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Dear Dr. Graham,

There are so many serious flaws in your recent review and rejection of the National Highway Traffic Safety Administration's (NHTSA's) proposal for a tire pressure monitoring system required by the Transportation, Recall Enhancement, Accountability and Documentation (TREAD) Act, it is hard to know where to begin. I find it difficult to believe, with all your emphasis on "sound science," that your office has returned a rule based on the pure speculation and infirm logic contained in your "return letter"<sup>1</sup> of February 13, 2002.

Let me get this straight. In your capacity as Administrator of the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB), you have blocked an overdue, lifesaving rule required by Congress in the wake of the nation's most publicized tire safety disaster because, in your view, NHTSA must permit industry to install a marginally cheaper, but far less accurate and beneficial, type of tire pressure monitoring system. Your return letter ignores the record that NHTSA has assembled in the course of the rulemaking and disregards the 191 comments filed in the agency's docket, including two of my own, during the agency's public notice and comment period. The docket includes notice of at least 20 meetings between the

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<sup>1</sup> A "return letter" is a rejection of an agency's rulemaking proposal, which can occur, as here, at the final stages of the rulemaking following a full notice and comment process. According to your testimony Feb. 28<sup>th</sup> before the House Subcommittee on Consumer Affairs, you have signed 20 return letters since taking office. Under the Clinton Administration, no return letters were issued in the last three years and just 25 were issued over Clinton's entire eight-year term. Even outside of the context of your other moves to consolidate power within OMB, such as the list of rules for rescission contained in the final Year 2001 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local and Tribal Entities, your activism in returning rules constitutes a major increase in the role of OMB and its interference in agency rulemaking. Of the 20 return letters discussed in your testimony, only 5 of the rules have since been passed by your office, meaning that OMB action has delayed issuance of the remaining 15 rules. Of course, as you told *Congressional Quarterly*, the threat of a return letter may be most critical in assuring that you are able to exert power at the early stages of every rulemaking, with leverage over formative decisions that are largely out of sight to the public or to Congress. See Rebecca Adams, "Regulating the Rule-Makers: John Graham at OIRA," *Congressional Quarterly*, Feb. 23, 2002, at 521.

agency and industry and other technical experts about the feasibility and cost of various systems. Your return letter also fails to take note of several recent, carefully designed studies conducted by NHTSA which have revealed the sorry state of the typical tire on the highway and the widespread hazards of tire underinflation,<sup>2</sup> including the agency's recent public awareness campaign, entitled *Tire Safety: Everything Rides On It*.<sup>3</sup>

The agency's Notice of Proposed Rulemaking (NPRM) clearly laid open for public comment the question whether the agency should require a direct or indirect system for monitoring tire pressure.<sup>4</sup> Like many others in the record, we urged the agency to require a direct system, given that direct systems are capable of measuring all four tires, and provide consistent and accurate results to the driver. We argued that the great inaccuracy and partial coverage (only three tires at most) of the indirect system would make that system a nuisance which many consumers would learn to disregard, and would be a source of disdain and irritation with inept government rules.

### *There Are Many Serious Deficiencies in Indirect Systems*

As Representative Markey (D-Mass.) forcefully pointed out in the hearing before the House of Representatives Subcommittee on Commerce, Trade, and Consumer Protection on February 28<sup>th</sup>, 2002, the indirect system barely works. Here are some of its many shortcomings:

- Indirect systems are only available on vehicles with antilock brakes, which are the more expensive vehicles on the highway.
- Because it measures differences in rotational speed of tires rather than directly measuring inflation levels, it works only if one tire is more than 25 percent less inflated than the others; the direct system, by contrast, provides continuous readouts on the dashboard *in addition to warnings at underinflation levels of 20 percent*, so that conscientious consumers can adjust tire inflation levels to keep them right at the recommended level, thereby preventing the repeated, cumulative damage to tires.
- Indirect systems do not work if all four tires are equally under inflated, a likely scenario if they are checked or purchased at the same time.

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<sup>2</sup> See National Center for Statistics and Analysis, Tire Pressure Special Study, August 2001, DOT HS 809 315 (Methodology); DOT HS 316 (Interview Data); DOT HS 317 (Vehicle Observation Data). As part of this four-part study, NHTSA also conducted extensive surveys at 336 gasoline stations throughout the U.S., see Kristin Thiriez (NHTSA Engineer) and Rakesh Subramanian (NHTSA Mathematical Analyst), Tire Pressure Special Study, October 2001, DOT HS 809 359 (Using sample of 10,900 observations of tire pressure of all four tires on vehicle); see also Frank Swoboda, "Inaccurate Tire Gauges Can Be a Matter of Safety," *The Washington Post*, Dec. 4, 2001.

