

DEPARTMENT OF TRANSPORTATION**National Highway Traffic Safety Administration****49 CFR Part 512**

[Docket No. NHTSA-02-12150]

RIN 2127-AI20

Confidential Business Information**AGENCY:** National Highway Traffic Safety Administration (NHTSA), DOT.**ACTION:** Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the regulation on Confidential Business Information. This proposal is designed primarily to simplify and improve the clarity of the regulation and to update specific sections to reflect current case law and legislative action. The proposal is intended to ensure the efficient processing of requests for confidential treatment and the proper protection for sensitive business information received by NHTSA.

DATES: Comments must be received on or before July 1, 2002.

ADDRESSES: Comments should refer to the docket number above and be submitted to: Docket Management Facility, 400 Seventh Street, SW., Nassif Building, Room PL-401, Washington, DC 20590. Alternatively, you may submit your comments electronically by logging onto the Docket Management System (DMS) Web site at <http://dms.dot.gov>. Click on "Help & Information" or "Help/Info" to view instructions for filing your comments electronically. Regardless of how you submit your comments, you should mention the docket number of this document.

You may call the Docket at 202-366-9324. Docket hours are 9:30 a.m. to 4 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Heidi L. Coleman, Assistant Chief Counsel for General Law, Office of the Chief Counsel, NCC-30, National Highway Traffic Safety Administration, 400 7th Street SW., Room 5219, Washington, DC 20590, phone: (202) 366-1834.

SUPPLEMENTARY INFORMATION: NHTSA first published 49 CFR part 512, Confidential Business Information (Part 512), as a final rule on January 8, 1981 (46 FR 2049). In response to a petition for reconsideration, the agency made a minor change to the published rule, and republished it on June 7, 1982 (47 FR 24587). On November 28, 1989, NHTSA revised Part 512 (54 FR 48892) to incorporate statutory and case law

changes, to provide procedural clarifications and to amend Appendix B—Class Determinations. The regulation has not been amended since that time.

NHTSA believes that the procedures for submitting confidential business information generally have worked well since the 1989 revision. However, new developments in the law as well as practical experience have made certain modifications necessary. These proposed modifications are described below.

Other changes are being proposed to make the regulation clearer and easier to follow, particularly for organizations or individuals who do not submit materials to the agency on a regular or frequent basis. In particular, we are proposing to reorganize the provisions of Part 512 and to use a question and answer format, designed to guide the reader through the procedural steps of Part 512. Under the proposal, Part 512 would be reorganized into five (5) general subparts, entitled: General Provisions; Submission Requirements; Additional Requirements; Agency Determination; and Agency Treatment of Information Claimed to be Confidential. Each subpart then would contain separate subheadings, most of which are presented in a question and answer format that is designed to guide the reader through all applicable requirements in that subpart.

While the proposal constitutes a significant change in the presentation and style of Part 512, it will not alter most of the substantive requirements contained in the regulation. The substantive changes that are being proposed are noted and explained below.

Subpart A—General Provisions

Subpart A would contain the general provisions that define the purpose, scope, and applicability of the regulation, which we use to consider claims that information is entitled to confidential treatment. This subpart also would include the definitions of terms used in the regulation. We propose to revise the definition for confidential business information to reflect the changes made in the case law. There are no substantive changes proposed in this portion of Part 512.

Subpart B—Submission Requirements

Subpart B would delineate the specific requirements that submitters must follow when they request confidential treatment for materials submitted to NHTSA. The requirements would specify the manner in which materials must be prepared, identified and submitted, and provide that

information claimed to be confidential must be submitted with supporting information and a signed certificate.

Consistent with the agency's current regulation, the proposal would continue to provide that any information submitted to NHTSA, for which confidential treatment is claimed, must be marked as "confidential." Each page that contains confidential information must be marked; if an entire page is claimed to be confidential, the markings must indicate this clearly; and, if portions of a page are claimed to be confidential, such portions must be marked by enclosing them within brackets "[]." We are proposing to emphasize these requirements for the benefit of submitters of information. If materials are not marked properly, there is a risk that information could be disclosed inadvertently to the public or to a competitor. We believe these requirements help ensure protection for information claimed to be confidential.

The proposal would also continue to require that any request for confidential treatment must be accompanied by supporting information and a signed certificate. However, the proposal further clarifies the elements that must be included in a request, and it specifies that certain additional items of information or statements must be included in the supporting documentation and the certificate. For example, the supporting documentation must include a general description of the information for which confidentiality is claimed and an indication of the confidentiality standard under which the claim is being made. The certificate must include a statement asserting the length of time for which confidential treatment is being claimed.

Through these proposed changes, we seek to ensure that submitters are fully informed about the items of information the agency needs to make a decision regarding the request, and provide submitters with an adequate opportunity to submit all of this information. If the agency does not receive sufficient information upon which to base its decision, there is a risk that a request might be denied improvidently. The burden remains on submitters to provide information that adequately supports requests for confidential treatment.

We are proposing to add a requirement that each page claimed to contain confidential information be numbered. This proposed change would allow these pages to be easily identified and distinguished. Such markings should help to ensure that there is no question about which pages are claimed

to be confidential and which pages are determined to be entitled to confidential treatment.

The agency's current regulation requires submitters to send to the Office of Chief Counsel two complete copies of documents that contain information claimed to be confidential and one copy of a public version of the document, from which portions claimed to be confidential have been redacted. In addition, the regulation requires submitters to send a public version of the document to "the appropriate NHTSA official" if the document claimed to be confidential relates to "an investigation or proceeding, a rulemaking action, or pursuant to a reporting requirement for which there is a public file or docket."

