comments from State or local government entities received.

In conclusion, the agency believes that it has complied with all of the applicable requirements under the Executive order and has determined that the preemptive effects of this final rule are consistent with Executive Order 13132.

## VII. References

The following reference has been placed on display at the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. The Quaker Oats Co. and Rhodia, Inc., ''Oatrim (BETATRIM) Health Claim Petition,'' HCN1, vol. 1, Docket No. 01Q–0313, April 12, 2001.

■ Accordingly, the interim final rule amending 21 CFR 101.81 that was published in the **Federal Register** of October 2, 2002 (67 FR 61773), is adopted as a final rule without change.

Dated: July 21, 2003.

**Jeffrey Shuren,**

*Assistant Commissioner for Policy.*

[FR Doc. 03–19027 Filed 7–25–03; 8:45 am]

BILLING CODE 4160–01–S

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## DEPARTMENT OF HOMELAND SECURITY

## Coast Guard

## 33 CFR Part 165

**[CGD13–03–008]**

**RIN 1625–AA00**

## Safety Zones; Annual Fireworks Events in the Captain of the Port Portland Zone, Willamette River, Portland, OR

**AGENCY:** Coast Guard, DHS.

**ACTION:** Notice of implementation of regulation.

**SUMMARY:** The Captain of the Port Portland will begin enforcing the safety zone for the Oregon Symphony Concert Fireworks Display established by 33 CFR 165.1315 on May 30, 2003. The Captain of the Port, Portland, Oregon, is taking this action to safeguard watercraft and their occupants from safety hazards associated with the fireworks display. Entry into this safety zone is prohibited unless authorized by the Captain of the Port.

**DATES:** 33 CFR 165.1315 will be enforced August 28, 2003 from 8:30 p.m. (PDT) until 9:30 p.m. (PDT). A rain date is scheduled for August 29.

**SUPPLEMENTARY INFORMATION:** On May 30, 2003, the Coast Guard published a final rule (68 FR 32366) establishing safety zones, in 33 CFR § 165.1315, to provide for the safety of vessels in the vicinity of fireworks displays. One of these fireworks displays is the Oregon Symphony Concert fireworks display. The safety zone covers all waters of the Willamette River bounded by the Hawthorne Bridge to the north, Marquam Bridge to the south, and shoreline to the east and west. Entry into this zone is prohibited unless authorized by the Captain of the Port or his designee. The Captain of the Port Portland will enforce this safety zone on August 28, 2003 from 8:30 p.m. (PDT) until 9:30 p.m. (PDT). A rain date is scheduled for August 29. The Captain of the Port may be assisted by other federal, state, or local agencies in enforcing this safety zone.

**FOR FURTHER INFORMATION CONTACT:** Captain of the Port Portland, 6767 N. Basin Ave., Portland, OR 97217 at (503) 240–9370 to obtain information concerning enforcement of this rule.

Dated: July 13, 2003.

**Paul D. Jewell,**

*Captain, Coast Guard, Captain of the Port, Portland.*

[FR Doc. 03–19144 Filed 7–25–03; 8:45 am]

BILLING CODE 4910–15–P

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## DEPARTMENT OF TRANSPORTATION

## National Highway Traffic Safety Administration

## 49 CFR Part 512

**[Docket No. NHTSA–02–12150; Notice 2]**

**RIN 2127–AI13**

## Confidential Business Information

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), DOT

**ACTION:** Final rule

**SUMMARY:** This document amends the regulation on Confidential Business Information to simplify and update the regulation to reflect developments in the law and to address the application of the regulation to the early warning reporting regulation issued pursuant to the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act.

**DATES:** This rule is effective on September 11, 2003. If you wish to submit a petition for reconsideration of this rule, your petition must be received by September 11, 2003.

**ADDRESSES:** Petitions for reconsideration should refer to the docket number and be submitted to: Administrator, Room 5220, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590.

**FOR FURTHER INFORMATION CONTACT:** For questions relating to procedures under Part 512, contact Lloyd Guerci or Otto Matheke. For questions relating to the treatment of material under the early warning reporting regulations, contact Lloyd Guerci or Michael Kido. For questions relating to the early warning regulation itself, contact Lloyd Guerci or Andrew DiMarsico. All can be reached in the Office of the Chief Counsel at the National Highway Traffic Safety Administration, 400 7th Street SW., Room 5219, Washington, DC 20590. They can be reached by telephone at (202) 366–5263.

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://dms.dot.gov*.

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## I. Background

On April 30, 2002, NHTSA published a Notice of Proposed Rulemaking (NPRM) to amend 49 CFR part 512, Confidential Business Information (part 512). The proposal was intended 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, and to update specific sections of the regulation to reflect developments in the law. The agency proposed 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 making a claim for confidential treatment of business information. The NPRM also addressed a variety of procedural matters relating to such claims.

