NHTSA PRIMER: BEST PRACTICES FOR REPORTING REQUIREMENTS AND MANAGING INVESTIGATIONS

SIDLEY

Need to Know: NHTSA Reporting Obligations for Suppliers

National Highway Traffic Safety Administration (NHTSA) regulations impose a mandatory duty on suppliers to determine whether safety-related defects exist in their parts. Be aware:

1. OEMs typically lead on defect reporting, but suppliers have an independent duty to report safety-related defects to NHTSA unless both:
   - A defective part is supplied to only one OEM
   - OEM files a defect report
2. Safety-related defects are broadly defined to include defects that pose "unreasonable risk of accidents" and an "unreasonable risk of death or injury in an accident" 49 U.S.C. § 30102.
3. NHTSA determines safety-related defects on a case-by-case basis, including *close engineering scrutiny* of the failure rate, the potential severity of the defect, and other factors.
4. In addition to defect reporting, under the Transportation Recall Enhancement, Accountability and Documentation (TREAD) Act, suppliers have a mandatory duty to monitor their parts and report to NHTSA under three circumstances:
   - Fatality claims and notices (a.k.a. death data early warning reporting)
   - External manufacturer communications on defects in equipment, including any flaw or unintended deviation from design specifications, regardless of whether or not such defect is safety-related
   - Safety recalls and other safety campaigns in foreign countries

Need to Know: NHTSA Reporting Obligations for Suppliers – Communications

1. Under the TREAD Act, a communication must be submitted to NHTSA when the communication is both:
   - Sent to, issued, or made available to more than one manufacturer, dealer, distributor, lessee, lessor, or purchaser in the United States
   - Refers to any one of the following:
     - Any defect
     - Any failure or malfunction beyond normal deterioration in use
     - Any failure or performance
     - Any flaw or unintended deviation from design specifications, regardless of whether there are safety implications
2. Under the rule, "communications" include (See 49 CFR § 579.5(a)-(b)):
   - Notices
   - Bulletins
   - Customer satisfaction campaigns
   - Consumer advisories
   - Comminuqués, including those transmitted by computer

- Telefax
- Other electronic means, including: warranty and policy extension communiqués and product improvement bulletins, and recalls or other safety activities involving the repair or replacement of motor vehicles or motor vehicle equipment

NHTSA Vehicle Safety Investigations: Key Takeaways

The National Traffic and Motor Vehicle Safety Act authorizes NHTSA to investigate issues relating to motor vehicle safety. These include:

1. Defect relating to motor vehicle safety
   - Defect includes: "any defect in performance, construction, a component, or material of a motor vehicle or motor vehicle equipment" 49 USC 30102.
   - Motor vehicle safety means: "the performance of a motor vehicle or motor vehicle equipment in a way that protects the public against unreasonable risk of accidents occurring because of the design, construction, or performance of a motor vehicle and against unreasonable risk of death or injury in an accident and includes non-operational safety of a motor vehicle" *Id.*
2. Important information regarding the Office of Defects Investigation (ODI), which conducts safety defect related investigations.
   - ODI has five investigative divisions and four supporting divisions.
   - In addition to ODI's processes, NHTSA may take additional actions, including pursuing civil penalties and other remedies against manufacturers that fail to comply with federal laws and regulations concerning motor vehicle safety.

Overview of NHTSA Vehicle Safety Investigation Process

DATA COLLECTION	DATA REVIEW	INVESTIGATION	RECALL MANAGEMENT
Collect, Validate, and Screen Data	Determine if Formal Investigation is Required	Determine if Motor Vehicle Safety Defect Exists	Manage Recall Process
• Consumer Vehicle Safety Complaints (VOQ) • Manufacturer TREAD* Early Warning Reporting (EWR) data • Manufacturer Communications • Other sources of information, including social media contents	• Review data screened during the first stage, plus defect petitions • Assess severity of risk associated with potential safety defects – May perform peer vehicle and precedent reviews • Document issue facts and findings • Identify potential safety defects for in-depth review	• Preliminary Evaluation – Review and analyze all existing information – Send Information Requests (IR) to manufacturers – Decide whether to proceed to Engineering Analysis • Engineering Analysis – Send additional IR to manufacturers – Conduct inspections, tests, and surveys • Issue public data and final report • Pursue recall or closure decision	• Review manufacture recall plans and communications • Track recall completion rates • Manage recalls, including filing of recall notices with NHTSA • Perform recall audits and administrative investigation

*The TREAD Act refers to the Transportation Recall Enhancement Accountability and Documentation Act.