These requirements have proved to be cumbersome and difficult for submitters to follow. In addition, these requirements may sometimes prevent offices with an immediate need for the submitted information from receiving it quickly, which can delay the work of the agency.

Accordingly, we are proposing to change these requirements to minimize the burden to submitters and provide other agency offices immediately with the information they need to perform their assigned tasks, while still providing the Office of Chief Counsel with the information it needs to consider submitters' requests for confidential treatment. Specifically, the proposal would require submitters to submit a single copy of the information claimed to be confidential (with the certificate and supporting information mentioned above) to the Office of Chief Counsel and a complete version of the materials, as well as a redacted version, to the responsible office within the agency. Note that any non-confidential information that may be needed for the agency to make its determination regarding the submitter's request for confidential treatment should also be submitted to the Office of Chief Counsel along with the claimed confidential materials to ensure that an accurate assessment can be made. A second redacted copy would need to be submitted only in cases when the information is being provided in connection with a proceeding for which there is an established public docket. Consistent with the agency's current regulation, if blueprints or engineering drawings are being submitted, only one original copy must be provided. If claimed to be confidential, this copy would be submitted to the Office of Chief Counsel.

Finally, the agency proposes to request that any personal information

contained in submissions, such as names, addresses and telephone numbers of consumers, be removed by the submitter from the redacted version of the submitted materials. This provision would help NHTSA protect the personal privacy of individuals, since the disclosure of this type of information could constitute a clearly unwarranted invasion of personal privacy.

Subpart C—Additional Requirements

Subpart C would contain additional requirements that submitters must follow when certain circumstances apply. All of these requirements are contained in the agency's current regulation, and NHTSA is not proposing to make any substantive changes to these requirements. The agency is proposing simply to assemble these requirements in a single subpart and to clarify these requirements.

Specifically, the requirements contained in this subpart would specify that submitters have a continuing obligation to amend any information they submit in support of a claim for confidential treatment whenever they become aware that the information submitted was inaccurate when it was originally submitted, or is no longer accurate. The requirements would also cover such procedural matters as the manner in which confidential treatment is to be claimed when the information is being submitted by a third party or when confidential treatment is being claimed for multiple items of information, and the steps submitters are to take if they need an extension of time to submit information in support of a claim for confidential treatment.

These requirements also would specify the consequences for noncompliance with part 512. For example, if submitters fail to amend incorrect information in support of a claim for confidential treatment, they may be subject to civil penalties; if submitters fail to properly mark materials for which they are claiming confidential treatment, their claim may be waived; and if submitters do not provide a certificate or adequate supporting information in support of their claim for confidential treatment, their claim may be denied.

Subpart D—Agency Determination

Subpart D would contain provisions that relate to decisions rendered by the agency regarding claims for confidential treatment. These provisions delineate the confidentiality standards and procedures used by the agency to render a confidentiality determination. These provisions also include determinations

involving classes of information and the right of submitters to request reconsideration if they disagree with an agency decision. We are proposing substantive changes to these provisions. We are also proposing to clarify these requirements and assemble them in a single subpart.

The agency's current regulation provides that information may be afforded confidential treatment if it is "a trade secret, or commercial or financial information that is privileged or confidential," and further that information is considered to be "confidential" when "disclosure of the information would be likely to result in substantial competitive harm to the submitter of the information; . . . (when) failure to afford the information confidential treatment would impair the ability of NHTSA to obtain similar information in the future; or (when) disclosure of the information would be likely to impair other protectable government interests." 49 CFR 512.5 (2001).

When part 512 was last published, these confidentiality standards reflected then-current case law. Since that time, however, court decisions have been rendered regarding the protection of information under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4). In particular, in 1992, the D.C. Circuit Court rendered a decision in *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992), which established a new standard of review for confidential business information that was submitted to an agency voluntarily. Under this decision, voluntarily submitted information need not meet the tests established in *National Parks & Conservation Ass'n v. Morton*, 351 F. Supp. 404 (D.D.C. 1972), rev'd & remanded, 498 F.2d 765 (D.C. Cir. 1974) (most notably the "competitive harm" test). Rather, voluntarily submitted information will be protected if it is the kind of information that is customarily not released to the public by the submitter. We are proposing to modify Part 512 to incorporate this new confidentiality standard. The proposal would also include a provision to cover any new confidentiality standards that are established in future court decisions.

Consistent with the agency's current regulation, the proposal would continue to provide that the agency may issue class determinations, under which NHTSA decides that a class of information is presumed to cause competitive harm if released. Appendix B to the agency's current regulation already lists three such classes of information. These classes include blueprints and engineering drawings

(under certain circumstances), future specific model plans, and future vehicle or equipment production or sales figures (in some cases, for limited periods of time). The proposal would retain these three classes of information presumed to cause competitive harm if released and would not add any others.

In addition, the proposal would provide that the agency may determine that a class of information is presumed not to cause competitive harm if released. Pursuant to this proposed change to the regulation, the agency proposes to create a number of classes of information presumed not to cause competitive harm if disclosed. These classes would be added, as a separate category, to Appendix B. To determine which classes of information might be included in this portion of the appendix, the agency considered the types of information typically submitted to the agency, particularly in connection with rulemaking actions, defect or compliance investigations, and regulatory reporting requirements. The agency also considered the types of information it is likely to receive in the future, such as pursuant to the new "early warning" requirements, about which an NPRM was published on December 21, 2001 (66 FR 66190). In addition, the agency considered relevant case law and the body of confidentiality requests it has received and decisions it has issued in recent years, regarding these types of information.

Based on this review, the agency proposes to determine that certain classes of information are presumed not to cause competitive harm if released. These classes would include consumer complaints and related documents required to be submitted to the agency, and reports and data required to be submitted to the agency relating to property damage and warranty claims. Although the agency routinely protects the name and other identifying information about individuals who may be identified in these documents, the agency has consistently not granted confidential treatment for this type of information.