The agency sought comment on whether it should create a series of class determinations of information presumed not to cause substantial competitive harm, in addition to those classes already contained in Appendix B to Part 512 applicable to information the disclosure of which has been determined to cause substantial competitive harm. Although the final rule establishing the early warning reporting obligations had not yet been issued, the agency sought comment on whether to establish class determinations relating to the early warning reporting information.

## II. Comments Received

The comment period closed on July 1, 2002. The agency received timely comments from various sectors of the automotive industry, including vehicle manufacturers, tire manufacturers, supplier and equipment manufacturers, and other interested parties. Comments were received from the following trade associations: the Alliance of Automobile Manufacturers (Alliance), the Association of International Automobile Manufacturers (AIAM), the Rubber Manufacturers Association (RMA), the Tire Industry Association (TIA), the Motor and Equipment Manufacturers Association and the Original Equipment Suppliers Association (MEMA/OESA), the Automotive Occupant Restraints Council (AORC), the Juvenile Products Manufacturers Association (JPMA), the Truck Manufacturers Association (TMA) and the Motorcycle Industry Council (MIC). Comments were received also from individual manufacturers: General Motors North America (GM), Cooper Tire (Cooper), Utilimaster, Blue Bird Body Company (Blue Bird), Bendix, Harley-Davidson Motorcycle Company (Harley-Davidson), WABCO North America (WABCO), Meritor-WABCO, and Workhorse Custom Chassis (Workhorse). Enterprise Rent-A-Car Company (Enterprise) and the Washington Legal Foundation (WLF) also filed comments.

On October 17, 2002, representatives of Public Citizen met with the agency and requested the opportunity to file comments three months after the closing of the comment period. As was noted in a memo to the docket, the agency informed Public Citizen that, consistent with its longstanding practice, the agency would consider late filed comments to the extent possible.[1] Public Citizen filed its comments on November 27, 2002.

## III. Overview of the Comments

Most of the comments supported the NPRM's approach to make Part 512 easier to read and to update the substantive description of what constitutes confidential business information to conform to developments in the law. Many commenters expressed concern over the number of copies the agency was considering requiring to be filed, the agency's request that certain submitters redact personal identifiers, and various other aspects of the proposal. Objections were also raised to the concept of establishing categories of information presumed not to cause substantial competitive harm if disclosed.

The majority of the comments responded to the agency's request that commenters address the early warning reporting requirements, which were proposed on December 21, 2001. *See* 66 FR 66190. Most of the business interests argued that the TREAD Act's disclosure provision in 49 U.S.C. 30166(m)(4)(C) created a categorical, statutory exemption for information submitted pursuant to the early warning reporting regulations, unless the Administrator makes certain findings specified in 49 U.S.C. 30167(b). This position was presented with the most detail in the comments filed by the RMA.

Many of the comments also expressed substantive concerns that the early warning data, given that it is ''raw'' and comprehensive in scope, could be misleading, available for misuse, and create public confusion. Many business interests presented arguments as to why the disclosure of specific elements of the early warning data would be competitively harmful within their particular sections of the motor vehicle or equipment industry. In addition, many commenters expressed concern that the public disclosure of the early warning information would be unfair to those companies that proactively seek out and collect customer feedback and field data.

The Alliance and Public Citizen did not adopt the view that the TREAD Act created a statutory exemption from disclosure. Public Citizen and the Alliance agreed with much of the analysis set forth in an internal departmental memo, dated October 27, 2000, and placed into the public docket on March 6, 2001. That memo expressed the view of NHTSA's Chief Counsel that the TREAD Act's disclosure provision did not create a statutory categorical exemption because of the manner in which it referenced 49 U.S.C. 30167(b). The memo concluded that the provision instead indicated a Congressional intent that NHTSA determine the confidentiality of the early warning reporting data in the same manner as it treated other data submitted to the agency; *i.e.*, under Exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. 502(b)(4).

The Alliance suggested that, in accordance with the October 27, 2000 memo, the agency could apply either Exemption 4 (confidential business

[1] The agency's analysis is scheduled to begin promptly after the comment period closes and, in general, we expect all comments to be filed within the specified period. We analyze the comments and all other available data to make decisions on how to shape our final rules. Allowing commenters to file late provides an unfair opportunity to critique the comments of those who submitted their comments in a timely manner. In some rulemakings it is possible to consider late comments without delaying the agency's decision making. In general, however, we only consider late comments to the extent they are filed before the agency has made significant progress towards the next step in the regulatory process and to the extent that they critique the agency's proposal.

information) or Exemption 7 (investigative records), and further argued that either exemption allows the agency to retain the data as confidential. The Alliance asserted that Congress considered the early warning data to be pre-investigative screening information of the type NHTSA traditionally considers part of its internal deliberative process, and intended that the information be confidential until such time as a defect investigation is opened. The Alliance contended that the effect of Section 30166(m)(4)(C) was to modify a presumption in Section 30167(b) generally favoring disclosure.

