

**Answers to Questions Posed After the Subcommittee on Commerce,
Trade, and Consumer Protection's May 6, 2010 Hearing Entitled
"H.R. _____, the Motor Vehicle Safety Act of 2010."**

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The Honorable Joe Barton

- 1. You have stated that lower car sales have a negative effect on safety of drivers, and this is likely to be the case of economics as the cost of cars increases. If EDRs increase the cost of cars, will that have a negative effect on the safety of drivers?**

The EDR mandate for all new cars is aimed at gathering data to improve driver safety. One must consider the costs of collecting data and the effects of those costs on that goal.

In my testimony, I made the straightforward argument that EDRs and mandated EDRs raise the cost of new cars by some margin, which reduces sales. This in turn reduces the pool of used cars and raises their prices. This causes people to remain in older used cars rather than buying newer used cars. Because of past safety improvements, newer used cars are safer than older used cars. Therefore, the bill will prevent some drivers from buying safer used cars.

I do not have the data to show how pronounced this effect will be, but the goal of protecting drivers is important enough that study of this problem should take place before a mandate goes into place, and any mandate should be limited to minimize the health and safety impacts of increasing the costs of cars.

- a. How does this cost affect the safety of lower income drivers?**

I believe it is safe to assume that lower income drivers are the most affected by the dynamic I described above. They will tend to be in the oldest cars—70s and 80s models that may not even have airbags, or that have aging and less well-designed steering and braking systems. Lower income drivers include younger people who have less experience with driving and poor driving judgment. This group is probably more often involved in accidents and likely to suffer most if auto prices keep them in older vehicles lacking the safety features of newer vehicles.

- b. You have stated mandate EDRs in every car has costs and that the same data sampling could be achieved by requiring them on more expensive cars. Could you please explain how much data would be sufficient to achieve this goal?**

Not knowing exactly what information is being sought through research using EDR data, I am not in a position to calculate the sample size that would be needed to gather statistically relevant data. Given the costs of EDRs and the effect of those costs on safety, the better policy is to gather only the amount of data needed, not to collect data on every car crash. Any EDR mandate should be aimed at gathering only the amount of data needed, or else the goal of driver safety will be undermined.

2. You have stated that privacy will be eroded by this legislation, the privacy limitations notwithstanding. Are there additional limitations you recommend or is it an impossible exercise?

Imagine if a federal law required American homes to have CCTV cameras installed in them, set to record, but only storing the information on a local server for possible later use. Anticipating uses of information that they couldn't be sure of predicting or controlling, people would rightly object to the presence of cameras they don't want in their homes.

Sometimes it is a good idea to have CCTV cameras in homes, and some people do install them because they perceive benefits from being able to monitor babysitters, record images of intruders, and so on. Having cameras in homes is consistent with privacy in these cases because it is a matter of choice. There is a fundamental loss of privacy when a person is required to maintain technology that makes a record of his or her actions.

The cure here is to give consumers choice about the presence of EDRs in their cars and the functioning of them. If there is a value to having EDRs in cars, consumers should be made aware of it and given a chance to adopt them voluntarily.

There are many ways this could happen: They could get a discount on a new car purchase if they choose an EDR (ideally paid for by automakers or insurers, not the government). Insurers could provide discounts or automakers could offer drivers a yearly stipend for providing data about their driving (perhaps going far beyond the limited information collected by EDRs today). I cannot predict all the ways institutions that want data about auto use might get it voluntarily, but getting that data through volunteer means rather than coercion would improve privacy by improving consumers' control.

3. Can there be any individual choice about privacy regarding EDRs if there is a mandate for their inclusion in some percentage of all cars?

It is possible to maintain choice around EDRs even while meeting a goal of having EDRs in the number of cars needed to capture statistically relevant data. As mentioned above, rewards to consumers for participating in valuable research could persuade them to allow collection of data about their driving.

- 4. A number of States have enacted laws addressing the use of EDRs in cars. What have been the results from California’s privacy law on EDRs? How has the information been used in that State?**

In advance of the hearing, I consulted with the Chief of the California Office of Privacy Protection to learn if there had been any notable developments as a result of the law governing EDRs and EDR data there. She reported that nothing significant had come to her attention.

I do not have information about how commonly California EDR data is used in litigation about auto crashes or other matters, in criminal investigations, or in auto safety research.

- 5. You have stated that a fundamental premise of effective privacy is control. Would safety be diminished if EDRs were mandated to be a safety option, rather than a mandatory requirement?**

If EDRs were a mandatory option, safety may or may not be affected. In the extreme case that zero car buyers wanted EDRs, for example, safety research would be hampered and safety would ultimately suffer. This can be remedied with various enticements rather than mandating EDRs in all cars. If the number of car owners needed to produce statistically relevant data can be enticed to use EDRs and share data from them voluntarily, safety would be undiminished.

- 6. Does the mandate in the legislation for EDRs deprive consumers of the right to control data collection about them? Is it at odds with other government policies that seek to protect privacy and give consumers greater control over their information, such as a way to “opt-out”?**

The EDR mandate and information rules called for in the legislation do undermine consumers’ power to control information about themselves. Though EDRs are already standard in many cars, the legal mandate would further deprive consumers of any hope that they may control the information infrastructure of their cars.

The debate about opt-in or opt-out is a quaint luxury compared to the rule proposed here. Consumers would have *no choice whatsoever*. Driving a car sold in the United States would be conditioned on data collection about the driver—no exceptions.

- 7. You have stated that the legislative draft reduces people’s property rights in EDR data by a small margin. Could you please explain?**

Though the legal status of information is unclear, it is probably the case that information produced and recorded by one’s automobile is the property of the owner or lessee, just like the auto itself. The draft calls for regulation that generally tracks this, but then takes away the property right if “the information is retrieved by a government motor vehicle

safety agency for the purpose of improving motor vehicle safety” This is a recipe for an unreliable property right: one that is created by federal regulation with a carve-out in that very regulation. Expect the “property right” to shrink and government access to grow as future policies discover new uses for EDR data.

8. You have expressed greater concerns that the future could further erode privacy protections. Is it possible to - or even wise – to permanently restrict the types of data that can be collected to avoid the eventual creep of more data collection? Can better information coupled with real consumer choice mitigate these concerns?

Congress can’t pass a federal statute that can’t be amended. Regulators can’t write a regulation that can’t be superseded. So there is no such thing as a “permanent” legislative or regulatory restriction on EDR data collection or use.

The better approach to privacy protection is structural. Giving consumers control of whether EDRs are in their cars and what EDRs do will protect privacy consistent with consumers’ interests. The rules called for in this regulation may protect consumers’ privacy for a time, but it sets the stage for migration away from consumer privacy toward serving the goals of government and industry related not only to safety but also to general law enforcement, taxation, and surveillance.