<sup>3</sup> See <http://www.nhtsa.dot.gov/cars/rules/TireSafety/ridesonit/brochure.html>; NHTSA Press Release, "Many U.S. Passenger Cars Are Driven on "Bald" Tires, NHTSA Research Shows: U.S. Transportation Secretary Mineta Announces Launch of Major Nationwide Campaign to Promote Tire Safety," Nov. 30, 2001.

<sup>4</sup> See Tire Pressure Monitoring Systems: Controls and Displays, Notice of Proposed Rulemaking, 66 FR 38982, July 26, 2001, at 38987-96 (discussing differences in direct and indirect systems). In the NPRM, NHTSA stated that its experts doubted whether indirect systems were even capable of complying with the minimum performance requirements of the second the regulatory alternatives the agency proposed. *Id.* at 38996.

- It also does not work if two tires on the same axle *or* the same side of vehicle are equally under inflated, but does work if diagonal tires are equally under inflated, a shell game that is certain to confuse and frustrate consumers. By comparison, the direct system monitors inflation changes in all four tires and any tire combination.
- The vehicle must be moving for the system to work, so it cannot be used to check proper inflation at a gasoline station while consumers are inflating the tire and will only alert consumers once they are already on the road.
- The indirect system did not work well on the smooth surface of the test track, or on long, straight roads without curves. Enormous areas of the Midwest and West may not be well served by these limitations.
- The indirect systems were, overall, less reliable in notifying consumers of serious underinflation levels.

*OIRA is Obstructing Congressional Intent and Relying on Flawed Analysis*

Indeed, at the same hearing on February 28, 2002, you agreed that the indirect system is inferior, stating that a direct system<sup>5</sup> will provide better safety, and that the quality of indirect systems is still under development. Nonetheless, according to your testimony, OIRA has won this round, and will be announcing that the requirement for a direct system, instead of being phased-in, as the agency proposed, has been put on hold for two additional years until model year 2007, in order to enable NHTSA to further “study” the problem and to consider a standard for anti-lock brake systems (ABS).<sup>6</sup>

This outrageous result, you were informed by Representative Markey, who authored this tire pressure amendment, means that “this amendment, the Markey amendment, is not being implemented.” As Representative Markey observed, the delay could be disastrous for the future of the rule, because industry will “use any scientific or technological hedge that they can” to resist additional safety requirements. Of course, as you are well aware, studying the issue until 2007 means in practical terms that a phase-in of new requirements would not occur until, at the earliest, model year 2011 or 2012. And folding in consideration of the ABS issue, which has long been a complicated data tangle, will doubtless provide ample opportunity for even more delay, obfuscation, and frustration of Congressional purpose.

The statute authored by Representative Markey under the Transportation, Recall Enhancement, Accountability and Documentation (TREAD) Act, specifically delegated authority to issue the rule to the Secretary of Transportation and provided an extremely short (one-year) statutory deadline for “a warning system in new motor vehicles to indicate to the operator when a tire is significantly under inflated.”<sup>7</sup> The statute makes no mention of ABS.

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<sup>5</sup> In your terminology, the “direct” system was called a “4-tire standard.”

<sup>6</sup> I hope, in arriving at this so-called “compromise,” that your office performed a meaningful analysis of the cost of this additional research to society, in terms of government expenditures, expertise, and the agency’s diversion from other pressing priorities, as well as in terms of the loss of the saved lives and other safety benefits that would have accrued in the interim from a requirement for direct systems. Your return letter lacks such self-reflection.

<sup>7</sup> See Transportation, Recall Enhancement, Accountability and Documentation Act, PL 106-414, 114 Stat. 1800 (Nov. 1, 2000).

Your 2001 Report to Congress states that one of the external peer reviewers of that report questioned OMB's legal authority to issue return letters, arguing that even if they were lawful, they should be "done with care."<sup>8</sup> In response, according to the report, your Office of General Counsel reviewed these concerns and found that there was authority for OIRA to issue return letters, although you provide not a hint of the origins of this considerable power. The report does note, however, that "[w]e share the view of the reviewer that OIRA should not return a rule to an agency for reasons that would compel an agency to act in ways that are inconsistent or incompatible with the statute under which the agency is operating."<sup>9</sup>

NHTSA was not charged by Congress with examining the safety benefits of ABS, and, because of long-standing doubt about their safety effects, has never issued a safety standard that would require them. NHTSA did, however, undertake considerable preparation for its actual assignment regarding whether to require direct or indirect tire pressure monitoring systems. A 136-page technical report by NHTSA drafted by three agency experts and ten other advisors, who conducted extensive testing of both systems, corroborated the agency's preference for direct measuring systems:

Through its testing, NHTSA found that systems that use sensors to directly measure tire pressure (pressure-sensor based systems) were better able to detect underinflation, had more consistent warning thresholds, and were quicker to provide underinflation warnings than the systems that infer tire pressure from monitoring wheel speeds (wheel-speed based [or "indirect] systems).<sup>10</sup>

In view of this ample record and the agency's years of building technical expertise in the area of tire inflation and safety, NHTSA wisely decided to permit only the installation of direct systems.