The agency frequently receives requests for confidential treatment for these types of materials, and consistently denies such requests. The agency is proposing to establish these class determinations to document its current practice, which is based on applicable case law. It is the agency's hope that these class determinations would serve to inform submitters of information about the types of materials likely to be granted or not granted confidential treatment, and that this might expedite the processing of

requests for confidential treatment that are submitted to the agency. The agency is interested in receiving public comment on these proposed class determinations. In particular, we are interested in comments regarding whether any of the class determinations proposed should be removed or modified.

The agency also proposes to establish a class determination applicable to test procedures used to certify compliance with applicable federal motor vehicle safety standards (FMVSS) and the results of such testing. Although it is customary for the agency to protect developmental or experimental testing data, the agency has had a long-standing practice of denying confidential treatment for information relating to tests based on the FMVSS or other standards that are known to the public, such as SAE standards, when used to certify compliance with FMVSS.

Release of compliance test data typically does not reveal testing procedures developed by manufacturers, but rather reveals only the results of testing based on procedures that are publicly known and contained in the FMVSS. In reviewing requests for confidential treatment of this type of information, the agency has often pointed out that while compliance test data may reveal specific test results for individual vehicles or motor vehicle equipment, such data do not typically reveal information that would cause competitive harm. For example, release of test results does not allow another manufacturer to anticipate competitive moves in the marketplace, plan investments to meet the competition or plan responses to anticipated actions of its competitors. The release of test results may reveal that a certain margin of compliance may be achieved, but it does not provide another manufacturer with information about how to obtain such a result.

The agency is proposing to establish a presumption that generally the release of these types of tests do not cause competitive harm. However, the agency recognizes that a manufacturer may develop a unique and confidential test or analysis to certify compliance with FMVSS applicable to its products. A manufacturer that in good faith believes that its testing or analysis does not mirror publicly known or available test procedures, and that disclosure of its unique processes may result in competitive harm, may seek to rebut the presumption and claim confidential treatment based on competitive harm. Any such claim must be accompanied by a thorough explanation of the basis for the submitter's assertions that the

test procedure is not publicly known or available and that disclosure of the procedure and results would be competitively harmful.

Similarly, a submitter whose information falls within the categories of information for which a presumption of confidentiality attaches under our existing class determinations may not seek confidential treatment for that information unless the submitter also certifies that appropriate measures have been taken to maintain its confidentiality and that it has not been released to the public.

The agency requests public comment regarding this proposed class determination. We are also interested in receiving comments regarding whether any of the proposed class determinations should be applicable to the material to be submitted under the agency's "early warning" regulations and whether any additional class determinations should be established. For example, the agency's "early warning" NPRM proposes that manufacturers submit to the agency reports on incidents involving deaths or injuries and copies of field reports. The agency seeks comments regarding whether the agency should presumptively determine that these (or a subset of these) types of documents would or would not cause competitive harm to the submitter if released. Any suggested changes or additions to the proposed list of class determinations should be justified. We recognize that a final rule has not yet been issued regarding the "early warning" requirements, but we ask commenters to provide as much information as possible within this comment period. If necessary, we will allow for additional comments prior to finalizing any class determinations covering the "early warning" submissions.

This subpart of the proposed regulation would also cover such procedural matters as who makes confidentiality decisions within the agency, how long it should take the agency to make decisions on confidentiality requests, and how submitters who request confidential treatment for their information are notified of the agency's decision.

Finally, this subpart would contain provisions that continue to afford submitters the right to petition for reconsideration if the submitter does not agree with the agency's decision. These provisions would also describe the steps to take if submitters wish to exercise this right.

Subpart E—Agency Treatment of Information Claimed to be Confidential

Subpart E would describe the manner in which information claimed to be confidential is treated by the agency. Consistent with the agency's current regulation, the proposal would provide that any information identified and claimed to be confidential will be protected by the agency pending an agency decision, and it will continue to be treated confidentially if the submitter's request for confidential treatment is granted, except under certain limited circumstances.

Also consistent with the current regulation, the proposal would provide that a grant of confidentiality may be modified under certain circumstances, including newly discovered or changed facts, a change in applicable law, a change in a class determination or a finding that the prior determination was erroneous.

The proposal would also provide that information that has been claimed or determined to be entitled to confidential treatment may nonetheless be publicly released in some situations.

These situations include releases to Congress, releases pursuant to a court order, releases to the Secretary of Transportation or to other Executive agencies in accordance with applicable law, releases with the consent of the submitter, and releases to contractors (subject to certain conditions).

The agency's current regulation lists also three additional situations under which information claimed or determined to be entitled to confidential treatment may nonetheless be disclosed to the public. They include the disclosure under 49 U.S.C. 32505(c), 32708(a), 32910(c) or 33116(a) of information obtained pursuant to the Motor Vehicle Information and Cost Savings Act, when the information is relevant to a proceeding under the Act; the disclosure under 49 U.S.C. 30167(a) of information obtained pursuant to the National Traffic and Motor Vehicle Safety Act, relating to the establishment, amendment or modification of a Federal motor vehicle safety standard (FMVSS), when relevant to a proceeding under the Act; and the disclosure under 49 U.S.C. 30167(b) of information obtained pursuant to the National Traffic and Motor Vehicle Safety Act, relating to an alleged defect or noncompliance with applicable standards, if the Administrator determines that disclosure is necessary to carry out the purposes of the Act.