Public Citizen argued that the TREAD Act did not create a categorical, statutory exemption from disclosure, and that a class determination that information does not presumptively create competitive harm should apply to information about consumer complaints, warranty data and property damage claims. Public Citizen further contended that it is reasonable to disclose each of the other categories of information because it is summary data by make and model and therefore, in Public Citizen's view, not competitively harmful. Public Citizen also asserted that reports of death and injuries and field reports are materials prepared as part of a defect investigation and therefore should be disclosed.

## IV. Overview of the Final Rule

In the NPRM, we proposed changes to part 512 that were designed primarily to simplify and improve the clarity of the regulation and to update specific sections of the regulation to reflect current case law and legislation. The proposal was intended to ensure the efficient processing of requests for confidential treatment and the proper protection for sensitive business information received by NHTSA.

In a newly captioned Subpart A, the final rule includes the general provisions that establish the purpose, scope, and applicability of the regulation governing claims for confidential treatment, and that define the terms used in the regulation. Additionally, the final rule revises the definition of confidential business information to reflect developments in the law.

The final rule addresses the number of copies to be submitted to the agency when information is claimed to be confidential. The following must accompany any claim for confidential treatment: (1) A complete copy of the submission, (2) a copy of a public version of the submission and (3) either a second complete copy of the submission or, alternatively, only those portions of the submission containing the material relating to the request for confidential treatment, with any appropriate sections within the pages marked in accordance with this rule. Those filing comments to rulemakings must additionally submit a copy of the public version to the docket. The submissions must also be marked in accordance with this final rule.

The final rule has eliminated the requirement that submitters redact personal identifying information from their submissions. The final rule specifies in Subpart B the manner in which information submitted to NHTSA and claimed to be confidential must be marked and identifies the supporting documentation that must accompany each submission. Each page containing information claimed to be confidential must be marked. If an entire page is claimed to be confidential, the markings must indicate this clearly. If portions of a page are claimed to be confidential, they must be marked by enclosing them within brackets ''[ ].''

The final rule clarifies issues relating to the duty to amend claims for confidential treatment. It also provides that, when 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 the submission requirements of Part 512, including the requirement to submit a certificate and supporting information.

We have decided against the creation of categories of information presumed not to cause substantial competitive harm for a variety of reasons, including the fact that such a presumption is duplicative of existing law. Class determinations are intended to reduce or eliminate the need for individual consideration of information that, by its nature, has been determined to cause substantial competitive harm if released. Class determinations alleviate the unnecessary burden of filing individual claims for confidential treatment. Information not subject to one of the class determinations is already presumed to be publicly available. Submitters must make individual claims relating to the information and carry the burden of showing that disclosure would either likely cause substantial competitive harm or, if the information is voluntarily submitted, that it is not ordinarily released to the public.

We nonetheless remain concerned that submitters may routinely seek confidential treatment for information the agency has consistently determined would not cause competitive harm if released. We will take appropriate action to discourage those who repeatedly file claims for confidential treatment despite our consistent rejection of similar requests.

Consistent with the analysis contained in the October 27, 2000 memo, we have determined that Section 30166(m)(4)(C) of the TREAD Act did not create a categorical statutory exemption pursuant to Exemption 3 of the FOIA applicable to all early warning reporting information. We have decided to consider the confidentiality of early warning reporting information pursuant to Exemption 4 of the FOIA, which exempts confidential business information from disclosure. We have created a series of class determinations covering those portions of the early warning reporting information we have determined are entitled to confidential treatment. We are permitting the information in these classes to be submitted and given confidential treatment without the filing of a part 512 justification and the accompanying certificate.

## V. Specific Provisions of Part 512

### *A. Subpart A—General Provisions*

The agency proposed to include in Subpart A the general provisions that establish the purpose, scope, and applicability of the regulation governing claims for confidential treatment, and that define the terms used in the regulation. In addition, we proposed to revise the definition of confidential business information to reflect developments in the law.

The agency did not receive any comments objecting to these portions of the regulation, and is adopting the proposed changes to this subpart without modification.

### *B. Subpart B—Submission Requirements*

The agency proposed to delineate in Subpart B the specific requirements that submitters must follow when they request confidential treatment for materials submitted to NHTSA. The NPRM described the information required to be submitted with a confidentiality request, how documents were to be marked, how many copies would be required, where materials were to be submitted and what supporting documentation would be needed. The comments raised no concerns regarding most provisions contained in proposed Subpart B, but several commenters objected to certain of its features.

1. Copies of Submissions

Part 512 previously provided that submitters send to the Chief Counsel two copies of documents containing information claimed to be confidential and one copy of a public version of the documents, from which portions claimed to be confidential were redacted. Submitters were also to send a second copy of the public version of the document to the appropriate program office within NHTSA (typically those engaged in the development of motor vehicle safety—Enforcement, Rulemaking or Applied Research). Thus, the submitter sent the agency two confidential sets of documents and two public sets of documents.