Step by Step: Breaking Down the Phases

Phase 1: Data Collection – Screening

The first phase of ODI processes concerning motor vehicle safety defect is data collection: screening. The types of information collected include:

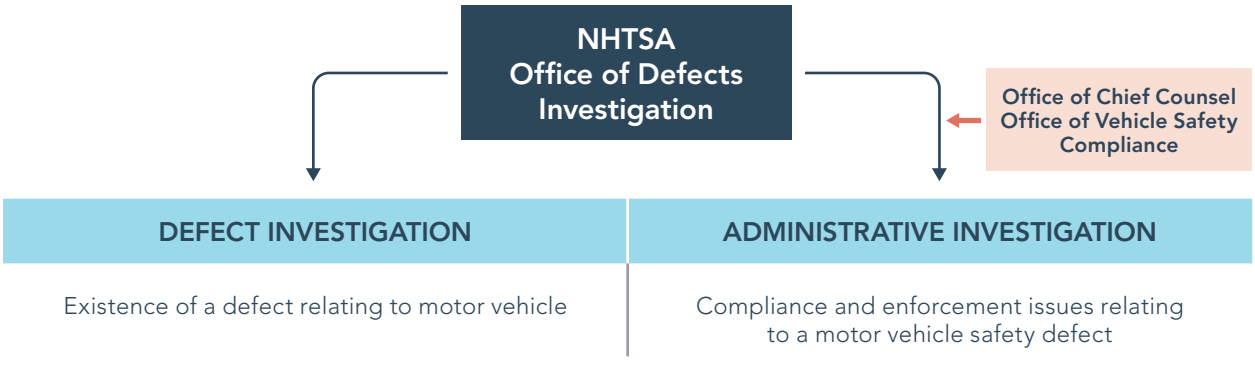
1. Consumer complaints
   - Vehicle Owner Questionnaire (VOQ)
2. Manufacturer information, 49 CFR Part 579, Subpart C
   - TREAD Early Warning Reporting (EWR) data
3. Other sources of information
   - Local government, first responders, and social/news media
   - Third-party consumer advocacy and motor vehicle safety organizations
   - Private civil lawsuits and whistleblower
   - Foreign governments

Phase 2: Data Review – Petition Analysis

The second phase takes the data collected during the first stage.

1. The data is screened to exclude:
   - Data relating to non-safety-related potential defects
   - Data not relating to motor vehicles or equipment
   - Data relating to safety issues not involving a potential vehicle or equipment defect
2. Reviewed data is screened during the first state, plus then checked for defect petitions including:
   - Early Warning Reporting (EWR) information by ODI Trends Analysis Division (TAD)
   - Other information by ODI Vehicle Defect Division (VDD)
     – VDD may request additional information from consumers and manufacturers
3. Then the data is assessed for the severity of the risk associated with potential safety defects:
   - Performing peer vehicle and precedent reviews
   - Employing hazard or vehicle system-specific risk matrix
4. A document is then issued to the supplier with these facts and findings.

Mapping of an ODI Investigation



ODI Investigation

Phase 3-1: Defect Investigation – Preliminary Evaluation

The Defect Investigation process is typically completed in four months.

1. Begins with opening a resume, including reviewing and analyzing all existing information, such as manufacturer technical service bulletins (TSBs)

2. Complete steps to obtain the limited information for analysis from manufacturers
   - Send Information Request (IR) letter
   - Evaluate response(s)
3. Communicate with the manufacturers and respond promptly to all inquiries
4. Two outcomes are either the NHTSA decides whether to close the issue or move the issue into the phase of engineering analysis (EA).

Phase 3-2: Defect Investigation – Engineering Analysis

If the NHTSA chooses to move the issue to the next phase, the second phase of a NHTSA defect investigation. This process is typically completed in 12 months. Steps moving forward are:

1. NHTSA obtaining more information from manufacturers.
   - Sending an additional IR letter
   - Evaluating response(s)
   - May need to send follow up IR and peer IR letters
2. Must be prepared for the conducting of inspections, tests, and surveys
3. Continue the informal communication with manufacturers and to respond to inquiries from manufacturers promptly
4. Be aware NHTSA may convene multi-disciplinary panel of experts, if the manufacturer has not initiated a recall
5. There may be an issue public data and final report
6. NHTSA decides whether to issue a recall via the following process:
   - ODI Director issues a Recall Request letter
   - NHTSA Associate Administrator makes an initial decision that a defect exists
   - Public meeting
   - NHTSA Administrator makes a final decision
   - A recall order is issued
7. Planning Ahead: What Could Be Expected?
   - NHTSA has the statutory authority to order a manufacturer to conduct a recall
   - The Department of Justice may also file an action in federal court to compel a manufacturer to conduct a recall
   - Normally, NHTSA resolves defect investigations prior to a formal finding of a defect, which results in an "Influenced Recall"
   - NHTSA may close the investigation if it does not result in sufficient evidence demonstrating the existence of a defect
     – NHTSA may re-open and continue the investigation if additional relevant information subsequently becomes available

Phase 4: Recall Management – Administrative Investigation

Key information for handling the Administrative Investigation process includes:

1. ODI works closely with other offices at NHTSA, including the Office of Chief Counsel and the Office of Vehicle Safety Compliance
   - NHTSA may compel manufacturers to provide information, including but not limited to through subpoenas and special orders. 49 CFR Part 510
2. Keeping track of the monthly report of administrative investigations and recalls
3. Deciding whether filing timely notice of defect or noncompliance per the Timeliness Query, or TQ Investigation: 49 CFR Part 573
4. Handling the Recall Query, or RQ Investigation: 49 CFR Part 577 effectively, in providing owners with proper notice of recall or providing owners with adequate remedy within reasonable time