The Motor Vehicle Information and Cost Savings Act (Cost Savings Act) and the National Traffic and Motor Vehicle

Safety Act (Vehicle Safety Act) have been repealed and their pertinent provisions have been codified under title 49 of the United States Code. The proposal would modify Part 512, consistent with these statutory changes. In addition, the proposal would reference a new disclosure provision added by section 3(b) of the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act, Pub. L. 106-414, November 1, 2000. Under that provision (49 U.S.C. 30166(m)(4)(C)) early warning information collected pursuant to regulations issued under 49 U.S.C. 30166(m), if claimed or determined to be entitled to confidential treatment, shall not be disclosed under 49 U.S.C. 30167(b) unless the Administrator determines that the disclosure will assist in carrying out Sections 30117(b) and Sections 30118 " 30121.

Written Comments

Interested persons are invited to comment on this notice of proposed rulemaking. It is requested, but not required, that two copies be submitted. All comments must be limited to 15 pages in length. Necessary attachments may be appended to those submissions without regard to the 15-page limit. See 49 CFR 553.21. This limitation is intended to encourage commenters to detail their primary arguments in a concise fashion.

You may submit your comments by one of the following methods:

(1) By mail to Docket Management Facility, Docket No. [NHTSA-02-XXXX], DOT, 400 Seventh Street, SW, Nassif Building, Room PL-401, Washington, DC 20590;

(2) By hand delivery to Room PL-401 on the Plaza level of the Nassif Building, 400 Seventh Street, SW, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday;

(3) By fax to the Docket Management Facility at (202) 493-2251; or

(4) By electronic submission: log onto the DMS Web site at <http://dms.dot.gov> and click on "Help and Information" or "Help/Info" to obtain instructions.

All comments received before the close of business on the comment closing date will be considered and will be available for examination in the docket at the above address before and after that date. To the extent possible, comments filed after the closing date will also be considered. However, the rulemaking action may proceed at any time after that date. The agency will continue to file relevant material in the docket as it becomes available after the closing date, and it is recommended that

interested persons continue to examine the docket for new material.

You may review submitted comments in person at the Docket Management Facility located at Room PL-401 on the Plaza level of the Nassif Building, 400 Seventh Street, SW, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday.

You may also review submitted comments on the Internet by taking the following steps:

(1) Go to the DMS Web page at <http://dms.dot.gov/search/>.

(2) On that page, click on "search".

(3) On the next page (<http://dms.dot.gov/search/>) type in the four digit docket number shown at the beginning of this notice. Click on "search".

(4) On the next page, which contains docket summary information for the docket you selected, click on the desired comments. You may also download the comments. Although the comments are imaged documents, instead of word processing documents, the "pdf" versions of the documents are word searchable.

Those persons who wish to be notified upon receipt of their comments in the docket should enclose, in the envelope with their comments, a self-addressed stamped postcard. Upon receiving the comments, the docket supervisor will return the postcard by mail.

Regulatory Analyses and Notices

Executive Order 12988 (Civil Justice Reform)

This proposed rule would not have any preemptive or retroactive effect. This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The agency has determined that this proposed action is not a significant regulatory action within the meaning of Executive Order 12866 or significant within the meaning of Department of Transportation Regulatory Policies and Procedures. Consequently, this rulemaking document was not reviewed by the Office of Management and Budget under Executive Order 12866, "Regulatory Planning and Review." The rulemaking action also is not considered to be significant under the Department's Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). Because the economic impacts of this rule are so

minimal, no further regulatory evaluation is necessary.

Executive Order 13132 (Federalism)

Executive Order 13132 requires the agency to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications." "Policies that have Federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, the agency may not issue a regulation with Federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, the agency consults with State and local governments, or the agency consults with State and local officials early in the process of developing the proposed regulation. The agency also may not issue a regulation with Federalism implications that preempts State law unless the agency consults with State and local officials early in the process of developing the proposed regulation.

We have analyzed this proposed rule in accordance with the principles and criteria set forth in Executive Order 13132 and have determined that this proposal does not have sufficient Federal implications to warrant consultation with State and local officials or the preparation of a Federalism summary impact statement.

Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601-612), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities.

I have considered the effects of this rulemaking action under the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601-612), and certify that this proposed

action would not have a significant economic impact on a substantial number of small entities and find that the preparation of a Regulatory Flexibility Analysis is unnecessary.

National Environmental Policy Act

The agency has analyzed this proposed action for the purpose of the National Environmental Policy Act (NEPA) (42 U.S.C. 4321-4347) and has determined that it would not have any significant impact on the quality of the human environment.

Paperwork Reduction Act

The requirements of Part 512 are considered to be information collection requirements as that term is defined by the Office of Budget and Management (OMB) in 5 CFR part 1320. Accordingly, the existing regulation of Part 512 has been submitted to and approved by OMB pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). These requirements have been approved through December 31, 2001. Under this proposed revision these requirements remain collection requirements within the meaning published in 5 CFR Part 1320, and a request for continued approval has been submitted to OMB.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) requires agencies to prepare a written assessment of the costs, benefits and other effects of rules that include a Federal mandate likely to result in the expenditure by State, local or tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This proposed rule does not require an assessment under this law. This rule would not impose any unfunded mandates under the Unfunded Mandates Reform Act of 1995. Further, it would not result in costs of \$100 million or more to either State, local, or tribal governments, in the aggregate, or to the private section.

Regulation Identifier Number (RIN)

A regulation identification number (RIN) is assigned to each regulatory section listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross-reference this section with the Unified Agenda.

List of Subjects in 49 CFR Part 512

Administrative procedure and practice, Confidential business

information, Freedom of information, Motor vehicle safety, Reporting and record keeping requirements.

In consideration of the foregoing, the National Highway Traffic Safety Administration proposes to amend title 49, Code of Federal Regulations, by revising Part 512 as set forth below.