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<sup>8</sup> It is clear that withdrawal of a published final rule and suspension of the effective date of a published final rule are both actions constituting rulemaking under the Administrative Procedures Act and require notice-and-comment procedures. See *Alaska Professional Hunters Association, Inc. v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999); *Natural Resources Defense Council, Inc. v. EPA*, 683 F.2d 752 (3d Cir. 1982).

<sup>9</sup> See *Making Sense of Regulation: 2001 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local and Tribal Entities* (Office of Management and Budget, Dec. 2001). The objections of this peer reviewer as to the return letter's underlying legitimacy throws serious doubt on your use of the return letter to assure early OMB access to the formative stages of the rulemaking process, as you told *Congressional Quarterly* was your goal. In an interview, you told the reporter that agencies are now operating under a thinly veiled threat of such letters: "What we've been working on is to create an incentive for agencies to come to us when they know they have something that in the final analysis is going to be something we're going to be looking at carefully. And I think that agencies that wait until the last minute and then come to us – well, in a sense, they're rolling the dice." See Rebecca Adams, "Regulating the Rule-Makers: John Graham at OIRA," *Congressional Quarterly*, Feb. 23, 2002, at 521. Your centralization of an OMB power that remains controversial even for experts in this area is of deep concern to me. If it is dubious to issue return letters, surely it is far more pernicious to use them as a threat to alter processes at the heart of statutorily assigned agency discretion and judgment.

<sup>10</sup> See *An Evaluation of Existing Tire Pressure Monitoring Systems*, DOT HS 809 297, July 2001.

Your office demurred. After once revising the rule for content, including at least one previous round of edits of the agency's NPRM on cost and benefit issues,<sup>11</sup> your office has again returned the agency's proposal. Inexcusably, your return letter employs only the most bare-bones and unproven assumptions about the cost and market effects of combining indirect systems with a requirement for anti-lock brakes (ABS) (a long-controversial area outside the focus of the agency's current rulemaking mandate), which, in turn, has only statistically insignificant and highly disputed safety effects.<sup>12</sup> In order to make even the sparsest case for indirect systems, it appears that OIRA must find some shred of benefits any place that it can.

In fact, your reasons for rejecting the rule are marked by fallacious assumptions, disingenuous statements and cost-benefit sophistry. Taking the word of only one manufacturer as evidence for the economic decisions of every manufacturer, you argue that "manufacturers can reduce the cost of compliance" by allowing indirect systems, accompanied by a requirement or manufacturer program to install anti-lock brake systems (ABS) across the entire vehicle fleet. You present no evidence that requiring direct systems will *discourage* manufacturers or consumers from installing ABS; nor is there any evidence that even suggests that every manufacturer will make a decision similar to the one cited above. Yet the very survival of your conclusions depends upon assumptions regarding the installation of ABS in every vehicle on the highway.

In fact, linking the availability of a functioning, direct tire pressure monitoring system to ABS makes no sense whatsoever, as the more expensive direct systems cost \$66 per vehicle (not including benefits such as increased tread life, increased fuel economy and reductions in crashes), whereas ABS and the indirect system impose costs of \$240 for the ABS and an additional \$13.29 for the indirect monitoring system, a total of \$253.29. Because ABS is currently not installed in the cheapest sector of the vehicle fleet, imposing an ABS requirement would essentially inflict an unnecessary \$187 of costs<sup>13</sup> on those customers who can least afford it and who should not have to pay for a brake system which, after years of use, has an unproven safety record.

What will these consumers, who have not chosen to pony up for ABS now, get for their enforced outlay? The only study cited by you in support of the safety "benefits" of ABS was a recent study undertaken to examine, ironically, the historical over-involvement of vehicles with ABS in certain kinds of crashes. In the past, while ABS had been found to reduce fatalities in two-vehicle crashes, other evidence suggested that, perhaps due to differences in handling, ABS actually increased run-off-the-road crashes and crashes with fixed objects.

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<sup>11</sup> See Memorandum in Response to Section 6(a)(3)(E) of Executive Order 12866, Docket NHTSA-2000-8572-69 (showing edits requested by OMB in strike and add format to pre-publication NPRM).

