

TOYOTA SUDDEN ACCELERATION: A CASE STUDY OF
THE NATIONAL HIGHWAY TRAFFIC SAFETY
ADMINISTRATION

RECALLS FOR CHANGE

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Introduction

The recent developments surrounding Toyota's current sudden or unintended acceleration crisis are disturbing to all of us. At least thirty-four deaths have been connected with Toyota or Lexus vehicles with defects causing sudden acceleration.¹ Before all is said and done, the death toll linked to these defects may reach one hundred or more.² Ten million Toyota and Lexus vehicles have been recalled,³ and yet the cause of the defects may still be unknown.⁴ This is the most extensive recall in history.⁵ Lawmakers and consumers alike are anxious to

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¹ Nick Bunkley, *Additional Complaints Crashes of Toyotas*, N.Y. TIMES, Feb. 16, 2010, at B3.

² Ken Bensinger & Ralph Vartabeian, *Toyota faces new reports of sudden-acceleration deaths*, L.A. TIMES, Feb. 15, 2010, at Main News 1.

³ Tiffany Hsu, *Toyota repairs are humming*, L.A. TIMES, Feb. 19, 2010, at B3.

⁴ *Response by Toyota and NHTSA to Incidents of Sudden Unintended Acceleration: Hearing before the Subcomm. On Oversight and Investigations, 111th Cong. 3 (2010)* (statement of Sean Kane, available at http://energycommerce.house.gov/Press_111/20100223/Kane.Testimony.pdf) (last visited March, 22, 2010) [hereinafter *Hearings*].

⁵ James Kanter & Luke Browne, *A Slow Reaction to Toyota Illustrates Gaps in Europe*, N.Y. TIMES, Feb. 10, 2010, at B1 (quoting Rep. Henry Waxman).

learn the causes of these defects.⁶ Toyota which was previously known for its quality⁷ has fallen under intense scrutiny for failing to alert the public and the National Highway Traffic Administration (“NHTSA”) of defective vehicles.⁸ The NHTSA is a regulatory agency charged with overseeing automotive safety defects and recalls.⁹

This note will provide a brief recent history of Toyota’s rise and fall as an industry leader followed by a narrative history of the sudden acceleration developments. Section II will discuss the many possible causes of sudden or unintended acceleration with a focus on electronic throttle control systems and modern automotives. Section III will provide a detailed explanation of the National Highway Traffic Administration’s origin, purposes and responsibilities. Next, the requirements and duties of Auto Manufacturers under the Vehicle Safety Act will be explained. Section IV will review the NHTSA’s role in the Toyota sudden acceleration recalls in addition to a previous recall, Ford-Firestone, which closely parallels the developments of Toyota’s defects. These two recalls will serve as case studies to show how the NHTSA must improve in order to best prevent similar vehicle safety calamities in the future.

I. A Recent History of Toyota Defects and Sudden Acceleration

A. Toyota’s Recent History: From Success to Scrutiny

Toyota’s rise to become the undisputed leader of the auto industry¹⁰ was based on a mantra that the quality of its vehicles was of the highest priority.¹¹ Quality production would lead to lower costs which, in turn, would lead to a higher market share.¹² Over a period of decades, Toyota built its reputation one car at a time¹³ and became known for its method of continuous self-improvement.¹⁴ Toyota became the company that all other

⁶ Nick Bunkley & Micheline Maynard, *Toyota Chief Agrees to Testify About Recalls Before A Congressional Panel*, N.Y. TIMES, Feb. 19, 2010, at B3.

⁷ Bill Saporito, *Spotlight: Toyota’s Recall*, TIME, Feb. 15, 2010, at 17.

⁸ See Bunkley, *supra* note 6, at B3.

⁹ 49 C.F.R. § 1.50 (2010).

¹⁰ See Paul Ingrassia, *Toyota: Too Big, Too Fast*, WALL ST. J., Jan. 29, 2010, at A15.

¹¹ Saporito, *supra* note 7, at 17.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

industry leaders in America, Europe and Asia wanted to emulate.¹⁵

Beginning in 1990, Toyota's focus changed.¹⁶ As one journalist aptly describes, "the parable of Toyota is that the tortoise became the hare."¹⁷ Toyota abandoned its mantra of quality first to aggressively seek market share.¹⁸ The company quickly grew in its chase to be the number one global manufacturer, but its reputation began to slip.¹⁹ Simply put, Toyota became too big, too fast.²⁰ Sacrificing production quality resulted in a corporate culture of secrecy.²¹ Toyota developed a pattern of reacting slowly to safety concerns and failures to notify previous customers of known defects of previously sold vehicles.²² This pattern has been evidenced many times by Toyota's actions and responses or lack thereof to previous safety problems with its vehicles since 1996.²³

Toyota's pattern of slow reactions and secrecy concerning safety concerns and defects in its vehicles may have worked in the past, but this era is now drawing to a close. As a result of recent failures to communicate vehicle defects to regulatory agencies and consumers, Toyota is beginning to experience brand erosion.²⁴ In 2009, Toyota's market share decreased from 17.9%

¹⁵ See Bunkley, *supra* note 1, at B3.

¹⁶ See Bensinger & Vartabeian *supra* note 2, at 1.

¹⁷ *Id.*

¹⁸ *Id.* Steven Spear, an MIT operations specialist who apprenticed in Toyota factories, states "If quality is first, it drives a certain set of behaviors. If the market share is the goal, it drives a different set of behaviors."

¹⁹ *Id.*

²⁰ See Bunkley, *supra* note 1, at B3.

²¹ See James Kanter et al., *Toyota's Pattern is Slow Response on Safety Issues*, N.Y. TIMES, Feb. 7, 2010, at A1 (describing Toyota's pattern of a making design changes to vehicles it produced without informing previous customers of safety concerns).

²² *Id.*

²³ *Id.* (describing Toyota's eight year refusal to alert customers of and recall vehicles with a steering mechanisms that could fracture); *Id.* (describing Toyota's attempt to cover up engine problems in the face of thousands of customer complaints); see also James Kanter, N.Y. TIMES, Feb. 6, 2010, at A18 (describing Toyota's attempt to ignore the current problem with 2010 Prius vehicles). A recent lawsuit filed by Dimitrios Biller, who managed defense of lawsuits for Toyota as in-house counsel from 2003 to 2007, claims that Toyota has hidden proof of safety defects from U.S. regulators and the public for years. See Ken Bensinger & Ralph Vartabedian, *Toyota Records may be Released*, L.A. TIMES, Feb. 3, 2010, at B1.

²⁴ Stuart Elliot, *Seeking Redemption On an Olympic Stage*, N.Y. TIMES,

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to 14.1%.²⁵ In the month of January this year, Toyota's sales fell 16%.²⁶ These numbers are likely to get worse as Toyota has plans to halt production at two of its American plants for several days.²⁷ Further, as the sudden acceleration crisis continues, Toyota's market share will continue to dwindle resulting from the ever increasing unsafe stigma attached to its vehicles.