PART 512—CONFIDENTIAL BUSINESS INFORMATION

Subpart A—General Provisions

Sec.

- 512.1 Purpose and scope.
- 512.2 Applicability.
- 512.3 Definitions.

Subpart B—Submission Requirements

- 512.4 When requesting confidentiality, what should I submit?
- 512.5 How should I prepare documents when submitting a claim for confidentiality?
- 512.6 How many copies should I submit?
- 512.7 Where should I send the information for which I am requesting confidentiality?
- 512.8 What supporting information should I submit with my request?

Subpart C—Additional Requirements

- 512.9 What are the requirements if the information comes from a third party?
- 512.10 Duty to amend.
- 512.11 What if I need an extension of time?
- 512.12 What if I am submitting multiple items of information?
- 512.13 What are the consequences for noncompliance with this part?

Subpart D—Agency Determination

- 512.14 Who makes the confidentiality determination?
- 512.15 What confidentiality standards will the Office of Chief Counsel use to make confidentiality determinations?
- 512.16 Class determinations.
- 512.17 How long should it take to determine whether information is entitled to confidential treatment?
- 512.18 How will I be notified of the confidentiality determination?
- 512.19 If I disagree with a determination made by the Office of Chief Counsel under this part, what can I do?

Subpart E—Agency Treatment of Information Claimed To Be Confidential

- 512.20 How does the agency treat information submitted pursuant to this part claimed to be confidential before a confidentiality determination is made?
 - 512.21 How is information submitted pursuant to this part treated once a confidentiality determination is made?
 - 512.22 Under what circumstances may NHTSA modify a grant of confidentiality?
 - 512.23 Under what circumstances may NHTSA publicly release confidential information?
- Appendix A to part 512—Certificate in Support of Request for Confidentiality
Appendix B to part 512—Class Determinations

Appendix C to part 512—OMB Clearance

Authority: 49 U.S.C. 322; 5 U.S.C. 552; 49 U.S.C. 30166; 49 U.S.C. 30167; 49 U.S.C. 32307; 49 U.S.C. 32505; 49 U.S.C. 32708; 49 U.S.C. 32910; 49 U.S.C. 33116; delegation of authority at 49 CFR 1.50.

Subpart A—General Provisions

§ 512.1 Purpose and scope.

The purpose of this part is to establish the procedure by which NHTSA will consider claims that information submitted to the agency, or which the agency otherwise obtains, is confidential business information, as described in 5 U.S.C. 552(b)(4).

§ 512.2 Applicability.

(a) This part applies to all information which is submitted to NHTSA, or which NHTSA otherwise obtains, except as provided in paragraph (b) of this section.

(b) Information received as part of the procurement process is subject to the Federal Acquisition Regulation. 48 CFR, Chapter 1, as well as this part. In any case of conflict between the Federal Acquisition Regulation and this part, the provisions of the Federal Acquisition Regulation prevail.

§ 512.3 Definitions.

Whenever used in this part,

(a) *Administrator* means the Administrator of the National Highway Traffic Safety Administration.

(b) *Chief Counsel* means the Chief Counsel of the National Highway Traffic Safety Administration.

(c) *Confidential business information* means trade secrets or commercial or financial information that is privileged or confidential.

(1) A trade secret is a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.

(2) Commercial or financial information is considered confidential:

(i) If the information was required to be submitted and would likely impair the government's ability to obtain necessary information in the future or would likely cause substantial harm to the competitive position of the person from whom the information was obtained, or

(ii) If the information was voluntarily submitted and is the kind of information that would customarily not be released to the public by the person from whom it was obtained.

(d) *NHTSA* means the National Highway Traffic Safety Administration.

(e) "*Substantial competitive harm*" includes "significant competitive

damage" under Chapter 329 of Title 49 of the United States Code, Automobile Fuel Economy, 49 U.S.C. 32910(c).

Subpart B—Submission Requirements

§ 512.4 When requesting confidentiality, what should I submit?

Any person submitting information to NHTSA and requesting that the information be withheld from public disclosure as confidential business information shall submit the following:

- (a) The materials for which confidentiality is being requested, in conformance with §§ 512.5, 512.6, and 512.7 of this part;
- (b) The Certificate, in the form set out in Appendix A to this part;
- (c) Supporting information, in conformance with § 512.8; and
- (d) Any request for an extension of time, made in accordance with § 512.11.

§ 512.5 How should I prepare documents when submitting a claim for confidentiality?

(a) Any person submitting information to NHTSA and requesting that the information be withheld from public disclosure as confidential business information shall identify the information being claimed as confidential as follows:

(1) The submitter shall stamp or mark the word "confidential" (or use some other legend that clearly indicates the presence of information claimed to be confidential) on the top of each page containing information claimed to be confidential. In addition, the submitter shall mark the first page of the submitted materials to clearly indicate that the document contains confidential information.

(2) *Entire page.* If an entire page is claimed to be confidential, the submitter shall indicate clearly that the entire page is claimed to be confidential.

(3) *Specific information within a page.* If the information for which confidentiality is being requested is contained within a page, the submitter shall enclose each item of information that is claimed to be confidential within brackets "[]."

(b) Any person submitting information to NHTSA and requesting that the information be treated confidentially, shall number each page of the materials individually or use some other method that will clearly identify and distinguish each page of information (such as by using a stamp that provides a unique number for each page).

(c) It is requested that any information of a personal nature (names, addresses, phone numbers etc.) also be removed from the redacted version of the submitted materials.

§ 512.6 How many copies should I submit?