<sup>12</sup> Indirect systems may only be used on cars with ABS.

<sup>13</sup> This cost is calculated by adding the cost of ABS (\$240) to the cost of installing an indirect system on a vehicle with ABS (\$13.29) (=253.29) and subtracting the cost of a direct system (\$66.50), which would have been imposed on all consumers under NHTSA's rulemaking proposal ( $253.29 - 66.50 = 186.79$ ). Therefore, an ABS requirement tied to this rulemaking would tax consumers with \$187 in potentially worthless additional costs for the dubious combined benefits of ABS and an indirect system.

In the study you cite as the only “best estimate” available on ABS and safety, safety researcher Charles Farmer found that ABS *had no statistically significant effect on crash fatalities*.<sup>14</sup> Farmer was unable to determine whether ABS ultimately saved or cost lives across the vehicle fleet, making the “between 4 and 9 percent reduction” in crash fatalities you cite as evidence for your position a statistical blip that may actually be zero percent. The Insurance Institute for Highway Safety summarized the results of the same study by Farmer as follows:

. . .the real-world advantages of antilock brakes are unproven. Over the long term, vehicles with such brakes have fared no better in overall fatal crash experience than vehicles without antilocks. “Despite their impressive performance on the test track, there is still no evidence that antilock brakes are producing overall safety benefits,” says Institute president Brian O’Neill.<sup>15</sup>

Since the remainder of your argument about the “benefits” of an indirect system rests on this blip of “4 to 9 percent,” your benefits calculus is actually a castle in the air.

Essentially, you need whatever sliver of benefits you can eke out of the data on ABS to add to the poor performance statistics of indirect systems in order to make your implausible claim that the addition of ABS to the remainder of the vehicle fleet *plus* the modest safety benefits of indirect systems would save more lives than a direct system alone. However, the breach of normal statistical practice you commit by relying on statistically insignificant data has devastating consequences for the validity of your conclusions. Rather than quibbling at NHTSA about yet more benefit details, as the remainder of your letter does, you should have performed your own sensitivity analysis<sup>16</sup> of these conclusions before holding the agency hostage to your arbitrary demands.

Due to the lack of statistical significance, as above, the “benefit” from ABS *could just as easily be zero as four or nine percent*. At zero benefits, a decision to require ABS would tax lower-income consumers with an undesired and valueless extra expenditure of \$187 for ABS systems and indirect monitors per vehicle, or \$935 million per year across the number of vehicles annually produced without ABS (some 5 million vehicles). A sensitivity analysis might have shown you that well-founded uncertainty about ABS yields you *either and equally probably* benefits or losses of this amount. Given that these benefits would accrue only if all your unsupported suppositions about manufacturer and market behavior are correct, and that consumers who choose to value ABS can purchase the system in this marketplace, one might think that you would yield to the agency’s mandate and exercise of judgment in this case.

If forcing consumers to pay \$187 for nothing was not enough, an ABS requirement would enable manufacturers to continue to install slipshod, lousy tire pressure monitoring systems, stunting the continued development of direct measurement

<sup>14</sup> See Charles M. Farmer, New Evidence Concerning Fatal Crashes of Passenger Vehicles Before and After Adding Antilock Braking Systems,” *Accident Analysis and Prevention* 33 (2001), at 361.

<sup>15</sup> See Insurance Institute for Highway Safety Status Report, Vol. 35, NO. 4, April 15, 2000.

<sup>16</sup> Sensitivity analysis is used to reinforce a finding by demonstrating that an outcome is robust, *i.e.*, that the conclusion is not very sensitive to potential changes in the variables upon which the result rests.

technologies. Furthermore, manufacturers would, predictably, be able to charge a mark-up for those consumers annoyed by the imprecision of indirect systems with money to expend on safety “extras,” thus further disadvantaging lower-income consumers.

Without OMB’s intervention, on the other hand, direct systems that truly warn of dangerous conditions would be available to all consumers at the lowest cost due to the ability to manufacture them in mass production as standard equipment, and the systems’ capacity for continuous monitoring of all four tires on the dashboard might trigger a cultural sea-change in attention to tire safety.<sup>17</sup> In addition, manufacturers of these systems would take the risk of further investments to perfect future direct systems. Consumers who regularly monitored their tire conditions would see cost savings in gas from improved fuel economy, cost savings on the longer tread life of their tires, and, most importantly, fewer tire-related crashes.