B. Toyota's Sudden Acceleration Crisis: History in the Making

In addition to a weakened reputation and loss of market share, Toyota is now faced with the costs of recalling approximately 10 million vehicles due to defects causing sudden or unintended acceleration.²⁸ Had Toyota honestly dealt with sudden acceleration defects earlier, it may have avoided much of the scrutiny and the problems it now faces.²⁹ Sudden acceleration was first publicly recognized by Toyota in 2000, when it issued a limited recall for 10,000 Lexus vehicles sold in England.³⁰ Through making this recall, the company then suggested that sudden acceleration was caused by gas pedals being trapped by defective floor mats.³¹ Toyota's floor mat explanation continued in 2007 and 2008 when it was confronted with repeated complaints of sudden acceleration.³²

The manufacturer's effort to blame sudden acceleration in

Feb. 18, 2010, at B7 (citing recent survey rating consumer perceptions Toyota's perception at -51.5 on a scale of -100 to +100 with the next lowest brand being Hummer at -8.03).

²⁵ Nick Bunkley, *Toyota Estimates It Lost 20,000 Sales in Last Week*, N.Y. TIMES, Feb. 3, 2010, at B4.

²⁶ Nick Bunkley, *U.S. Wants to Know When Toyota First Knew of Problems with Accelerator Pedals*, N.Y. TIMES, Feb. 17, 2010, at B3.

²⁷ Bunkley, *supra* note 25, at B4.

²⁸ Hsu, *supra* note 3, at B3. See Section II. THE MECHANICS AND ELECTRONICS OF SUDDEN ACCELERATION for a detailed explanation of sudden acceleration.

²⁹ See Safety Research & Strategy Inc., available at <http://www.safetyresearch.net/toyota-sudden-unintended-acceleration/toyota-sudden-acceleration-timeline/> (last visited February 26, 2010) (providing a detailed Timeline of Toyota's sudden acceleration defect)

³⁰ Christopher Jensen, *Toyota to Adjust Gas Pedals*, N.Y. TIMES, Nov. 29, 2009, at AU5.

³¹ *Id.*

³² See James Kanter et al., *Toyota's Pattern is Slow Response On Safety Issues*, N. Y. TIMES, Feb 7, 2010, at A1; *A Lot To Fix*, N.Y. TIMES, Feb. 6, 2010, at A18.

its vehicles on floor mats has recently come under fire.³³ In December of 2008, customers in Europe made several complaints about sudden acceleration in Toyota vehicles.³⁴ These complaints led Toyota to redesign accelerator pedals, a more likely cause of sudden acceleration, on new vehicles sold there.³⁵ Following its pattern of secrecy, Toyota attempted to hide its knowledge and belief that defective acceleration pedals, rather than floor mats, were the likely cause of sudden acceleration in many of its vehicles.³⁶ Despite its implementation of a new design in vehicles being manufactured, Toyota continued to claim that sudden acceleration in European and substantially similar American vehicles was caused only by defective floor mats.³⁷

Had a severe tragedy not caught the eyes and hearts of U.S. regulatory agencies and the media,³⁸ Toyota's story may have never changed. The death of an off-duty California Highway Patrol officer and his family caused by sudden acceleration in a Lexus 350 sedan led the National Highway Traffic Safety Administration ("NHTSA")³⁹ to seriously question Toyota's previous explanations.⁴⁰ Toyota began to face intense scrutiny after it was reported that at least nineteen deaths were known to have occurred due to sudden acceleration defects in its vehicles.⁴¹ This death toll was nearly double the amount of deaths linked to sudden acceleration in vehicles made by all other manufacturers combined.⁴² As this scrutiny increased for months, Toyota continued to maintain its explanation that the sole cause of sudden acceleration was defective floor mats.⁴³ Toyota insisted that there was "no evidence" to support any other conclusion.⁴⁴

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ See Bill Vlasic & Nick Bunkley, *Gas Pedals That Stick Force Recall of Toyotas*, N.Y. TIMES, Nov. 26, 2009, at B1.

³⁹ See Section III of this article for an explanation of the NHTSA.

⁴⁰ Kanter, *supra* note 32, at A1; See also Ken Bensinger & Ralph Vartabedian, *New Details in Crash that prompted Toyota Recall*, L. A. TIMES, October 25, 2009, at Main News 4 (providing a detailed account of this tragic incident).

⁴¹ Ken Bensinger & Ralph Vartabedian, *Toyota fix 'dangerous' pedal defect*, L.A. TIMES, Nov. 26, 2009, at Main News 1.

⁴² *Id.*

⁴³ Bensinger & Vartabedian, *supra* note 40, at Main News 4.

⁴⁴ Bill Vlasic et al., *Toyota's Slow Awakening to a Deadly Problem*, N.Y.

However, Toyota finally crossed the line when it claimed that the NHTSA, the regulatory agency currently investigating Toyota's sudden acceleration defects, had reached a conclusion "that no defect exists in vehicles in which the driver's floor mat is compatible with the vehicle and properly secured."⁴⁵ This led the NHTSA to issue a rare and immediate public rebuke of Toyota for making a statement that was "misleading and inaccurate."⁴⁶

Under the ire of the NHTSA, Toyota changed its story about sudden acceleration for the first time. On November 25, 2009, Toyota recalls suggesting that defective acceleration pedals were the cause of sudden acceleration in approximately 4.3 million vehicles.⁴⁷ Toyota still claimed that sudden acceleration was caused by the floor mat entrapping the acceleration pedal, but now asserted that the pedal itself, rather than the floor mat, was to blame.⁴⁸ For several vehicles, Toyota promised to shorten customer's existing acceleration pedals and even replace foam carpeting under the pedal with thinner pads so that there was no way sudden acceleration would occur by an acceleration pedal being trapped by a floor mat.⁴⁹ In addition, the manufacturer promised to install "smart pedals" in *some* vehicles.⁵⁰ A "smart pedal" is an acceleration pedal equipped with software that cuts engine power any time both the break and acceleration are depressed concurrently.⁵¹ Although Toyota promised to equip all new vehicles it manufactured with these pedals, it offered only to install them in some of the vehicles experiencing sudden acceleration.⁵² Safety experts suggested that *all* Toyota vehicles experiencing sudden acceleration should receive these pedals.⁵³ Further, experts believed that Toyota's November 25 recall did not extend to many of its vehicles with defects causing sudden acceleration.⁵⁴ However, Toyota refused to reconsider its recall.⁵⁵

TIMES, Feb. 1, 2009, at A1.

⁴⁵ See NHTSA, Press Release 110409, Nov. 4, 2009, *available at* <http://www.nhtsa.dot.gov/portal/site/nhtsa/template.MAXIMIZE/menuitem.f2217bee37fb302f6d7c121046108a0c/> (last visited Mar. 22, 2010).

⁴⁶ *Id.*

⁴⁷ Christopher Jensen, *Toyota to Adjust Gas Pedals*, N.Y. TIMES, Nov. 29, 2009, at AU5.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Jensen, *supra* note 47, at AU5.