We proposed changing the regulation to require the submitters to send to the Office of the Chief Counsel one confidential and one public set of submitted documents. The submitter could also send, along with the confidential set, any non-confidential information the submitter wanted NHTSA to consider along with its request. We also proposed that submitters send a confidential and a public set of the documents to the appropriate program office.

A number of comments characterized this proposal as requiring the creation of a ''third version'' of the submitted materials, and argued that it would significantly increase the time, expense, and difficulty associated with the exercise of the statutory right to protection of confidential commercial and financial information. JPMA and others suggested instead that the agency require submitters to furnish two copies of the complete submission and one or two redacted versions.

The agency did not intend to require the creation of any ''third version'' of submitted documents. The agency believes that some companies may find it easier to send the Chief Counsel only those material for which confidential treatment is sought, especially when the amount of material claimed to be confidential is small in comparison to the whole submission or when it is limited to documents that are easily severable from the whole. We have accordingly modified this provision to provide this option when submitting confidentiality claims.

Each claim for confidential treatment must be accompanied with the following: (1) A complete copy of the submission, (2) a copy of a public version of the submission and (3) either a second complete copy of the submission or, alternatively, only those portions of the submission containing the material relating to the request for confidential treatment, with any appropriate sections within the pages marked in accordance with this rule. Those individuals who are filing comments to rulemakings must additionally file an electronic or hard copy of the public version to the docket. All submissions must be appropriately marked in accordance with this final rule. Information for which the submitter requests confidential treatment may be submitted electronically or in an electronic format. Submitters should also provide any special software necessary to review the submitted materials.

The Chief Counsel will distribute the complete copy and the public version of the material to the program office for its use, and will use the additional marked copy or set of material to evaluate the claim for confidential treatment. This will provide the program office expeditiously with the information necessary for program activity and ensure that the program office is aware of which material is claimed to be confidential and which is not. This process will also provide the Chief Counsel with the information needed to consider the claim for confidential treatment. Generally, this will simply be the material for which confidential treatment is sought. The submitter may also include any additional information it wishes the Chief Counsel to evaluate in considering the claim.

2. Personal Information

The agency proposed to include in Part 512 a request that submitters remove personal information, such as names, addresses and telephone numbers of consumers, from the redacted version of submitted materials, to protect the privacy of individuals. The agency's policy has been to redact personal identifiers from all owner complaints (whether filed directly with the agency or from documents obtained from manufacturers in the course of a defect investigation) before placing them on the public record. The policy was designed to encourage the submission of information by protecting personal privacy concerns. The agency believes that consumers may be less willing to make complaints if their personal contact and other information are made publicly available.

In *Center for Auto Safety* v. *National Highway Traffic Safety Administration*, 809 F. Supp. 148 (D.D.C. 1993), the Center for Auto Safety sought release of the names and addresses of consumers who filed complaints directly with the agency. The court analyzed the possible effects of disclosure, balancing the interests of the individuals filing complaints with the asserted public interest in obtaining not only the substance of the complaint, which was publicly available, but also the identities of those filing them. The Court ruled that the privacy of the complainants will be recognized and protected because ''there is no ascertainable public interest of sufficient significance or certainty to outweigh [a complainant's privacy] right'' that would justify the release of this personal contact information provided by consumers. *Id.* at 150. Thus, the court upheld the agency's decision not to release the names of, and other personal information about, those voluntarily providing information to the agency.[2]

The same policy concerns apply to personal identifiers on copies of information submitted by manufacturers. The judicially recognized privacy interest in protecting the personal identifiers and contact information when a consumer complains to the agency is at least as strong when applied to a consumer who complains directly to the company, and is in all likelihood unaware that the company may be required to send that communication to the government, which, in turn, will place it into a publicly accessible file.

Many comments, including those from TMA and the Alliance, objected to the proposed requirement that submitters remove personal information, pointing out that the legal burden of reviewing and redacting personal identifiers lay with the agency, not with the private submitters of the information. TMA also argued that relying on submitters to redact the information might lead to inconsistent approaches and cause confusion over what personal identifiers are or are not redacted.

In light of the comments, we have revised the proposed regulation to eliminate this requirement. The agency nonetheless would appreciate submissions, in addition to the complete copy, of redacted versions deleting any personal identifiers from any companies willing to provide them.

[2] Public Citizen expressed opposition to the agency's practice of providing a release option on its Vehicle Owner Questionnaires to allow the agency to share consumer names with manufacturers but not a similar release option with respect to advocacy groups. Manufacturers have a legal obligation to investigate vehicle problems and make timely defect determinations. The release of information to them, with the owner's permission, assists in their performance of their legal responsibilities by enabling them to investigate reports of vehicle problems. Advocacy groups and other members of the public have no such statutory obligation.