Nor does it matter, as your analysis suggests, that the cost of inflicting ABS on the remainder of the vehicle fleet *plus* the cost of indirect systems for the whole fleet is cheaper than the cost of a direct system requirement. NHTSA already determined that the cost savings from allowing an indirect system were *not worth it* on safety grounds. Given the total uncertainty of any safety benefits flowing from ABS, there is literally no reason to doubt the agency's informed decision.

Other unexamined assumptions and errors also plague your re-hashing of NHTSA’s hundred-page economic analysis. Here are just two examples: 1) The number of crash fatalities used as a multiplier of your fanciful “4 to 9 percent” was 40,000, an extremely rough number that actually includes some 10,000 annual pedestrian, large truck occupants, bus occupants, and bicyclist fatalities,<sup>18</sup> which are outside the scope of the rule and which should, at the least, be considered separately; 2) You failed to account for the time it takes to alter vehicle manufacturing processes, instead assuming that 1.1 million vehicles currently produced without ABS would suddenly be manufactured with this feature. NHTSA avoids these pitfalls because the agency does not base its benefit estimates on overall fatality statistics, but instead looks at specific benefits.

In sum, your agency has embarrassed itself by getting in over its head. How many mechanical engineers are on staff at OIRA, who can fairly evaluate the merits of the agency’s decision? The expertise of your office in this arena is unclear, at best. What is clear is that you are choosing to trade a known quantity of lives that will be lost by allowing indirect systems in exchange for highly dubious ABS benefits and assured

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<sup>17</sup> Statistical evidence collected by the agency suggests that this is quite possible, as 85 percent of drivers of the 11,530 vehicles surveyed were “concerned about maintaining proper tire inflation.” See Preliminary Analysis of Findings, 2001 NASS Tire Pressure Special Study, Aug. 3, 2001, Docket No. NHTSA-2000-8572-74.

<sup>18</sup> Occupant fatalities in passenger cars and light trucks actually totaled 31,910. See Traffic Safety Facts 2000 – Overview, National Center for Statistics and Analysis (2001). Using your methodology, this error alone subsumes your conclusions. Confusingly, you do not use benefits numbers comparing it to the whole fleet with ABS, but only 7.4 percent. Reducing 7.4 percent of the total number of fatalities (2,308) by 4 to 9 percent would reduce fatalities by 92-207, a number solidly in the range of the number of fatalities averted by the direct system (141). Of course, the agency’s calculations regarding number of fatalities averted by a direct system requirement was substantially justified by NHTSA, whereas the “4 to 9 percent” figure you utilize for the add-on benefits of ABS could just as easily be zero.

increases in costs for lower-income consumers. This line of reasoning would not have passed the laugh test if it had originally been submitted by NHTSA to your office, and would be far more comical now if the precedent your action sets, and the human lives that will be lost from allowing a much less effective system, were not so grave.

### *Conflicts of Interest Impugn Your Involvement in this Rule*

Nor have you chosen to recuse yourself from this decision, as you should, because of your well-documented and specific conflicts of interest. The OIRA docket shows that you held a meeting regarding tire pressure monitoring systems with auto industry representatives on October 26, 2001, just before the agency's pending rulemaking mandate would become past due.<sup>19</sup> Attending that meeting were three representatives of the Alliance of Auto Manufacturers (Alliance), as well as lobbyists for Toyota, Ford, DaimlerChrysler and Volkswagen of America.<sup>20</sup> Under your tenureship as Director of the Harvard Center for Risk Analysis (HCRA), a post which you left only months before this meeting, the center received unrestricted funding, in undisclosed amounts, from Ford, Volvo and General Motors, as well as the American Automobile Manufacturers Association, the predecessor organization of the Alliance.<sup>21</sup>

Unsurprisingly, OIRA's return letter mirrors the reasoning of the Alliance,<sup>22</sup> which appears to be disappointed by NHTSA's decision, as manufacturers would not have the option of charging consumers a premium for the luxury of an accurate tire monitoring system. The Alliance has loudly clamored for its right to get by with a shoddy, indirect system, despite all the evidence of the potential harm that would result and the unfairness of this option for lower-income consumers.<sup>23</sup> Fearing they might not prevail in the public comment process, the industry came to you.

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<sup>19</sup> See Meeting Record Regarding: Tire Pressure Monitoring Systems, Oct. 26, 2001, <http://www.whitehouse.gov/omb/oira/2127/meetings/78.html>; Meeting Record Regarding: Tire Pressure Monitoring Systems, Feb. 21, 2002, <http://www.whitehouse.gov/omb/oira/2127/meetings/94.html>.