⁵³ *Id.*

⁵⁴ Ken Bensinger & Ralph Vartabedian, *Regulation: Auto Safety Agency*

On January 21, 2010, Toyota was forced to eat its words by issuing another recall that was unrelated to the length of the acceleration pedal, carpeting on the floor, or the floor mat itself.⁵⁶ Toyota now asserted that sudden acceleration may occur in 2.3 million of its vehicles (1.7 million of which were also covered by the first recall) due to “abnormal friction” in defective accelerator pedals.⁵⁷ Toyota now admitted that because of this defective condition in what they referred to as “sticky” pedals, a depressed “sticky” acceleration pedal may be stuck in a partially or fully depressed position even when a driver lifts his or her foot off of the pedal causing unintended acceleration.⁵⁸ After prodding from the NHTSA, Toyota was forced to stop production and sales of eight of its most popular models which were being manufactured with “sticky” pedals until a remedy for “sticky” pedals was found.⁵⁹ Meanwhile, the Manufacturer expanded its floor mat related recall of November 25 to five additional models.⁶⁰ Although Toyota came up with what they claimed to be a remedy for “sticky” pedals, on February 1, 2010⁶¹, their questionable and unconfirmed explanations for sudden acceleration were beginning to frustrate concerned lawmakers.⁶²

Finally, after years of denials and seemingly unfounded explanations for alleged sudden acceleration defects, Congress began to apply public pressure to Toyota to prove its assertions.⁶³ Vehicle Safety Experts and independent electronic engineers have long been suggesting that sudden acceleration in Toyota vehicles results from defective electronic throttle control systems or drive-

labors to keep pace, L.A. TIMES, Dec. 31, 2009, at B1.

⁵⁵ See Ken Bensinger & Ralph Vartabedian, *Study: Toyota received most complaints about sudden acceleration*, L.A. TIMES, Dec. 8, 2009, at B2.

⁵⁶ Nick Bunkley, *Toyota Estimates it Lost 20,000 Sales in Last Week*, N.Y. TIMES, Feb. 3, 2010, at B4.

⁵⁷ Ken Bensinger & Ralph Vartabedian, *Doubt cast on Toyota's decision to blame sudden acceleration on gas pedal defect: Pedal maker for Toyota denies fault*, L.A. TIMES, Jan. 30, 2010, at Main News 1.

⁵⁸ *Id.*

⁵⁹ Bill Vlassic et al., *Toyota' Slow Awakening to a Deadly Problem*, N.Y. TIMES, Feb. 1, 2010, at A1.

⁶⁰ Ken Bensinger & Ralph Vartabedian, *Toyota safety issues grow*, L.A. TIMES, Jan. 28, 2010, at Main News 1.

⁶¹ Micheline Maynard, *Answers to Questions About Toyota*, N.Y. TIMES, Feb. 5, 2010, at B6.

⁶² See Vlassic, *supra* note 59, at A1.

⁶³ *Id.* at A1 (quoting Rep. Bart Stupak “The problem has not exactly been identified. Therefore, you [Toyota] have no solution and consumers are left in the lurch.”)

by-wire throttles⁶⁴ which Toyota began using in 2002.⁶⁵ In support of their suggestions, these experts point to the fact that complaints of sudden acceleration in Toyota manufactured vehicles dramatically increased after Toyota first began installing electronic throttle systems.⁶⁶ They call Toyota's recalls a "red herring" claiming that many vehicles experiencing sudden acceleration are not covered by any recalls and have not been explained.⁶⁷ Further, these experts believe that Toyota has avoided the "root cause" of sudden acceleration defects because it will be very expensive to fix.⁶⁸ The recalls Toyota has proposed involve very nominal costs on a per vehicle basis.⁶⁹ For example, Toyota's January 21 recall will cost the company pennies to produce the part for each car in comparison to an electronic throttle fix that would potentially cost the company \$100 or more per vehicle.⁷⁰ Toyota completely denies the experts' claims.⁷¹ The manufacturer claims that it has "thoroughly tested" its electronic systems and these systems cannot possibly be the cause of sudden acceleration in their vehicles.⁷²

In the coming days, Toyota's claims and denials will be tested by both the House⁷³ and the Senate.⁷⁴ Lawmakers will consider whether Toyota's explanations for sudden acceleration are valid.⁷⁵ Among the issues before congress are: (1) whether Toyota sudden accelerations are caused or could be caused by electronic throttles;⁷⁶ and (2) why Toyota vehicles prone to

⁶⁴ See Section II. THE MECHANICS AND ELECTRONICS OF SUDDEN ACCELERATION for a detailed explanation electronic throttle control systems.

⁶⁵ Ken Bensinger & Ralph Vartabedian, *A Times Investigation: Data Point to Toyota's Throttles*, L.A. TIMES, Nov. 29, 2009, at MN 1.

⁶⁶ *Id.*

⁶⁷ See Ken Bensinger & Ralph Vartabedian, *Doubt cast on Toyota's decision to blame sudden acceleration on gas pedal defect: Pedal maker for Toyota denies fault*, L.A. TIMES, Jan. 30, 2010, at Main News 1.

⁶⁸ See Bensinger & Vartabedian, *supra* note 65, at Main News 1.

⁶⁹ See Ken Bensinger & Ralph Vartabedian, *For Toyota, the crucial question is the electronics*, L.A. TIMES, Feb. 14, 2010, at Main News 1.

⁷⁰ *Id.*

⁷¹ Micheline Maynard, *Toyota, Eyeing Its Reputation, Issues Repair for Gas Pedals*, N.Y. TIMES, Feb. 2, 2010, at A1.

⁷² *Id.*

⁷³ See Nick Bunkley & Micheline Maynard, *Toyota Chief Agrees to Testify about Recalls*, N.Y. TIMES, Feb. 19, 2010, at B3.

⁷⁴ *Id.*

⁷⁵ See Micheline Maynard et al., *Lawmakers Put Pressure on Toyota*, N.Y. TIMES, Feb. 3, 2010, at B1.

⁷⁶ *Id.*

sudden acceleration are not covered by previously issued recalls.⁷⁷ While the answers to these questions may or may not be obtained by the publication of this note, it has been made clear that legislators, regulators at the NHTSA, and the public alike are unsure of what causes the sudden acceleration problem.⁷⁸ Further, consumers are unaware of whether it is safe to drive their cars⁷⁹ after thirty-four deaths have been connected with sudden acceleration defects.⁸⁰

II. The Mechanics and Electronics of Sudden Acceleration

A. Many Possible Causes

“Toyota unintended acceleration to date raises more questions than answers.”⁸¹ Sean Kane, a vehicle safety expert asked to testify at hearings before the Subcommittee on Oversight and Investigations, testified recently that sudden acceleration in Toyota vehicles could stem from multiple causes.⁸² Toyota’s expressed belief that sudden acceleration, in general, may be caused by several different issues (including but not limited to transmissions and cruise control) seems to agree with Mr. Kane’s testimony.⁸³ Toyota has acknowledged that causes of sudden acceleration are “very, very hard to identify.”⁸⁴ The ongoing shift to more computerized controls in new manufactured vehicles has made it more difficult for government regulators and manufacturers to determine the nature of potential defects.⁸⁵

⁷⁷ See Nathaniel Popper & Jerry Hirsch, *Toyota Says Recalls Will Cost the Company About \$2 billion*, L.A. TIMES, Feb. 4, 2010, at Main News 1.

