significant difference in claim frequency.

Johnson Controls provides this example as illustration of a scientific method applied to early warning data and how it can be useful in determining the need for an investigation.

We appreciate the opportunity to comment on this important rulemaking.

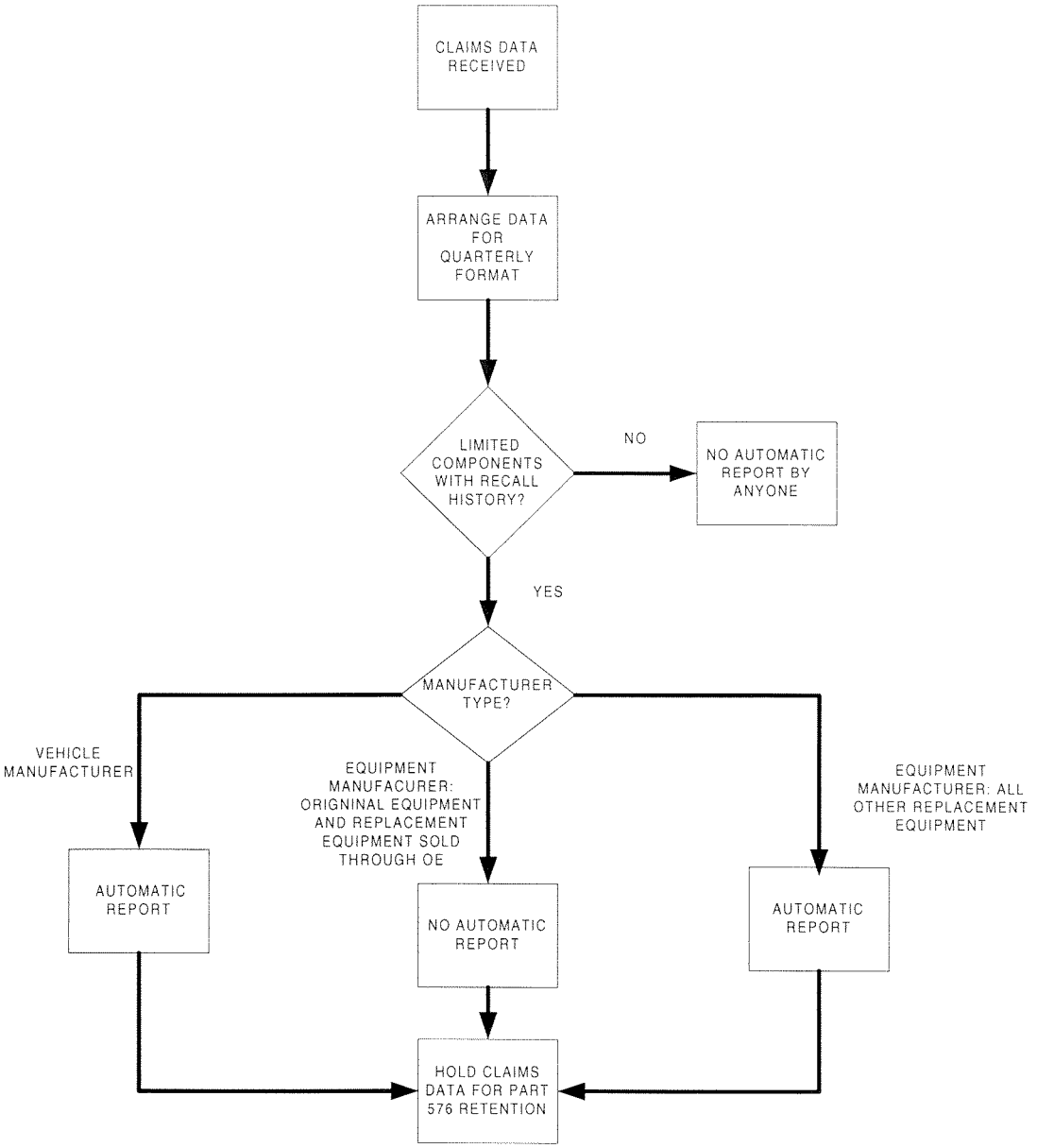
Very truly yours,

JOHNSON CONTROLS, INC.