3. Stamp Each Page

The proposal specified the manner in which information submitted to NHTSA and claimed to be confidential must be marked, and identified the supporting documentation that must accompany each submission. The NPRM intended to continue the requirement that each page containing information claimed to be confidential be marked as such. The markings would indicate if an entire page was claimed to be confidential or would identify with brackets any particular portions of a page claimed to be confidential.

This proposal was intended to avoid misunderstanding by establishing a system through which companies could provide the agency with clear direction as to which portions of the pages or documents were claimed to be confidential. To allow the pages with confidential information to be identified easily, the proposal provided also that each page claimed to contain confidential information must be numbered.

The RMA claimed that the combination of this feature with other parts of the proposed regulation would create an unreasonable burden and violate the Paperwork Reduction Act. The RMA was concerned with the combined effect of presumably requiring three versions of the same information, stamping each appropriate page with the word ''confidential,'' potentially redacting personal information, and the potential application of all the requirements to each quarterly submission of the early warning reporting information.

As noted above, we have made various modifications to address many of these concerns. We have clarified that we did not intend to require a so-called third version of each submission, have eliminated the proposal to require the redaction of personal identifiers, and have addressed the early warning reporting information through a series of class determinations covering those portions we have determined are entitled to confidential treatment under Exemption 4 of the FOIA.

In sum, we believe that this final rule simplifies the process for submitting confidentiality claims, allows for the more efficient handling of those claims within the agency and imposes no additional burden on those submitting the information. The final early warning reporting regulation likewise clarified those reporting obligations and, we believe, assuages many of the concerns raised by the RMA.

Those providing submissions electronically must either separate the material that is confidential from that which is not, or find an alternative method of marking those pages that are confidential. We note that companies increasingly are supplying information required as part of a defect or noncompliance investigation in electronic formats.

*C. Subpart C—Additional Requirements*

In Subpart C, the agency proposed to retain additional requirements from the existing regulation that submitters must follow when certain circumstances apply. The NPRM stated that we did not intend to change these requirements substantively, only to clarify the requirements and assemble them in a single subpart.

The requirements contained in this portion of the proposed rule covered such issues as the submitter's continuing obligation to amend information provided in support of a claim for confidential treatment, the manner in which confidential treatment is to be claimed for multiple items of information or for information submitted by a third party, the steps submitters must take if they need an extension of time to claim confidential treatment, and the consequences for noncompliance with part 512.

The final rule includes the requirement that submitters specify with their claim the length of time for which confidential treatment is sought. The information supporting the confidentiality request must include adequate justification for the time period specified in the claim.

The agency did not receive comments objecting to the proposed reorganization of these provisions into Subpart C, or to most of the specific requirements contained in this portion of the proposal. Objections were raised, however, regarding two provisions of the proposal:

1. Duty To Amend

The existing regulation provides that submitters of information ''shall promptly amend supporting information'' justifying a claim for confidential treatment ''if the submitter obtains information upon the basis of which the submitter knows that the supporting information was incorrect when provided, or that the supporting information, though correct when provided, is no longer correct and the circumstances are such that a failure to amend the supporting information is in substance a knowing concealment.'' 49 CFR 512.4(i). The NPRM proposed to revise this language to provide that submitters ''shall promptly amend any information 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.''

Several comments, including those submitted by TMA and AIAM, objected to this proposed change on the grounds that it would impose an unreasonable burden on submitters to monitor submissions constantly in order to avoid civil penalties. Workhorse expressed concern that, by removing the ''knowing concealment'' standard, the rule would subject submitters to civil penalties based on ''constructive knowledge.'' Business interests urged the agency not to adopt the proposed changes. Public Citizen, on the other hand, considers the ''knowing concealment'' standard ''too weak'' and believes it allows situations in which materials that are no longer confidential receive continued protection ''long after the conditions justifying its confidentiality have been removed.''

We note that the agency requires the submitter to identify the length of time for which confidential treatment is sought. The agency will evaluate these requests when determining whether to grant confidential treatment and will release information once the time period for which confidential treatment is granted has lapsed. If the time period between the grant and the possible disclosure is long, the agency may seek reconfirmation, with appropriate support, that the information remains confidential.

The comments show that the proposed language could impose substantial and unnecessary burdens on submitters to monitor information previously submitted to the agency without providing additional benefit, since the agency is able to monitor the time for which confidential treatment is granted and is able to reassess a confidentiality grant should the information be requested. Accordingly, we have revised the final rule to clarify that the duty to amend relates to the supporting information submitted to justify the claim for confidential treatment, not to the substance of the reported information itself. In addition, we have revised the rule further so that, as before, the duty to amend is triggered only when circumstances are such that a failure to amend the supporting information would constitute a knowing concealment.

2. Third Parties

In the NPRM, the agency proposed that, when 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 the requirements of this regulation, including the requirement to submit a certificate of confidentiality.

The agency received several comments, all from suppliers, raising questions concerning this aspect of the agency's proposal. MEMA/OESA, AORC, Bendix, and WABCO, among others, argued that they should have the opportunity to request confidentiality directly with respect to information that they submit to their customers, and should be able to deal directly with the agency regarding information that is not available to the original submitter.