⁷⁸ Bunkley, *supra* note 1, at B3.

⁷⁹ *Id.*

⁸⁰ Nick Bunkley, *U.S. gets Additional Complaints of Crashes at Toyota*, N.Y. TIMES, Feb. 16, 2010, at B3.

⁸¹ Letter from Clarence Ditlow to David Strickland, February 2, 2010, available at <http://www.autosafety.org/sites/default/files/Toyota%20Strickland%20Letter.pdf> (last visited Feb. 26, 2010) [hereinafter Letter from Clarence Ditlow].

⁸² *Hearings*, *supra* note 4 (testimony of Sean Kane).

⁸³ See Michael Hiltzik, *Denial is Familiar Road for Toyota*, L.A. TIMES, Feb. 4, 2010, at B1.

⁸⁴ Micheline Maynard, *Toyota, Eyeing Its Reputation, Issues Repair for Gas Pedals*, N.Y. TIMES, Feb. 2, 2010, at A1.

⁸⁵ *Id.*

B. The Modern Car: A Computer on Wheels

The recent evolution of automotive controls has been rapid.⁸⁶ The same models that used to take five years to develop are currently developed in fifteen months.⁸⁷ Cars have become “like 30 or more computers on wheels.”⁸⁸ Basic vehicles have more than least thirty microprocessor-controlled devices and electronic control units while some luxury cars have more than one hundred.⁸⁹ These electronic control units are packed with up to 100 million lines of computer code, which is more than some fighter jets.⁹⁰ As a result, experts state that even thorough testing may fail to identify computer defects.⁹¹

C. Electronic Throttle Systems

The electronic throttle system or “drive-by-wire” is one of the computerized units in modern vehicles in which it is difficult to diagnose problems.⁹² Electronic throttle systems have replaced the old cable or mechanical connections in many, if not all, newly produced vehicles.⁹³

Installing electronic throttle systems in vehicles makes it easier for manufacturers to add advanced cruise control and traction features.⁹⁴ Instead of a cable connecting the acceleration pedal to the throttle, an electronic throttle connects the driver’s foot to a sensor in the acceleration pedal sending a signal to a control unit which analyzes several factors and then relays a command to the throttle body to open the throttle.⁹⁵ Although electronic throttle systems are engineered to detect false signals or electronic interference that may cause sudden acceleration, every possibility for error or defect is not tested which leaves room for error.⁹⁶ A breakdown of the electronic throttle may be caused by random and intermittent electronic faults, electrical contacts,

⁸⁶ Jim Motavalli, *The Dozens of Computers That Make Modern Cars Go*, N.Y. TIMES, Feb. 5, 2010, at B6.

⁸⁷ Bensinger & Vartabedian, *supra* note 69, at Main News 1.

⁸⁸ Motavalli, *supra* note 86, at B6.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Bensinger & Vartabedian, *supra* note 69, at Main News 1.

⁹² Motavalli, *supra* note 86, at B6.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Motavalli, *supra* note 86, at B6.

electromagnetic interference or a programming error.⁹⁷ Each of these potential problems is difficult to detect.⁹⁸

A report of these potential problems in Toyota vehicles was recently completed and submitted to Congress by Dr. David W. Gilbert.⁹⁹ Dr. Gilbert has been a technical educator involved with automotive diagnostics and trouble shooting for nearly thirty years.¹⁰⁰ While studying Toyota vehicles Dr. Gilbert came to the “startling conclusion” that electrical faults could be introduced into an electronic throttle control system without setting a diagnostic trouble code.¹⁰¹ Without a diagnostic trouble code, a vehicle’s computer or electronic throttle system does not realize that a problem has occurred.¹⁰² All vehicles are designed with “fail safe modes” so that when the vehicle’s computer identifies a false or defective signal to act through the setting of a diagnostic trouble code, such as entirely opening the throttle, the computer internally recognizes that the signal is false and does not act on it.¹⁰³ However, when manufacturer’s design vehicles they assume that the electronic throttle control and “fail safe modes” will perform exactly as they have designed them to.¹⁰⁴ In other words, manufacturers, such as Toyota, have not accounted have not accounted for signals or interference that goes undetected by diagnostic trouble codes.¹⁰⁵ An undetected signal or interference can cause the engine’s throttle open wide without any movement of a driver’s foot against the acceleration pedal.¹⁰⁶ Thus, it is clear from the preliminary findings of Dr. Gilbert’s research that Toyota sudden acceleration could, in fact, be caused by undetected defects in electronic throttle controls.¹⁰⁷

⁹⁷ Letter from Clarence Ditlow, *supra* note 81, at 4.

⁹⁸ *Id.*

⁹⁹ See generally Dr. David Gilbert, *Toyota Electronic Throttle Control Investigation*, Feb. 21, 2010, available at http://www.safetyresearch.net/Library/Preliminary_Report022110.pdf (last visited Feb. 26, 2010).

¹⁰⁰ *Response by Toyota and NHTSA to Incidents of Sudden Unintended Acceleration: Hearing before the Subcomm. On Oversight and Investigations*, 111th Cong. 1 (2010) (statement of Dr. David Gilbert, available at http://energycommerce.house.gov/Press_111/20100223/Gilbert.Testimony.pdf (last visited Feb. 26, 2010) [hereinafter Gilbert Statement].

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Gilbert Statement, *supra* note 100, at 1.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 3-4.

D. A Potential Fix for Defective

Even if undetected signals do cause a throttle to fully open, there is a potential fix. As part of Toyota's November 25 recall the company agreed to install "smart pedals" in some vehicles that had experienced sudden acceleration.¹⁰⁸ Several manufacturers who install electronic throttle systems also install "smart pedals" as a preventative measure against sudden acceleration including BMW, Volkswagen, and Audi.¹⁰⁹ By taking this preventative step, undetected signals or interference causing a throttle to open would be stopped when the driver hit the brake pedal.¹¹⁰ A "smart pedal" contains software that will immediately tell an engine to disregard the gas pedal once the break is depressed by the driver.¹¹¹ Although Toyota will be installing "smart pedals" in all of its 2011 vehicles, many Toyota vehicles prone to sudden acceleration, which are currently on the streets, will not receive this preventative technology.¹¹² Despite the potential for sudden acceleration in these vehicles and their previous deadly impact on drivers, passengers and pedestrians, neither the NHTSA nor Congress have required Toyota or other manufacturers to install this technology.

III. NHTSA and the Vehicle Safety Act: Roles, Rights and Responsibilities

A. Origin, Purpose and General Responsibilities

The NHTSA is charged by statute with the responsibility of reducing deaths and resulting from motor vehicle crashes by monitoring vehicle manufacturers, such as Toyota.¹¹³ This agency was first conceived in the 1960's in a congressional response to Ralph Nader's work exposing the dangers of motor vehicles.¹¹⁴ Each year the agency receives approximately 30,000 complaints

¹⁰⁸ Bunkley, *supra* note 56, at B4.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See Kevin M. McDonald, *Judicial Review of NHTSA- Ordered Recalls*, 47 WAYNE L. REV. 1301, 1308 (2002); See Act of Jan. 12, 1983, Pub. L. No. 97-449, § 7(b), 96 Stat. 2443 (1983) (codified throughout various sections of 49 U.S.C.).