<sup>20</sup> According to letterhead submitted in comments to the docket, the present membership of the Alliance includes DaimlerChrysler, Ford, Volvo, the BMW Group, Fiat, Ford, General Motors, Isuzu, Mazda, Mitsubishi Motors, Nissan, Porsche, Toyota, Volkswagen and Volvo

<sup>21</sup> As was made clear in two letters sent by prominent academic scholars in opposition to your nomination to OIRA, many, if not most, academic researchers shy away from accepting unrestricted funding due to the multiple and serious problems it poses for conflicts of interest, both apparent and actual. Instead, researchers typically seek funding under the rubric of restricted funding research contracts, which explicitly spell out the terms of the grant and conditions for review of result by funders. See Letter from 32 Scholars Opposing Graham and Raising Conflicts of Interest Concerns, May 17, 2001, <http://www.citizen.org/congress/regulations/graham/chivian.html>; 53 Scholars and Academics Write the Senate Governmental Affairs Committee Opposing the Graham Nomination, May 9, 2001, <http://www.citizen.org/congress/regulations/graham/academics.html>.

<sup>22</sup> See Letter from Vann H. Wilbur, Alliance of Automobile Manufacturers Director for Vehicle Safety And Harmonization, Mar. 23, 2001 to NHTSA ("The Alliance believes that both wheel-speed [indirect] based and pressure-sensor [direct] based TPMS [tire pressure monitoring systems] have merit and should be permitted under pending requirements. Our proposal will allow the further development of both types of systems."), Docket no. NHTSA-2000-8572-16.

<sup>23</sup> Other than the typical resistance offered by industry on cost grounds, we presume that the industry is unwilling to offer the more preferable system for tire monitoring on cars which lack ABS, which are the less expensive cars across one-third of the vehicle fleet.

You conducted an additional meeting with industry after the return letter was issued, and according to your statements at the House hearing, while "negotiations" with NHTSA were ongoing. The OMB docket reflects a meeting on February 21, 2002, between yourself, a few officials from OIRA and three representatives of the Rubber Manufacturers Association (RMA). According to letterhead submitted to the NHTSA docket, the RMA includes Goodyear Tire and Rubber Company, which was a former source of unrestricted funding in undisclosed amounts under your direction of HCRA.<sup>24</sup>

Unlike the former meeting, NHTSA officials were apparently not invited or chose not to attend your meeting with RMA. While NHTSA provides substantive notes of *ex parte* meetings with industry and others as a part of the rulemaking docket, your meeting docket simply notes the date and subject of the meeting and its attendees. We do know that, in its official comments to the docket and meetings with NHTSA officials, the RMA consistently supported a strong rulemaking, arguing that NHTSA should use a stringent definition for the amount of underinflation that would produce a warning, and that an adequate warning system was necessary because consumers would "rely heavily on the [Tire Pressure Monitoring Systems] and ignore routine tire maintenance."

#### *A Meaningful Tire Safety Rule Is Necessary for Public Health*

In testimony before the House Subcommittee on Commerce, Trade, and Consumer Protection, NHTSA's Administrator Dr. Jeffrey Runge, made it clear that OMB is squashing the agency's judgment on this issue:

The NPRM to require a warning system to indicate to vehicle operators when a tire is significantly under inflated was published on July 26, 2001. The NPRM drew extensive comments. We have sought to resolve the issues raised by the comments and devise a system that will meet the intent of the TREAD Act in a manner that best serves safety. In the belief that we had devised such a system, we sent a final rule to OMB on December 18, 2001. On February 12, 2002, OMB returned the rule to us for reconsideration based on concerns it had identified.<sup>25</sup>

In overriding the outcome of the public process in this rulemaking, you are also infringing upon the expressed will of Congress. In addition to the mandate for this rulemaking, in the Transportation, Recall Enhancement, Documentation and Accountability (TREAD) Act, Congress went out of its way to signal the importance of tire safety and to grant NHTSA wide-ranging authority to enact measures that will result in enhanced public awareness of tire-related problems.<sup>26</sup>

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<sup>24</sup> See Comments of the Rubber Manufacturers Association on NPRM Federal Motor Vehicle Safety Standards; Tire Pressure Monitoring Systems; Controls and Displays, Sept. 6, 2001, at 1.

<sup>25</sup> Testimony of Jeffrey W. Runge, M.D., Administrator, National Highway Traffic Safety Administration, Before the Subcommittee on Commerce, Trade, and Consumer Protection, Committee on Energy and Commerce, U.S. House of Representatives, February 28, 2002, at 6-7.