(a) Except as provided in paragraph (b) of this section, any person submitting information to NHTSA and requesting that the information be withheld from public disclosure as confidential business information shall submit to NHTSA copies as follows:

- (1) One complete copy;
- (2) One redacted copy from which information claimed to be confidential has been removed;
- (3) If the information is being sent in connection with a proceeding for which there is an established public docket, then a second redacted copy shall be sent directly to the docket; and
- (4) One copy containing only the information claimed to be confidential, and any non-confidential information necessary to enable the agency to assess the submitter's claim for confidential treatment.

(b) Any person submitting blueprints or engineering drawings need only provide the original version with their submission.

§ 512.7 Where should I send the information for which I am requesting confidentiality?

(a) The submitter shall send the complete copy and one redacted copy to the NHTSA office that requested the information or, if the information was not requested, to the intended NHTSA recipient of the information.

(b) The submitter shall send the copy containing only confidential information to the Office of Chief Counsel. This copy shall be accompanied by the certificate and the supporting information as required under §§ 512.4(b) and (c) of this part. Any non-confidential information that is necessary to enable the agency to assess the submitter's claim for confidential treatment should also be submitted to the Office of Chief Counsel.

(c) If the submitter does not know where to send the information, all copies shall be sent to the Office of Chief Counsel, National Highway Traffic Safety Administration, Room 5219, 400 Seventh Street, SW., Washington, DC 20590. These copies shall be accompanied by the certificate and the supporting information, as required under §§ 512.4(b) and (c) of this part.

§ 512.8 What supporting information should I submit with my request?

Whenever requesting confidentiality, the submitter shall:

- (a) Describe the information for which confidentiality is being requested;

(b) Identify the confidentiality standard(s) under which the confidentiality request should be evaluated, in accordance with § 512.15;

(c) Justify the basis for the claim of confidentiality under the confidentiality standard(s) identified pursuant to paragraph (b) of this section by describing:

(1) Why the information qualifies as a trade secret, if the basis for confidentiality is that the information is a trade secret;

(2) What the harmful effects of disclosure would be and why the effects should be viewed as substantial, if the claim for confidentiality is based upon substantial competitive harm;

(3) What significant NHTSA interests will be impaired by disclosure of the information and why disclosure is likely to impair such interests, if the claim for confidentiality is based upon impairment to government interests; or

(4) What measures have been taken by the submitter to ensure that the information is not customarily disclosed or otherwise made available to the public, if the basis for confidentiality is that the information is voluntarily submitted;

(d) Indicate if any items of information fall within any of the class determinations included in Appendix B to this part; and

(e) State the name, address, and telephone number of the person to whom NHTSA's response and any inquiries should be directed.

Subpart C—Additional Requirements

§ 512.9 What are the requirements if the information comes from a third party?

Where confidentiality is claimed for information obtained by the submitter from a third party, such as a supplier, the submitter is responsible for obtaining from the third party the information that is necessary to comply with § 512.4 of this part, including a certificate in the form set out in Appendix A to this part.

§ 512.10 Duty to amend.

The submitter shall promptly amend any information provided under § 512.4 of this part whenever the submitter knows or becomes aware that the information was incorrect at the time it was provided to NHTSA, or that the information, although correct when provided to NHTSA, is no longer correct.

§ 512.11 What if I need an extension of time?

If a person is unable to submit the necessary information required under § 512.4 at the time the claimed

confidential information is submitted to NHTSA, then that person may request an extension of time. Any request for an extension shall explain the reason for the extension of time and the length of time requested. The Office of Chief Counsel will determine whether an extension of time should be granted as well as the length of any extension.

§ 512.12 What if I am submitting multiple items of information?

Any certificate provided under § 512.4(b) of this part, and any supporting information provided under § 512.4(c) of this part, may be used to support a claim for confidential treatment of more than one item of information. However, general or nonspecific assertions or analysis may be insufficient to form an adequate basis for the agency to find that the information is entitled to confidential treatment, and may result in the denial of the claim.

§ 512.13 What are the consequences for noncompliance with this part?

(a) Noncompliance with § 512.10 may subject the submitter of information to civil penalties.

(b) If the submitter fails to comply with § 512.4 of this part at the time the information is submitted to NHTSA or does not request an extension of time under § 512.11, the claim for confidentiality may be waived, unless the agency is notified or otherwise becomes aware of the claim before the information is disclosed to the public. If the information is placed in a public docket or file, such placement is disclosure to the public within the meaning of this part and may preclude any claim for confidential treatment. The Office of Chief Counsel may notify a submitter of information or, if applicable, a third party from whom the information was obtained, of inadequacies regarding a claim for confidential treatment and may allow the submitter or third party additional time to supplement the submission, but has no obligation to provide either notice or additional time.

(c) If the submitter does not provide the certificate required under § 512.4(b) of this part or any supporting information required under § 512.4(c) of this part, or if the information is insufficient to establish that the information should be afforded confidential treatment under the confidentiality standards set out in § 512.15 of this part, a request that such information be treated confidentially may be denied. The Office of Chief Counsel may notify a submitter of information of inadequacies in the

supporting information and may allow the submitter additional time to supplement the showing, but has no obligation to provide either notice or additional time.

Subpart D—Agency Determination

§ 512.14 Who makes the confidentiality determination?

The determination as to whether an item of information will be afforded confidential treatment under this part will be made by the Office of Chief Counsel.

§ 512.15 What confidentiality standards will the Office of Chief Counsel use to make confidentiality determinations?

Information may be afforded confidential treatment if the Office of Chief Counsel determines that:

(a) The information is a trade secret;

(b) Public disclosure of the information would be likely to cause substantial harm to the competitive position of the submitter;

(c) Public disclosure of the information would be likely to impair NHTSA's ability to obtain necessary information in the future;

(d) The information was provided to NHTSA voluntarily and the information would customarily not be released to the public by the person from whom it was obtained; or

(e) The information is otherwise entitled to protection, pursuant to 5 U.S.C. 552(b)(4) and the cases that have been decided thereunder.