¹¹⁴ Bensinger & Vartabedian, *supra* note 54, at B1. See also McDonald, *supra* note 113, at 1303-08.

from consumers who believe their vehicle is defective or noncompliant with applicable safety standards.¹¹⁵ The purpose of the NHTSA is to “reduce traffic accidents and deaths resulting from traffic accidents” as provided in the Vehicle Safety Act.¹¹⁶ In order to fulfill this purpose, the NHTSA must: 1) prescribe motor vehicle safety standards; and 2) carry out safety research and development.¹¹⁷ More specifically, the NHTSA is responsible for: 1) setting and enforcing safety performance standards for motor vehicles and motor vehicle equipment; (2) investigating safety-related defects in motor vehicles and, where appropriate, issuing recall orders; (3) enforcing fuel economy standards; (4) overseeing grants to state and local governments so as to conduct local highway safety programs; and (5) conducting research on driver behavior and traffic safety in order to develop the most efficient and effective safety improvements.¹¹⁸ The NHTSA has been given broad power and authority to carry out its responsibilities and fulfill its purpose.¹¹⁹

B. NHTSA’s Important Roles in Motor Vehicle Safety

i. Setting Standards

In order to establish motor vehicle safety standards, the NHTSA is granted authority to collect pertinent information and perform research and testing as it sees fit.¹²⁰ The agency has power to obtain information by subpoena, issuing requests for documents and things, holding information gathering hearings, holding administrative depositions, or requesting special reports

¹¹⁵ Eric Lichtblau & Bill Vlassic, *As Toyota’s Recall Expands, Safety Agency Is in Cross Hairs*, N.Y. TIMES, Feb. 10, 2010, at B1.

¹¹⁶ 49 U.S.C. § 30101 (2010). *See also* United States v. Ford Motor Co., 574 F.2d 534, 539 (D.C. Cir. 1978) (holding that the purpose of the Vehicle Safety Act is to “protect [the] public against unreasonable risks of accidents [that] might be caused by defects in design, construction, or performance of motor vehicles and against unreasonable risk of death or injury”).

¹¹⁷ 49 U.S.C. § 30101.

¹¹⁸ McDonald, note 113, at 1308; *See* 96 Stat. 2443 (This note will focus only on the NHTSA’s responsibilities to set and enforce safety standards and to investigate defects and issue recalls).

¹¹⁹ *See* 49 C.F.R. § 501.7 (2010); 49 C.F.R. § 510.3 (2010). *See also* 49 C.F.R. § 1.50 (delegating related functions of the Secretary of Transportation to the Administrator of the NHTSA).

¹²⁰ 49 U.S.C. § 30168.

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from related entities.¹²¹ After holding hearings and considering pertinent research and data, the NHTSA has the sole authority to make final decisions on rules and safety standards that will be adopted for future automobiles.¹²² Once the NHTSA establishes a standard, the Agency is required to ensure that manufacturer's comply when producing new vehicles.¹²³

ii. Enforcing Standards and Investigating Defects

When enforcing standards for new vehicles and investigating defects for old, the NHTSA is given the same broad information gathering powers listed above.¹²⁴ Manufacturers are required to permit the NHTSA's Office of Vehicle Safety Compliance to: collect field reports; inspect manufacturer's test data, vehicles or equipment; conduct selective compliance tests; and do anything necessary to conduct investigations.¹²⁵ Similarly, the NHTSA's Office of Defect Investigation is granted robust power to "elicit [information] from every available source" and evaluate "any information suggesting the existence of a safety related defect."¹²⁶ NHTSA is required to receive and evaluate petitions or complaints from any interested person claiming that a vehicle is defective or noncompliant.¹²⁷ After determining that a particular vehicle is defective, the NHTSA has the power to notify a manufacturer and take action to order a recall if the manufacturer is unwilling to issue a recall on its own initiative.¹²⁸

Regardless of whether a manufacturer recalls a defective vehicle on its own initiative or by NHTSA order, the NHTSA is charged with monitoring the manufacturer to ensure that it promptly provides notice to consumers and adequately remedies any safety defects free of charge to the consumer.¹²⁹ When a particular defect presents a serious risk of injury to the public, the NHTSA is empowered to force the manufacturer accelerate the process of providing notifications of defects to consumers and applicable remedies for defects when a defect is particularly

¹²¹ 49 C.F.R. § 510.3; 49 C.F.R. § 510.7.

¹²² 49 C.F.R. § 553.29 (2010); 49 C.F.R. § 501.7.

¹²³ 49 C.F.R. § 501.7.

¹²⁴ 49 C.F.R. § 510.3.

¹²⁵ 49 C.F.R. § 554.4 (2010).

¹²⁶ 49 C.F.R. § 554.5 (2010).

¹²⁷ 49 C.F.R. § 557.8 (2010).

¹²⁸ 49 C.F.R. § 501.7 (2010).

¹²⁹ 49 U.S.C. § 30120 (2010).

dangerous.¹³⁰ Further, the NHTSA has the authority to subject manufacturers who fail to comply with its requests to civil penalties.¹³¹ Finally, in an instance where a manufacturer intentionally misleads the NHTSA about defects that cause death or serious bodily injury, the agency may seek criminal penalties in the form of further fines or imprisonment.¹³²

C. Responsibilities of Motor Vehicle Manufacturers

Inasmuch as the Vehicle Safety Act places responsibility on the NHTSA to oversee vehicle safety, the Act also places a duty on manufacturers to be forthcoming about defects and safety standards. Each automaker selling new vehicles in the United States is required to provide a certificate indicating that every vehicle it sells is complaint with current federal safety standards.¹³³ It is illegal to sell noncompliant vehicles in the United States.¹³⁴ Should a manufacturer become aware of a safety defect or noncompliant vehicle after it has sold the vehicle to a dealer but before the dealer has sold the vehicle to a consumer, the manufacturer must “immediately” notify the NHTSA and the respective dealer and repurchase the vehicle or provide a remedy for the defect or noncompliance.¹³⁵ Once a vehicle has been sold to a consumer, the manufacturer has a duty to notify the NHTSA within five days after determining the existence of a defect in the vehicle.¹³⁶ Subsequently, the manufacturer must notify purchasers of a defective vehicle within a reasonable time after determining that a defect exists.¹³⁷ Automakers have a responsibility to remedy defects and noncompliant vehicles at their own expense.¹³⁸ This responsibility is followed by a requirement that the manufacturer submit quarterly reports to the NHTSA indicating its progress towards remedying defects.¹³⁹ Even when a defect may not exist, a manufacturer is required to report recalls of “substantially

¹³⁰ 49 C.F.R. § 573.14 (2010).

¹³¹ 49 C.F.R. § 510.12 (2010); 49 C.F.R. § 578.6 (2010).

¹³² 49 U.S.C. § 30170 (2010).

¹³³ 49 U.S.C. § 30115 (2010).