The agency believes these comments reflect a misunderstanding of the proposed regulation. The proposed regulation would not prevent suppliers from submitting information to the agency or seeking confidential treatment directly. This provision of the NPRM merely provided that if a person submits information that was obtained from a third party (such as an automobile manufacturer submitting information obtained from a supplier, a supplier submitting information obtained from a vehicle manufacturer, a contractor submitting information obtained from a subcontractor, or a similar situation involving wholly different parties), and if the submitter seeks confidential treatment for the information, it must obtain adequate supporting documentation to justify the claim. For example, it may be appropriate, or even necessary, to obtain and submit a Certificate in Support of the Request for Confidentiality that was prepared by the entity from which the information was obtained. In the absence of adequate supporting information, the agency will have no choice but to make the information public. Accordingly, this provision of the proposed rule is adopted without change.

*D. Subpart D—Agency Determination*

NHTSA proposed in the NPRM to delineate the confidentiality standards and procedures used by the agency to render a confidentiality determination. We also proposed to state that the agency may render determinations involving classes of information and that submitters may request reconsideration if they disagree with an agency decision. We indicated that we were proposing to clarify these provisions and assemble them into a single subpart. We indicated also that we were proposing some substantive changes to these portions of the regulation.

The majority of the comments related to the submission and protection of early warning reporting information, but a few additional issues were also addressed:

1.Time To Request Reconsideration or To Respond When a FOIA Request Is Pending

Part 512 previously provided that, if a request for confidential treatment is denied in whole or in part, the agency would inform the submitter of its right to petition for reconsideration of the denial within ten working days after receiving notice of the agency's decision. The NPRM proposed no changes to this aspect of the rule. A number of comments, primarily from smaller businesses, requested that this period of time be extended.

Blue Bird, for example, asserted that small-to medium-sized companies should have ''the opportunity to undertake the type of expanded review which the Company would need in cases where it must fully consider and present all possible arguments and justifications to protect what [it considers to be] proprietary, competitively sensitive information.'' In addition, MEMA/OESA asserted that ''requests for reconsideration where sensitive company documents are otherwise at risk will often require the input of many company employees * * * [and that] the ten-day period under the current and proposed rules * * * provides insufficient time.'' These comments recommended that the period of time should be extended from 10 working days to 20 working days or 30 calendar days.

Upon consideration of the difficulties faced by small companies (Blue Bird) and the potential need to coordinate responses with widely dispersed employees (MEMA/OESA), the agency has decided to adopt the commenters' request to extend the period of time to request reconsideration of denials of confidential treatment rendered by the agency, from ten working days to twenty working days.

In related comments, citing sections 512.22 and 512.23 of the regulation, which appear in Subpart E and relate to modifications of confidentiality decisions and the public release of confidential information under certain limited circumstances, the WLF recommended that ''the agency should [n]ever give less than ten (10) day advance notice to [a] company before releasing business documents.'' Although not specifically raised in any other comments, the agency notes that several portions of part 512 provide submitters of information with ten working days within which to seek review of agency decisions.

For example, if a petition for reconsideration is denied in whole or in part under Section 512.19 (also in subpart D), or if the agency determines that an earlier determination of confidentiality should be modified under section 512.22 or that information previously determined or claimed to be confidential will be disclosed under section 512.23 (in subpart E), the submitter is advised that the information will be made available to the public not less than ten working days after the date on which notification of the agency's action is received.

The reasons that support an extension from ten working days to twenty working days for requesting reconsideration also justify the extension of these other time periods. Nonetheless, while we are revising the regulations to provide a period of twenty working days, rather than ten, in each of the sections referenced above, we are reserving the right to shorten these periods when the agency finds it to be in the public interest.

WLF asserted that the NPRM would provide ''an inadequate amount of time to businesses to review and respond to FOIA requests submitted to the [agency] by third parties,'' and recommended that the agency ''provide the third-party FOIA request to the affected business within three (3) business days after receiving it * * * [and] copies of all correspondence between the agency and the FOIA requester.''

The agency notes that while the WLF's comments asserted that they concern notice to businesses upon the agency's receipt of a FOIA request for the information, the sections of the NPRM that WLF cites do not relate to these circumstances. Moreover, the agency does not believe that additional notice to submitters is needed at the time a FOIA request is received. Unlike many other Federal agencies, NHTSA does not wait until it has received a FOIA request before asking a submitter to justify the withholding of information. Instead, NHTSA's regulation provides that submitters must support their claims for confidential treatment at the time of submission. *See* 49 CFR 512.4. The agency would not expect, nor would we welcome, any additional materials from a submitter simply because a FOIA request has been filed. If a submitter disagrees with the agency's confidentiality determination (whether or not it is made in the context of a FOIA request), it can then request reconsideration. Therefore, there is no need to notify submitters if a FOIA

request is received by the agency for submitted information.