§ 512.16 Class determinations.

(a) The Office of Chief Counsel may issue a class determination relating to confidentiality under this section if the Office of Chief Counsel determines that one or more characteristics common to each item of information in that class, will, in most cases, necessarily result in identical treatment of each item of information under this part, and that it is appropriate to treat all such items as a class for one or more purposes under this part. Once a class determination is made, the Office of Chief Counsel will publish the new class determination in the **Federal Register**.

(b) The Chief Counsel may amend, modify, or terminate any class determination established under this section. These changes will be published in the **Federal Register**.

(c) Class determinations that have been made by the Chief Counsel are listed in Appendix B to this part.

(d) A class determination may state that all of the information in the class:

(1) Is or is not governed by a particular section of this part or by a particular set of substantive criteria;

(2) Fails to satisfy the applicable substantive criteria and is therefore presumed not to cause competitive harm if released;

(3) Satisfies the applicable substantive criteria and is therefore presumed to cause competitive harm if released; or

(4) Satisfies the substantive criteria that competitive harm would result if released for a certain period of time, but thereafter would not.

(e) Class determinations will have the effect of establishing rebuttable presumptions and do not conclusively determine any of the factors set out in paragraph (d) of this section.

§ 512.17 How long should it take to determine whether information is entitled to confidential treatment?

(a) When information claimed to be confidential is requested under the Freedom of Information Act, the determination will be made within twenty (20) working days after NHTSA receives such a request or within thirty (30) working days in unusual circumstances as provided under 5 U.S.C. 552(a)(6)(A). However, these time periods may be extended by the Office of Chief Counsel for good cause shown on the Office of Chief Counsel's own motion or on request from any person. An extension will be made only in accordance with 5 U.S.C. 552(a)(6)(A), and will be accompanied by a written statement setting out the reasons for the extension.

(b) When information claimed to be confidential is not requested under the Freedom of Information Act, the determination of confidentiality will be made within a reasonable period of time, at the discretion of the Office of Chief Counsel.

§ 512.18 How will I be notified of the confidentiality determination?

(a) If a request for confidential treatment is granted, the submitter of the information will be notified in writing of the determination and of any appropriate limitations.

(b) If a request for confidential treatment is denied in whole or in part, the submitter of the information will be notified in writing of the determination, and the reasons for the denial, and will be informed that the information will be made available to the public not less than ten (10) working days after the submitter of the information has received notice of the denial. The information may be released publicly on an earlier date, if the Office of Chief Counsel determines in writing that the public interest requires that the information be made available to the public on such date.

§ 512.19 If I disagree with a determination made by the Office of Chief Counsel under this part, what can I do?

(a) A submitter of information whose request for confidential treatment is denied in whole or in part, may petition for reconsideration of that decision. Petitions for reconsideration shall be addressed to and received by the Office of Chief Counsel prior to the date on which the information would otherwise be made available to the public. The determination by the Office of Chief Counsel upon such petition for reconsideration shall be administratively final.

(b) If a person is unable to submit a petition for reconsideration by the date on which the information otherwise would be made available to the public, that person may submit a request for an extension of time. Any request for an extension of time under this paragraph must be received by the Office of Chief Counsel before the date on which the information would be made available to the public, and the request must be accompanied by an explanation describing the reason for the request and the length of time requested. The Office of Chief Counsel will determine whether to grant or deny the extension and the length of the extension.

(c) If a petition for reconsideration is granted, the petitioner will be notified in writing of the determination and of any appropriate limitations.

(d) If a petition for reconsideration is denied in whole or in part, or if a request for an extension is denied, the petitioner will be notified in writing of the denial, and the reasons for the denial, and will be informed that the information will be made available to the public not less than ten (10) working days after the petitioner has received notice of the denial. The information may be released publicly on an earlier date, if the Office of Chief Counsel determines in writing that the public interest requires that the information be made available to the public on such date.

Subpart E—Agency Treatment of Information Claimed to be Confidential

§ 512.20 How does the agency treat information submitted pursuant to this part before a confidentiality determination is made?

(a) Information received by NHTSA, for which a properly filed confidentiality request is submitted, will be kept confidential until the Office of Chief Counsel makes a determination regarding its confidentiality. Such information will not be disclosed publicly, except in accordance with this part.

(b) Redacted copies of documents submitted to NHTSA under this part will be disclosed to the public.

§ 512.21 How is information submitted pursuant to this part treated once a confidentiality determination is made?

(a) Once the Office of Chief Counsel makes a determination regarding the confidentiality of the submitted information, all materials determined not to be entitled to confidential protection will be disclosed to the public in accordance with the determination, unless a timely petition for reconsideration is received by the agency.

(b) Upon receipt of a timely petition for reconsideration under § 512.19 of this part, the submitted information will remain confidential, pending a determination regarding the petition. Once the Office of Chief Counsel makes a determination regarding the petition for reconsideration, all materials determined not to be entitled to confidential protection will be disclosed to the public, in accordance with that determination.

§ 512.22 Under what circumstances may NHTSA modify a grant of confidentiality?

(a) NHTSA may modify a grant of confidentiality based upon:

- (1) Newly discovered or changed facts;
- (2) A change in the applicable law;
- (3) A change in class determination, pursuant to § 512.16;
- (4) The passage of time; or
- (5) A finding that the prior determination is erroneous.