¹³⁴ 49 C.F.R. § 573.11 (2010); 49 U.S.C. § 30112 (2010).

¹³⁵ 49 U.S.C. § 30116 (2010).

¹³⁶ 49 C.F.R. § 573.5 (2010).

¹³⁷ 49 C.F.R. § 577.7 (2010); 49 U.S.C. § 30119 (2010).

¹³⁸ 49 U.S.C. § 30120.

¹³⁹ 49 C.F.R. § 573.7 (2010).

similar” vehicles in other countries¹⁴⁰ and, more importantly, information on deaths or injuries that are allegedly resulting from vehicle defects in the United States.¹⁴¹ Unfortunately, the Vehicle Safety Act’s delegation of power and authority to the NHTSA and the duties it has established for manufacturers were not enough to prevent the Toyota Sudden Acceleration crisis from continuing far longer than it should have.

IV. Recalls for Change: Problems and Suggested Solutions

The current Toyota sudden acceleration problems have brought the NHTSA under fire for failing to investigate potential defects, mishandling of information and failing to use its authority under the Vehicle Safety Act to prevent deaths and injuries.¹⁴² Clarence Ditlow, who for many years has run the Center for Auto Safety, said this, “This is history repeating itself. Where were we before this? The whole relationship [between automakers and the NHTSA] is to cozy. They [the NHTSA] view their constituency as the auto industry and not the consumer.”¹⁴³ In making this statement, Mr. Ditlow refers to the infamous Ford-Firestone disaster in the not too distant past. NHTSA’s response to the Ford-Firestone defects in 2000 and 2001 was eerily similar to its response to the Toyota Sudden Acceleration crisis.¹⁴⁴ Both of these events provide real life (and unfortunately death) case studies that shed light on the NHTSA’s drastic need for improvement.

A. Toyota Sudden Acceleration Crisis

While Toyota may have withheld information from the NHTSA, the Agency’s inadequate response to the current sudden acceleration crisis presents a picture of a regulatory agency in desperate need of change. Beginning in 2005, NHTSA began investigating Lexus vehicles for sudden acceleration defects.¹⁴⁵ However, the NHTSA investigations did not thoroughly review

¹⁴⁰ 49 C.F.R. § 579.11 (2010).

¹⁴¹ 49 C.F.R. § 579.21 (2010).

¹⁴² See Lichtblau & Vlassic, *supra* note 115, at B1.

¹⁴³ *Id.*

¹⁴⁴ Nick Bunkley, *Toyota Halting Most Car Sales For Pedal Flaw*, N.Y. TIMES, Jan. 27, 2010, at A1.

¹⁴⁵ Bensinger & Vartabedian, *supra* note 65, at Main News 1.

all potential causes of sudden acceleration.¹⁴⁶ Later, State Farm gave data to the NHTSA in 2007 suggesting that the likelihood of a sudden acceleration defect in Toyota manufactured vehicles.¹⁴⁷ Although the NHTSA purports to have investigated the State Farm data, the Agency seems to have chosen the path of least resistance by accepting Toyota's assertions that sudden acceleration problems were caused by floor mats trapping gas pedals.¹⁴⁸ Toyota later got away with one by issuing only a small voluntary recall of floor mats in response to the NHTSA's inquiry.¹⁴⁹ Internal Toyota documents have now surfaced that suggest Toyota saved \$100 million by negotiating the floor mat recall in avoidance of a finding of defects.¹⁵⁰ Toyota knew how to exploit the NHTSA.¹⁵¹ Toyota took advantage of the NHTSA's limited staff and resources by agreeing to provide inadequate recalls in order to cause the agency to move on to other investigations.¹⁵²

NHTSA internal documents demonstrate that the agency received numerous complaints describing mysterious accelerations in Toyota vehicles.¹⁵³ Each time the agency received complaints it would open reviews, make dissatisfied statements about Toyota failing to provide information, and then the NHTSA would itself fail to act.¹⁵⁴ Since 2003, the NHTSA has investigated Toyota sudden acceleration problems six times and all six times have resulted in NHTSA's failure to take action.¹⁵⁵ Throughout NHTSA's previous investigations of sudden

¹⁴⁶ *Id.*

¹⁴⁷ Lichtblau & Vlassic, *supra* note 115, at B1.

¹⁴⁸ Hiroko Tabuchi & Nick Bunkley, *Toyota Confirms That it Will Recall Thousands of 2010 Prius Hybrids for a Brake Glitch*, N.Y. TIMES, Feb. 9, 2010, at B5.

¹⁴⁹ *Id.*

¹⁵⁰ Kelly Olsen & Ken Thomas, *Toyota Boasted Saving \$100 Million on limited Recall*, WASH. TIMES, Feb. 22, 2010, available at <http://www.washingtontimes.com/news/2010/feb/22/toyota-boasted-saving-100m-recall/> (last visited Feb. 26, 2009).

¹⁵¹ *Response by Toyota and NHTSA to Incidents of Sudden Unintended Acceleration: Hearing before the Subcomm. On Oversight and Investigations, 111th Cong. 4 (2010)* (statement of Clarence Ditlow, available at <http://www.autosafety.org/sites/default/files/CAS%20House%20Oversight%20Testimon%202-24-10.pdf>) (last visited Feb. 26, 2010) [hereinafter Ditlow Statement].

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Lichtblau & Vlassic, *supra* note 115, at B1.

acceleration, they did not use their power to subpoena records or hold hearings even one time.¹⁵⁶ Despite receiving approximately 2,000 complaints about sudden acceleration in Toyota vehicles,¹⁵⁷ NHTSA has “bent over backwards” to ensure that Toyota was not made uncomfortable.¹⁵⁸ The “NHTSA can’t say what it did, how it did it or what the results were.”¹⁵⁹

The NHTSA’s investigation into electronic throttle defects is particularly troubling. NHTSA failed to document any engineering analysis on whether electronic throttles could either be the cause or a cause of Toyota sudden acceleration problems.¹⁶⁰ In fact, there is no electrical or software engineer on the NHTSA’s staff.¹⁶¹ Further, the agency’s most recent study on sudden acceleration, on which it has relied, was completed in 1989 on vehicles without complex electronic control systems.¹⁶² It is no wonder that the NHTSA’s investigation of electronic throttle control systems has been inadequate.

After thousands of complaints and several investigations over a period of years, the NHTSA still has not identified or even attempted to identify all the causes of Toyota sudden acceleration.¹⁶³ The agency has been unsuccessful in fulfilling its purpose. It has failed to cause Toyota to address the safety related complaints consumers are reporting.¹⁶⁴ With lawmakers now investigating the NHTSA,¹⁶⁵ the agency has finally begun to seriously investigate Toyota’s questionable explanations.¹⁶⁶ The NHTSA has requested a massive volume of documents and data

¹⁵⁶ *Id.*

¹⁵⁷ Coco Masters, *Autos: Toyota may issue recall of Corolla*, L.A. TIMES, Feb. 18, 2010, at B1.

¹⁵⁸ Michael Hiltzik, *Denial is a familiar road for Toyota*, L.A. TIMES, Feb. 4, 2010, at B1.