2. Whether Voluntarily Submitted Materials Should Be Returned Following a Denial of a Confidentiality Request

Bendix suggested that Section 512.18 should be amended to ''clarify'' that information voluntarily provided to the agency subject to a claim for confidential treatment should be returned to the submitter if the agency denies the request for confidential treatment. Such information may be submitted as part of a rulemaking, research activity or a request for interpretation of our statutes and regulations.

We note that the Federal Records Act imposes limitations on the agency's ability to return information voluntarily submitted to the agency. That Act mandates the maintenance and preservation of federal records.[3] It does not contemplate the return of records to individual submitters. Those providing technical or market information as part of a rulemaking or in connection with the agency's research activity do so voluntarily and with knowledge of the standards applicable to the treatment of the data. Further, we believe we can respond to interpretation requests while maintaining the confidentiality of any information. Accordingly, we are not adopting this suggestion.

3. Class Determinations

The NPRM proposed no specific changes to the already established class determinations applicable to information found to cause substantial competitive harm if released. Appendix B to part 512 currently contains three such determinations. These classes are blueprints and engineering drawings (under certain circumstances), future specific model plans, and anticipated vehicle or equipment production or sales figures (in some cases, for limited periods of time).

The NPRM sought comment with regard to whether the agency should also consider the establishment of class determinations applicable to categories of information that presumptively would not cause substantial competitive harm if released. The proposal suggested that such class determinations, if established, would be applicable only to compelled information. The agency did not intend that any such class determinations would be applicable to information voluntarily submitted to the agency. Such information is subject to disclosure under a different legal standard and only upon a showing that the company customarily discloses the information to the public.

We have decided against the creation of class determinations trying to address categories of information the release of which would be presumed not to cause substantial competitive harm. Such class determinations are unnecessary because all data the agency requires to be submitted is already presumptively subject to disclosure under FOIA unless shown to be subject to a FOIA exemption or covered by a class determination. Class determinations merely set forth those categories in which it is unnecessary to make individual submissions regarding the release of data that by its very nature would cause substantial competitive harm or impair the Government's ability to obtain the information in the future. In addition, we have concluded that some of the areas we posed as candidates for such treatment, such as testing conducted pursuant to ''known'' procedures, would require specific evaluation, thus rendering the class determination futile.

We nonetheless remain concerned that submitters may routinely seek confidential treatment for information the agency has consistently determined would not cause competitive harm if released. We will take appropriate action to discourage those who repeatedly file claims for confidential treatment despite our consistent rejection of similar requests.

*E. Subpart E—Agency Treatment of Information*

In Subpart E, the proposal described the manner in which information claimed to be confidential would be treated by the agency. The proposal intended to continue the practice of providing that any information identified and claimed to be confidential would be protected from disclosure by the agency pending an agency decision, and would continue to be treated confidentially as if the submitter's request for confidential treatment were granted, except under certain limited circumstances.

The Alliance suggested that the final rule should explicitly state that information claimed to be confidential would remain confidential pending the agency's administrative determination that the information is not entitled to confidential treatment. The NPRM expressly proposed such protection during the administrative reconsideration process: ''Upon receipt of a timely petition for reconsideration * * * the submitted information will remain confidential, pending a determination regarding the petition.'' The Alliance also suggested an express regulatory provision maintaining the confidentiality of material pending any judicial review of the agency's final administrative action regarding confidential treatment.

The agency will continue to treat as confidential any information that remains subject to an administrative review. This includes both the initial determination and the agency's response to any petition for reconsideration. The agency declines, however, to adopt the Alliance's suggestion that we continue automatically to treat such information as confidential pending judicial review. The agency will make the information publicly available, consistent with its administrative decision, unless ordered otherwise by a court of competent jurisdiction. We recognize that if we were to make information available immediately following the denial of a petition for reconsideration, it would obviate the submitters' right to judicial review. Accordingly, the regulation will provide that the agency will allow the submitter twenty working days within which to obtain a court order (*e.g.*, through a temporary restraining order) requiring the agency to maintain the confidentiality of information pending judicial review. We have chosen twenty working days to be consistent with the other time periods incorporated into this final rule. We also recognize that, while the basis and arguments for the confidentiality claim should have been fully developed by the time a submitter seeks judicial review of our determination, additional work may be necessary before a lawsuit is filed. In the absence of a judicial order to the contrary, information we have determined is not entitled to confidential treatment will be placed into the public record twenty working days after receipt of the agency's decision on reconsideration. As in other contexts, we reserve the right to shorten this period if we find that it is in the public interest to do so.

The proposal also provided that a grant of confidentiality may be modified

[3] The Act defines a ''federal record'' as consisting of ''all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them.'' 44 U.S.C. 3301. The disposal of these records is governed by 44 U.S.C. 3314 and related provisions of the Act. See 44 U.S.C. 3302, *et seq.*

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 further incorporated certain statutory provisions under which information that has been claimed or determined to be entitled to confidential treatment may nonetheless be publicly released in some situations, including releases made to Congress, pursuant to a court order, to the Secretary of Transportation or to other Executive agencies in accordance with applicable law, with the consent of the submitter, and to contractors (subject to certain conditions).