(b) If NHTSA believes that an earlier determination of confidentiality should be modified based on one or more of the factors listed in paragraph (a) of this section, the submitter of the information will be notified in writing that NHTSA has modified its earlier determination and of the reasons for the modification, and will be informed that the information will be made available to the public in not less than ten (10) working days from the date of receipt of the notice of modification. The submitter may seek reconsideration of the modification, pursuant to § 512.19.

§ 512.23 Under what circumstances may NHTSA publicly release confidential information?

(a) Information that has been claimed or determined to be confidential under this part may be disclosed to the public by the Administrator notwithstanding such claim or determination, if disclosure would be in the public interest as follows:

- (1) Information obtained under chapter 325, 327, 329 or 331 of title 49

of the United States Code (formerly under the Motor Vehicle Information and Cost Savings Act) may be disclosed when that information is relevant to a proceeding under the chapter under which the information was obtained.

(2) Information obtained under chapter 301 of title 49 of the United States Code (49 U.S.C. 30101 *et seq.*), relating to the establishment, amendment, or modification of Federal motor vehicle safety standards (FMVSS), may be disclosed when relevant to a proceeding under the chapter.

(3) Except as specified in the next sentence, information obtain under Chapter 301 of title 49 of the United States Code (49 U.S.C. 30101 *et seq.*), related to a possible defect or noncompliance, shall be disclosed when the Administrator decides the information will assist in carrying out sections 30117(b) and 30118 through 30121 of title 49 or that is required to be disclosed under 30118(a) of title 49, except as provided in paragraph (a)(4) of this section. Early warning information collected pursuant to regulations promulgated under section 30166(m) of title 49 (which was added by section 3(b) of the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act) shall not be disclosed under this section, unless the Administrator determines the disclosure of the information will assist in carrying out sections 30177(b) and 30118 through 30121 of title 49.

(b) No information will be disclosed under paragraph (a) of this section unless the submitter of the information is given written notice of the Administrator's intention to disclose information under this section. Written notice will be given at least ten (10) working days before the day of release, unless the Administrator finds that shorter notice is in the public interest. The notice under this paragraph will include a statement of the Administrator's reasons for deciding to disclose the information, and will afford the submitter of the information an opportunity to comment on the contemplated release of the information. The Administrator may also give notice of the contemplated release of information to other persons and may allow these persons the opportunity to comment. In making the determination to release information pursuant to this section, the Administrator will consider ways to release the information that will cause the least possible adverse effects to the submitter.

(c) Notwithstanding any other provision of this part, information that

has been determined or claimed to be confidential may be released:

- (1) To a committee of Congress;
- (2) Pursuant to an order of a court with valid jurisdiction;
- (3) To the Office of the Secretary, U.S. Department of Transportation and other Executive branch offices or other Federal agencies in accordance with applicable laws;
- (4) With the consent of the submitter of the information; and
- (5) To contractors, if necessary for the performance of a contract with the agency or any Federal agency, with specific prohibitions on further release of the information.

Appendix A—Certificate in Support of Request for Confidentiality

Certificate in Support of Request for Confidentiality

I, _____, pursuant to the provisions of 49 CFR part 512, state as follows: (1) I am (official) and I am authorized by (company) to execute documents on behalf of (company);

(2) The information contained in (pertinent document(s)) is confidential and proprietary data and is being submitted with the claim that it is entitled to confidential treatment under 5 U.S.C. 552(b)(4) (as incorporated by reference in and modified by the statute under which the information is being submitted);

(3) I hereby request that the information contained in (pertinent document(s)) be protected for (requested period of time);

(4) I have personally inquired of the responsible (company) personnel who have authority in the normal course of business to release the information for which a claim of confidentiality has been made to ascertain whether such information has ever been released outside (company);

(5) Based upon such inquiries, to the best of my knowledge, information and belief, the information for which (company) has claimed confidential treatment has never been released or become available outside (company); (except as hereinafter specified);

(6) There have been no prior determinations by NHTSA, other Federal agencies, or Federal courts relating to the confidentiality of the submitted information; (except as hereinafter specified);

(7) I make no representations beyond those contained in this certificate and, in particular, I make no representations as to whether this information may become available outside (company) because of unauthorized or inadvertent disclosure (except as stated in Paragraph 5); and

(8) I certify under penalty of perjury that the foregoing is true and correct. Executed on this the ___ day of _____, _____. (If executed outside of the United States of America: I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct). (signature of official)

Appendix B—Class Determinations

(a) The Office of Chief Counsel has determined presumptively that the following

classes of information would cause competitive harm if released:

(1) Blueprints and engineering drawings containing process and production data where the subject could not be manufactured without the blueprints or engineering drawings except after significant reverse engineering;

(2) Future specific model plans (to be protected only until the date on which the specific model to which the plan pertains is first offered for sale); and

(3) Future vehicle production or sales figures for specific models (to be protected only until the termination of the production period for the model year vehicle to which the information pertains);

(b) The Office of Chief Counsel has determined presumptively that the following classes of information would not cause competitive harm if released:

(1) Consumer complaints and related documents required to be submitted to the agency;

(2) Reports and data required to be submitted to the agency related to property damage claims;

(3) Reports and data required to be submitted to the agency related to warranty claims; and

(4) Test procedures used to certify compliance with applicable Federal motor vehicle safety standards (FMVSS) and the results of such testing.

Appendix C—OMB Clearance

The OMB clearance number for this regulation is 2127-0025.

National Highway Traffic Safety Administration.

Issued on: April 19, 2002.

Jeffrey W. Runge,
Administrator.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[I.D. 041802C]

RIN 0648-AP76

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Atlantic Deep-Sea Red Crab Fishery; Atlantic Deep-Sea Red Crab Fishery Management Plan

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of availability of a fishery management plan; request for comments.