¹⁵⁹ Ken Bensinger & Ralph Vartabedian, *Toyota inquires take a new turn*, L. A. TIMES, Feb. 3, 2010, at Main News 1.

¹⁶⁰ Letter from Clarence Ditlow, *supra* note 81.

¹⁶¹ See *Response by Toyota and NHTSA to Incidents of Sudden Unintended Acceleration: Hearing before the Subcomm. On Oversight and Investigations*, 111th Cong. 1 (2010) (statement of Rep. Harry Waxman, Chairman, Comm. on Energy and Commerce), available at http://energycommerce.house.gov/Press_111/20100223/waxman.statement.2.23.10.pdf (last visited Feb. 26, 2010) [hereinafter Waxman Statement].

¹⁶² See Letter from Clarence Ditlow, *supra* note 81, at 2.

¹⁶³ *Hearings*, *supra* note 4, at 1 (testimony of Sean Kane).

¹⁶⁴ *Id.* at 1.

¹⁶⁵ Ralph Vartabedian et al., *Toyota Gets Intense New U.S. Scrutiny*, L.A. TIMES, Feb. 17, 2010, at Main News 1.

¹⁶⁶ *Id.*

from the Toyota.¹⁶⁷ Unsurprisingly, the agency has now asked Toyota to explain specifically how it assessed potential interference with electronic throttle systems.¹⁶⁸ Although answers to this and other inquiries recently made will likely be helpful to bring about consumer safety in the future, the NHTSA can do nothing about its failed responses in the past.

B. The Ford-Firestone Disaster

The Ford-Firestone disaster is another one of the NHTSA's failures that illustrates the agency's need for dramatic change which has never occurred. Between 1990 and 2001, more than 271 people died and over 700 people suffered injuries in accidents involving Firestone tires on SUV's manufactured by Ford Motor Company.¹⁶⁹ Numerous complaints were filed with the NHTSA alleging that Firestone tires, which Ford installed as standard equipment on Explorer SUVs, caused vehicle rollovers resulting in death and serious injuries.¹⁷⁰ Similar to Toyota, State Farm insurance officials warned the NHTSA as early as 1998 that at least twenty-one failures involving fourteen Ford Explorers resulted in serious accidents.¹⁷¹ However, the NHTSA did not begin a formal defect investigation until May 2, 2000 concluding in July of 2001.¹⁷² Finally, Firestone announced a recall of 6.5 million tires.¹⁷³ With the same soft touch the NHTSA has given to Toyota, it did nothing when Firestone refused to carry out the agency's request to expand the initial recall.¹⁷⁴ Further, the NHTSA exonerated Firestone even though it had received 193 personal injury claims, 2,288 property damage

¹⁶⁷ Masters, *supra* note 157, at B1.

¹⁶⁸ Lichtblau & Vlassic, *supra* note 115, at B1.

¹⁶⁹ Timothy Aeppel et al., *Firestone Broadens Recall of Defective Tires*, WALL ST. J., May 23, 2001, at A3, *noted in* Kevin M. McDonald, *Don't Tread on Me*, 49 BUFF. L. REV. 1163, 1175 (2001).

¹⁷⁰ See Kevin M. McDonald, *Don't Tread on Me*, 49 BUFF. L. REV. 1163, 1163-64 (2001).

¹⁷¹ See Jenifer Dixon, *Insurance Firms Going After Ford, Firestone*, DETROIT FREE PRESS, Aug. 6, 2001, at 1A, *noted in* McDonald, *supra* note 170, at 1174.

¹⁷² S. REP. NO. 106-423, at 2 (2000), *noted in* McDonald, *supra* note 170, at 1174.

¹⁷³ See *id.*

¹⁷⁴ H.R. REP. NO. 106-954, at 7 (2000), *noted in* McDonald, Note 170, at 1174.

claims, and was defending 66 lawsuits by February 2000.¹⁷⁵ The agency claimed that Firestone was not required to provide the NHTSA with this information because Firestone allegedly had not yet determined the existence of a defect.¹⁷⁶ After the NHTSA failed to oversee the Ford-Firestone defects as it should have,¹⁷⁷ Congress accused the agency of failing to adequately detect and investigate safety related defects.¹⁷⁸

In response to the Ford-Firestone crisis, Congress felt the need to create legislation that would address the NHTSA's ineffective and inefficient process of analyzing data pertaining to vehicle defects, initiating investigations, and issuing recalls.¹⁷⁹ Shortly after it conducted hearings, Congress passed the Transportation Recall Enhancement, Accountability and Documentation Act ("TREAD") in October of 2000.¹⁸⁰ The current response from lawmakers to Toyota's sudden acceleration crisis also seems likely to generate new legislation as Congressmen suggest this is a necessary step to address the Toyota problem and the NHTSA's recent failures.¹⁸¹

C. Suggested Improvements for the NHTSA

In the wake of the NHTSA's mishandling of the Toyota sudden acceleration crisis, law makers and regulators must carefully observe the picture this problem has painted so that history does not repeat itself yet a third time. As is evidenced by the semi-recent Ford-Firestone situation, many lawmakers and the NHTSA have a short term memory. As Ralph Nader recently stated, "It is a broken agency has to be rebuilt. Thousands of lives can be saved."¹⁸² Now is the time for dramatic and effective change. The following paragraphs provide several suggestions to that end.

¹⁷⁵ See Standards Enforcement and Defect Investigation, 66 Fed. Reg. 6532, 6533 (Jan. 22, 2001), *noted in* McDonald, *supra* Note 170, at 1174. *noted in* McDonald, *supra* note 170, at FN 34.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ S. REP. NO. 106-423, at 1, *noted in* McDonald, *supra* note 170, at 1174.

¹⁷⁹ McDonald, *supra* note 170, at 1178.

¹⁸⁰ Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act, Pub. L. No. 106-414, 114 Stat. 1800 (2000).

¹⁸¹ Waxman Statement, *supra* note 161.

¹⁸² Bensinger & Vartabedian, *supra* note 54, at B1 (quoting Ralph Nader, the man whose work caused the NHTSA to come into existence).

i. Increased Funding

The first and most important change requires that the NHTSA be funded so that it can fulfill its mission of “reducing traffic accidents and deaths resulting from traffic accidents.”¹⁸³ An underfunded regulatory agency, such as the NHTSA, is simply unable to carry out a mission as broad and important as the NHTSA’s. On April 8, 2009, the NHTSA began what would be a very telling investigation in the Toyota crisis.¹⁸⁴ The investigation report acknowledges that the NHTSA received 64 complaints alleging sudden acceleration in the same model of vehicle it was investigating.¹⁸⁵ These incidents resulted in eight crashes and fifteen injuries.¹⁸⁶ While the agency did not make a finding that a safety related defect (other than floor mats) did not exist, it closed the investigation because of “the need to allocate and prioritize NHTSA’s limited resources to best accomplish the agency’s safety mission.”¹⁸⁷ The closing of this investigation due to financial constraints evidences the fact that NHTSA is simply not financed in order to carry out its purpose. With NHTSA’s shoe string budget, it can only afford to seriously investigate defects that are tantamount to crisis. Many times, this is too late.