Steven J. Furr
Executive Director, Product Safety
Automotive Systems Group

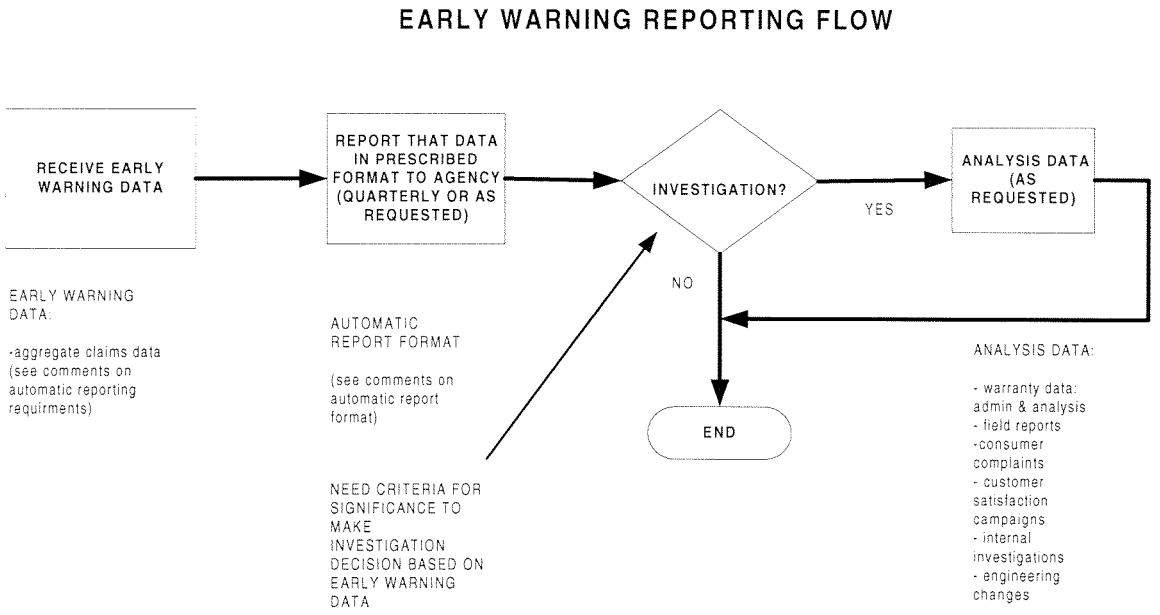
APPENDIX A: EARLY WARNING PROCESS PROPOSED



APPENDIX B

The purpose of this appendix is to review the various types of data outlined in the rulemaking and to illustrate Johnson Controls view of the appropriate use of that data in the wake of the TREAD Act.

Below is a chart that illustrates our view of the process:



The automatic reporting covered by TREAD is outlined to the left of the investigation decision point. This Appendix will be devoted to other types of data outlined in the rulemaking that Johnson Controls believes are more appropriately requested after a decision to investigate has been made.

A. Warranty data

Johnson Controls believes that this type of data is not useful as part of the automatic report for a number of reasons. First, the data does not have a demonstrated relationship to defects related to motor vehicle safety. By its very nature, warranty covers the part itself and does not cover property damage (as defined in the comments) or personal injury situations that

are indicative of motor vehicle safety concerns. Second, the warranty data does not universally exist for all manufacturers. A number of equipment manufacturers handle warranty with their customers as a percent in lieu of piece by piece reimbursement. Third, the type of warranty data that is available (where it is available at all) is marked by variety. The following are illustrative of the type warranty data that might be available but will generally never be the same:

- Warranty verbatim accounts from customers
- Warranty teardowns of product returned from the field
- Warranty handled as percent in lieu of with no data
- Record that warranty was honored but nothing further

Unlike claims as defined in the comments, warranty records have a variability and lack of defined connection to safety that make them poor early warning indicators. Using them as a basis for decision on whether to conduct an investigation would be unduly burdensome on manufacturers without providing meaningful benefit to the agency. Johnson Controls does believe that warranty data, such as it exists, can be helpful for analysis as part of an agency investigation once a potential safety problem has been identified through the early warning data.

B. Field Reports

It is unclear what specific reports would fall in this area for an equipment manufacturer and how this might differ from information received on customer complaints. Johnson Controls refers the agency to the following section on customer complaints.

C. Customer complaints

Customer complaints are generally poor early warning indicators because of the variety of complaints registered by customers on characteristics of quality unrelated to safety. In a number of instances, equipment manufacturers will not have access to any customer complaints.

If a count of customer complaints were used as an early warning indicator, the agency would be overwhelmed by data that has questionable relevance to safety

As with warranty data, where an investigation has been commenced and a specific alleged defect is in focus, customer complaints can be useful for analysis.

D. Customer satisfaction campaigns

The agency position on this is unclear. As noted in our comments, customer campaigns related to service are already the subject of an automatic reporting requirement.

E. Internal Investigations

Johnson Controls does not believe that internal investigations are the appropriate subject of early warning reporting. As noted by the agency, the investigations are those that are commenced with respect to a component after receiving a field report, customer complaint or other data indicating a "potential problem in a component".