<sup>26</sup> See Transportation, Recall Enhancement, Accountability and Documentation Act, P.L. 106-414, Sec. 11. Improved tire information. "(b) Inflation levels and load limits. In the rulemaking conducted under subsection (a), the Secretary may take *whatever additional action* is appropriate to ensure that the public is

And the facts bear out their concern. Unlike the spare analysis in your return letter and accompanying evaluation, NHTSA supported its regulatory decision with meticulous research into existing systems, consumer habits, and tire conditions. Using the National Automotive Sampling System (NASS), extensive driver attitude and vehicle tread and tire pressure surveys were conducted at 336 gasoline stations throughout the U.S., including some 11,530 vehicles.<sup>27</sup>

When a tire is under inflated, its sidewalls flex more than they should and the air temperature inside the tire increases, making it more prone to failure. In addition, under inflation reduces the tread life of tires and the fuel economy of vehicles, both of which are costly for consumers. The facts unearthed by the agency in preparing for the rulemaking are alarming and suggest there is a dire need for a rule that will heighten consumer awareness of tire hazards as Congress intended:

- Seventy-four percent of the on-road fleet has at least one tire that is under inflated.<sup>28</sup>
- Thirty-six percent of passenger cars and 40 percent of light truck vehicles (minivans, pick-up trucks and sport utility vehicles) have at least one tire that is 20 percent or more below the recommended tire pressure.<sup>29</sup>
- While 85 percent of the population of drivers are concerned about maintaining proper tire inflation in their vehicles, only 25 percent use the correct method to determine the manufacturer's recommended tire pressure, and 43 percent fail to actively maintain their tire pressure.<sup>30</sup>
- Worn tire tread may reflect continuous driving on under inflated tires; nine percent of vehicles sampled had at least one tire that was bald, that is, with tread wear at or below two 32<sup>nds</sup> of an inch.<sup>31</sup>
- Radial tires, which are standard equipment on most new cars, can lose much of their air pressure and still appear to be fully inflated,<sup>32</sup> yet

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aware of the importance of observing motor vehicle tire load limits and maintaining proper tire inflation levels for the safe operation of a motor vehicle..." [emphasis added].

<sup>27</sup> See Preliminary Analysis of Findings, 2001 NASS Tire Pressure Special Study, Aug. 3, 2001, Docket No. NHTSA-2000-8572-74.

<sup>28</sup> See National Center for Statistics and Analysis, Tire Pressure Special Study, August 2001, DOT HS 809 315 (Methodology); DOT HS 316 (Interview Data); DOT HS 317 (Vehicle Observation Data). As part of this four-part study, NHTSA also conducted extensive surveys at 336 gasoline stations throughout the U.S., see Kristin Thiriez (NHTSA Engineer) and Rakesh Subramanian (NHTSA Mathematical Analyst), Tire Pressure Special Study, October 2001, DOT HS 809 359 (Using sample of 10,900 observations of tire pressure of all four tires on vehicle); see also Frank Swoboda, "Inaccurate Tire Gauges Can Be a Matter of Safety," *The Washington Post*, Dec. 4, 2001.

<sup>29</sup> See Tire Pressure Monitoring Systems: Controls and Displays, Notice of Proposed Rulemaking, 66 FR 38982, July 26, 2001.

<sup>30</sup> See Kristin Thiriez (NHTSA Engineer) and Rakesh Subramanian (NHTSA Mathematical Analyst), Tire Pressure Special Study, October 2001, DOT HS 809 359.

<sup>31</sup> See National Center for Statistics and Analysis, Tire Pressure Special Study, August 2001, DOT HS 317 (Vehicle Observation Data).

<sup>32</sup> See Frank Swoboda, "Inaccurate Tire Gauges can Be a Matter of Safety," *The Washington Post*, Dec. 4, 2001.

between 6 and 16 of drivers admitted to checking their tire inflation levels visually.<sup>33</sup>

- While more than 90 percent of gas stations have air pumps, nearly 10 percent are out of order; 50 percent lack gauges to measure air pumped into the tire; and 20 percent of those that do have pumps give inaccurate readings, reflecting an inflation level that is as much as 4 psi more than the air pressure actually in the tire.<sup>34</sup>
- Eighty-five percent of all tire air pressure losses are the result of slow leaks that occur over a period of hours, days, or months.<sup>35</sup>

How much more research money and expert time will taxpayers have to spend to overcome your paralysis by analysis and to get this relatively simple, lifesaving measure implemented?

### *NHTSA Was Right On the Money*

Although the cost difference, once benefits are factored in, amounts to a mere \$15 per vehicle, the difference in the number of injuries and deaths prevented by the two systems is considerable.<sup>36</sup> While direct tire pressure monitoring systems would prevent an estimated 10,635 injuries and 79 deaths, the indirect system would, in the agency's best estimates, fail to prevent 4,050 of those injuries and 30 of those deaths.<sup>37</sup> The real numbers are likely to be even worse, given that consumers using the shoddy, indirect system, which fails to show drivers which tire is under inflated, or if more than one is under inflated (as well as failing in other confusing permutations), and is more frequently in error, would quickly learn to disregard the warnings.