Instead of increasing as time has progressed, the agency’s funding has decreased at a time when automotive technology and the demands of investigating defects have increased.¹⁸⁸ Nearly 75% of the NHTSA’s annual budget of \$867 million is required to go to state grants to promote seat belt use and drunk driving.¹⁸⁹ This leaves just approximately \$216 million for the agency to spend on all of its other functions including researching and inspecting vehicle defects and creating new federal safety standards. On this budget, there is simply no way for NHTSA to effectively monitor every vehicle and automotive part with potential defects.

¹⁸³ 49 U.S.C. § 30101.

¹⁸⁴ See NHTSA, OFFICE OF DEFECTS INVESTIGATION REPORT, NHTSA Action Number DP09001, available at <http://www-odi.nhtsa.dot.gov/cars/problems/defect/defectsearch.cfm> (last visited Mar. 15, 2010). (User must enter “DP09001” into the “Quick Search” box).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Bensinger & Vartabedian, *supra* note 54, at B1

¹⁸⁹ *Id.*

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ii. Increased Staff

With increased funding, the NHTSA will be able to add much needed new staff. The agency has acknowledged that it has been short staffed in the past.¹⁹⁰ Due to budgetary constraints, the NHTSA has struggled to hire new staff members with the capabilities to research and investigate defects in modern vehicles and draft modern safety standards.¹⁹¹ It has been reported that the Office of Defects has fewer than 60 total employees.¹⁹² Of these employees, only 18 investigate defects on vehicles throughout the entire country.¹⁹³ As noted by Representative Waxman, the NHTSA does not have even one electrical or software engineer on its staff.¹⁹⁴ If legislators do not provide the Agency with more staff, it cannot be held accountable for failing to detect defects.

iii. Technology

One of the biggest lessons that Toyota sudden acceleration teaches, is that the NHTSA needs to transform itself into a tech savvy entity. The staff, equipment and facilities of the NHTSA must be conducive to working with cutting edge automotive technology or it will not be able to carry out its function. Some defects may be avoided by specific safety standards that address computerized vehicles. Many current federal standards were drafted in the 1960's and 1970's.¹⁹⁵ In order to create effective new standards and ensure compliance, the agency will need the technological resources. Further, in order to test for defects in increasingly computerized automotives, advanced technology is needed for the agency to conduct proper investigations.

iv. Stronger Oversight and Accountability

In both the Toyota and Ford-Firestone recalls, the NHTSA received many complaints suggesting that defects existed months and even years before the NHTSA took any

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Bensinger & Vartabedian, *supra* note 54, at B1

¹⁹⁴ Waxman Statement, *supra* note 161.

¹⁹⁵ Ken Bensinger, *Congress to Grill Toyota Regulators*, L.A. TIMES, Feb. 7, 2010, at Main News 1.

action.¹⁹⁶ The NHTSA must be held accountable for its handling of claims on a consistent basis. Congress must make sure that the NHTSA is serving its purpose at all times rather than micromanaging only in crisis situations. Just as in the Ford-Firestone debacle, legislators are now scrutinizing the NHTSA because they are under heat from constituents due to the current crisis. In order for the NHTSA to fully improve and develop, legislators must continue to monitor the NHTSA even after the Toyota sudden acceleration buzz dies down. The functioning of the NHTSA is a national safety concern and should be treated as one.

v. Increased Consumer Awareness

The agency must rely, to a certain extent on complaints and petitions from consumers who have experienced defects. In order to educate consumers about the NHTSA legislators must provide funding for it to increase consumer awareness of its existence and purpose. Pamphlets explaining the NHTSA's role as a regulator should be available at every car dealership. Many consumers are not aware of the NHTSA's roles and responsibilities. Consumer complaints serve as a valuable resource for the NHTSA that cannot be fully utilized without public awareness and education.

vi. Tiered Probationary System

In an effort to increase enforcement of noncompliance while at the same time encouraging good corporate citizens, Congress should work with the NHTSA to develop a probationary system for automotive manufacturers. Such a system would rate each automaker's track record with safety standards compliance and defects. A tiered system would serve as a reward to companies who comply in good faith and a deterrent for those who fail to meet safety standards and take appropriate precautionary measures for defects. Such a system would encourage auto manufacturers to pursue safety as a means to competitively increase their market share.

¹⁹⁶ See Waxman Statement, *supra* note 161.

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vii. Willingness to Use of Power and Authority

a. Information Gathering Powers

The NHTSA must consistently use its information gathering powers when complaints of defects are first reported. Once these powers are used, the NHTSA needs to hold manufacturers accountable to provide information in an efficient manner. The NHTSA has robust powers to collect information and data from manufacturers. It must do so aggressively. Auto manufacturers are not likely to willingly volunteer information that will injure their bottom line. Even though they have a duty to provide information to the NHTSA, the NHTSA must refuse to give manufacturers the benefit of the doubt when it comes to consumer safety.

b. Ordering and Requiring Recalls

Despite its power to order recalls, the NHTSA has only ordered a manufacturer to make one recall since 1979.¹⁹⁷ The NHTSA must show big auto manufacturers that it means business. If a manufacturer knows it is possible to avoid expensive recalls, it may take risks in order to enhance its bottom line.

c. Imposing Stiff Civil Fines and Criminal Penalties

Since 2004, the NHTSA has not levied any civil penalties on an automaker.¹⁹⁸ Even if it did, the maximum penalty that can be levied on an automaker is \$16.375 million.¹⁹⁹ As pointed out by a former NHTSA attorney, these fines do not “have enough teeth” to deter a big manufacturer from taking risks with defects and noncompliance.²⁰⁰ The largest sum of a fine issued by the NHTSA to date is only \$1,000,000.²⁰¹ Caps on civil penalties should be based on a manufacturer’s average annual revenues or sales. Maximum penalties could be based on a sliding scale increasing fines for large manufacturers and decreasing fines for

¹⁹⁷ Bensinger & Vartabedian, *supra* note 54, at B1

¹⁹⁸ *Id.*

¹⁹⁹ See 49 C.F.R. §578.6.

²⁰⁰ Bensinger & Vartabedian, *supra* note 54, at B1

²⁰¹ Ken Bensinger et al., *Toyota Gets Intense New U.S. Scrutiny*, L.A. TIMES, Feb. 17, 2010, at Main News 1.

small. This would be fair for manufacturers of all sizes and would provide the NHTSA with a much stronger deterrent against noncompliance. If fines are not a strong enough deterrent, the NHTSA must seek criminal penalties, as it is empowered to do, in order to ensure safety.

V. Conclusion

Although Toyota is a very ominous black cloud, its silver lining can be realized if Congress and the NHTSA work together to produce stronger more effective legislation that transforms NHTSA into an active, efficient and cutting edge agency. The NHTSA will need a substantial increase in funding for this transformation to occur. The Toyota sudden acceleration crisis demonstrates the potential benefits the necessity of a well funded, proactive NHTSA. Without drastic changes, the NHTSA will remain unable to accomplish its purpose and another recall crisis similar to Ford-Firestone or Toyota sudden acceleration may occur in the not so distant future.