There are a number of problems with this type of data as an early warning indicator. First, what is described by the agency is a sweep of any problem solving activity involving quality. Problem solving activities on quality are part of an ongoing discipline of continuous improvement at all companies. The magnitude of the activity at the companies governed by the legislation would make the requirement of ongoing disclosure at best extremely difficult and at worst, impossible. Because of the decentralized nature of companies, these continuous improvement activities currently exist throughout a number of companies without central databases tracking the activity. Second, if the agency was to receive such data, the volume of data would be so high as to prevent the effective oversight required for early warning data by Section 30166(m)(4)(A). Finally, if the internal activities result in a determination that a defect related to motor vehicle safety exists, the obligation to report is already governed by Section

30118(c)(1). If the internal determination is that a quality issue exists, then the burden to the manufacturer and lack of effective oversight by the agency concerns apply.

As with previous categories, if an investigation involving an alleged defect exists, then internal investigations relevant to that alleged defect are appropriate.

F. Engineering Change Notices

This is not an appropriate subject for early warning reports. If a specified alleged defect is being analyzed as part of an investigation, this data is appropriate for purposes of analysis.

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Johnson Controls notes that all of the above categories of data are currently used by the agency for analysis data as part of product investigations.

APPENDIX C. LEGISLATIVE BACKGROUND

TREAD requires the agency to establish early warning reporting requirements for manufacturers of motor vehicles and motor vehicle equipment. See Section 30166(m)(1). Subsequent sections of the Act deal with the nature, handling and use of those early warning reports by the agency. This Appendix sets forth Johnson Controls understanding of the legislation.

A. Nature of the Data.

Sections 30166(m)(3)(A), Section 30166(m)(3)(B), and Section 30166(m)(3)(C) specify the nature of the data to be reported. Per subsections (A) and (B), the information to be reported (bodily injury and property damage claims, customer satisfaction and warranty repairs, and other data) is required to have the following characteristics:

- ✓ It is to come from domestic or foreign sources
- ✓ It is to be of a type that "may assist in the identification of defects related to motor vehicle safety in motor vehicles and motor vehicle equipment"

Because not all of the information available is appropriate for automatic reporting, these subsections allow the agency to determine whether the information should be reported periodically or on request of the Secretary. That distinction recognizes that some information is appropriate for making decisions on whether an investigation should be initiated while other information is important in determining how that investigation should be resolved. In engineering terms, it is the difference between problem definition [what is the potential problem] and problem analysis [why is it occurring]. Apart from subsections (A) and (B), subsection (C)

requires the reporting of all incidents on which actual notice is received involving death or serious personal injury.

Prior to TREAD, the only automatic reporting required on vehicle or equipment defects was for communications to more than one recipient regarding such defects e.g. service bulletins.[21] There was no requirement to provide information from foreign sources regarding such campaigns nor was there any requirement to report foreign experience on any defects.[22]

Data which the agency was missing in the Firestone ATX matter is illustrative of the type of data which would satisfy legislative intent. In that situation, the agency experienced an increase in complaints on these tires after a television report in Houston during February of 2000. What the agency did not know was that 193 personal injury claims, 2,288 property damage claims and 66 lawsuits involving these tires had previously been filed.[23] Focusing on the time difference between when Firestone became aware of these claims and when the agency became aware of a potential problem, Congress viewed TREAD as a means of "ensur[ing] that NHTSA receives appropriate data in a timely fashion".[24]

B. Handling of Automatic Reports

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[21] ANPRM at 6533.

[22] ANPRM at 6534.

[23] ANPRM at 6533.

[24] ANPRM at 6534.

Section 30166(m)(4)(C) specifies that none of the information provided pursuant to the automatic reporting mandated in the final rule shall be disclosed under Section 30167(b) unless the Secretary determines the disclosure will assist in one of the following purposes:

- Maintaining purchaser records. Section 30117(b).
- Supporting an initial determination of defect under Section 30118.
- Supporting notification to purchasers under Section 30119.
- Supporting implementation of remedies under Section 30120.
- Supporting provisional notification as part of a civil action to enforce a defect order under Section 30121.

The interpretation advanced by the agency appears to vary from the plain language of the statute indicating that "none" of the information that is the subject of automatic disclosure is to be disclosed.[25]

Sections 30166(m)(4)(B) forbids the agency to require a manufacturer to report information that is not in its possession. In addition, the agency is not allowed to require automatic disclosure of information whose meaningfulness in the identification of defects related to motor vehicle safety is not justified when compared with the costs required to collect it.[26]

C. Utilization of Automatic Reports

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[25] ANPRM at 6543.

[26] . See Section 30166(m)(4)(D).

Section 30166(m)(4)(A) requires the agency to specify how the information disclosed will be utilized to assist in the identification of defects related to motor vehicle safety. As noted earlier, data provided for automatic reporting will be used in determining whether a potential problem exists that merits an investigation. The agency is required to specify the systems and processes it will employ in making that decision as well as form such reporting should take. Under the Act, automatic reporting would not appear to be allowed unless the agency can show how the data collected will be used as part of its oversight function.