Put another way, the agency estimated that direct systems would result in 38 percent of light vehicle operators being warned of low tire pressure, while indirect systems would result in only 24 percent of operators currently on the highway being warned, due to the imprecision of that system.<sup>38</sup>

Even with the agency's badly inflated cost numbers,<sup>39</sup> the net cost per life saved is \$1.9 million for the direct system and \$1.1 million for the indirect system, well below the

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<sup>33</sup> See Preliminary Analysis of Findings, 2001 NASS Tire Pressure Special Study, Aug. 3, 2001, Docket No. NHTSA-2000-8572-74.

<sup>34</sup> *Id.*

<sup>35</sup> See Tire Pressure Monitoring Systems: Controls and Displays, Notice of Proposed Rulemaking, 66 FR 38982, July 26, 2001.

<sup>36</sup> *Id.*

<sup>37</sup> That is, it would prevent only 6,585 injuries and 49 deaths. *Id.*

<sup>38</sup> See Tire Pressure Monitoring System, Preliminary Economic Assessment, July 2001, Docket No. NHTSA-2000-8572-57.

<sup>39</sup> Public Citizen's individual comments to the docket pointed out that the agency overweights its cost estimate by a factor of 1.5, as it inflated the costs to reflect a retail markup rather than using a societal cost figure. See Tire Pressure Monitoring System FMVSS No. 138, Preliminary Economic Assessment, Docket No. NHTSA-00-8572-57, p.VI-1. Because the retail markup is a transfer payment from consumers to industry rather than a net social cost, and because some part of the cost to industry is likewise a transfer payment among industries, the real cost figures are actually lower than the agency's estimates. See Office of Management and Budget, "Economic Analysis of Federal Regulations Under Executive Order 12866,"

\$6.3 million value assigned to human life in the type of ghastly arithmetic practiced by regulatory actuaries such as those in your office.<sup>40</sup>

*OIRA's Over-Reaching Must Stop*

OIRA had one bite at the agency's NPRM, and the agency kindly obliged you. Nowhere in statute does your office retain the authority to delay an overdue rule mandated by Congress and subject to the Administrative Procedures Act notice-and-comment rulemaking process, much less to force OIRA's will upon the agency, in violation of an express delegation of decision-making power to the Secretary of Transportation.

It is far past time, as you promised at your nomination hearing, to leave behind your role as industry advocate and try on your civil servant hat. These problems with OIRA's peremptory refusal to let this rule become final are serious and should be addressed. My hope is that you will review our objections with more care than it appears you have allocated to NHTSA's well-developed position requiring direct monitoring systems, and that sound science exercised in its true form – with humility – as well as the interests of public health and democracy, will ultimately prevail.

Sincerely,

Joan Claybrook  
President  
Public Citizen

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(January 11, 1996), which reads in part “[a]n important, but sometimes difficult, problem in cost estimation is to distinguish between real costs and transfer payments. Transfer payments are not social costs but rather are payments that reflect a redistribution of wealth;” See Public Citizen, Re: Tire Pressure Monitoring Systems: Notice of Proposed Rulemaking 66 FR 38982 *et seq.*, July 26, 2001, Docket No. NHTSA 2000-8572-148.

<sup>40</sup> These figures rendering the value of human life in monetary terms remain highly controversial, *see, e.g.*, Frank Ackerman and Lisa Heinzerling, “If It Exists, It’s Getting Bigger: Revising the Value of a Statistical Life,” *Global Development and Environment Institute Working Paper No. 01-06*, Oct. 2001; Lisa Heinzerling, “The Rights of Statistical People,” 28 *Harv. Envtl. L. Rev.* 189 (2000); Richard L. Revesz, “Environmental Regulation, Cost-Benefit Analysis, And the Discounting of Human Lives,” 99 *Colum. L. Rev.* 941 (May 1999); Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 *Yale L.J.* 1981 (1998); Lisa Heinzerling, “Reductionist Regulatory Reform,” 8 *Fordham Envtl. Law J.* 459 (1997); David A. Wirth & Ellen K. Silbergeld, “Book Review: Risky Reform,” 95 *Colum. L. Rev.* 1857 (Nov. 1995); Douglas E. MacLean, “Comparing Values in Environmental Policies: Moral Issues and Moral Arguments,” in *Valuing Health Risks, Valuing Health Risks, Costs, and Benefits for Environmental Decision Making* (1990); Mark Sagoff, *The Economy of the Earth* 46 (1988).