The agency's existing regulation also listed three additional situations under which information determined to be confidential may nonetheless be disclosed to the public. The proposed rule explained that the Cost Savings Act and the Vehicle Safety Act have been repealed and their pertinent provisions have been codified under title 49 of the United States Code. Accordingly, the NPRM proposed to modify part 512 in a manner consistent with these statutory changes. We are adopting these revisions.

## VI. Early Warning Reporting Information

The NPRM sought public comment on how the agency should handle the data to be submitted under the new early warning reporting regulation. Although the final rule prescribing the early warning reporting requirements had not yet been issued, the agency received numerous comments with regard to that data.

Some business interests argued that the TREAD Act itself prohibits the disclosure of any early warning reporting information under Exemption 3 of the Freedom of Information Act (FOIA). Others argued that Exemption 4 of the FOIA, applicable to confidential business information, governs whether the information should be disclosed. All business interests contended that release of the early warning data is likely to cause substantial competitive harm and many pointed out that disclosure is likely to impair the agency's ability to obtain the material in the future. Public Citizen, while agreeing that Exemption 4 is applicable, argued that all the data should be released because it is summary in nature, is important to the identification of potential defects and is often released in the course of individual defect determinations.

As the Court of Appeal for the District of Columbia Circuit recently noted, the Freedom of Information Act is premised on public access to information within enumerated bounds ensuring that the government's proper functions are not impeded:

> ''Public access to government documents'' is the ''fundamental principle'' that animates FOIA. *John Doe Agency* v. *John Doe Corp.,* 493 U.S. 146, 151 (1989). ''Congress recognized, however, that public disclosure is not always in the public interest.'' *CIA* v. *Sims,* 471 U.S. 159, 166–67 (1985). Accordingly, FOIA represents a balance struck by Congress between the public's right to know and the government's legitimate interest in keeping certain information confidential. John Doe Agency, 493 U.S. at 152. To that end, FOIA mandates disclosure of government records unless the requested information falls within one of nine enumerated exemptions, see 5 U.S.C. 552(b). While these exemptions are to be ''narrowly construed,'' *FBI* v. *Abramson,* 456 U.S. 615, 630 (1982), courts must not fail to give them a ''meaningful reach and application,'' John Doe Agency, 493 U.S. at 152. The government bears the burden of proving that the withheld information falls within the exemptions it invokes. 5 U.S.C. 552(a)(4)(b).

*See Center for National Security Studies, et. al.* v. *U.S. Department of Justice,* 331 F.3d 918 (D.C. Cir. 2003).

We have determined that the confidentiality of the early warning submissions should be reviewed under Exemption 4 of FOIA relating to confidential business information. Below we briefly set forth the early warning reporting requirements and the arguments made in favor and against disclosure. We then apply the principles set forth in *National Parks & Conservation Ass'n* v. *Morton* (*National Parks*), 498 F.2d 765 (D.C. Cir. 1974), and its progeny to each element of the early warning reporting information.

### *A. Summary of the Early Warning Reporting Requirements*

The bulk of the early warning reporting requirements apply to larger manufacturers of motor vehicles, and all manufacturers of child restraint systems and tires (*see* 49 CFR part 579). In general, vehicle manufacturers must submit quarterly reports with regard to the following categories of vehicles, if they produce 500 or more vehicles of a category annually: light vehicles, medium-heavy vehicles and all buses, trailers, and motorcycles. The reporting information required of these manufacturers is summarized below:

- *Deaths.* These manufacturers must report certain specified information about each incident involving a death that occurred in the United States that is identified in a claim (as defined) against and received by the manufacturer. They must also report information about incidents involving a death in the United States that is identified in a notice received by the manufacturer alleging or proving that the death was caused by a possible defect in the manufacturer's product. Finally, they must report on each death occurring in foreign countries that is identified in a claim against the manufacturer involving the manufacturer's product, or one that is identical or substantially similar to a product that the manufacturer has offered for sale in the United States.
- *Injuries.* These manufacturers must report certain specified information about each incident involving an injury that occurred in the United States that is identified in a claim against and received by the manufacturer, or that is identified in a notice received by the manufacturer which notice alleges or proves that the injury was caused by a possible defect in the manufacturer's product.
- *Property damage.* These manufacturers (other than child restraint system manufacturers) must report the numbers of claims for property damage that occurred in the United States that are related to alleged problems with certain specified components and systems, regardless of the amount of such claims.
- *Consumer complaints.* These manufacturers (other than tire manufacturers) must report the numbers of consumer complaints they receive that are related to problems with certain specified components and systems that occurred in the United States. Manufacturers of child restraint systems must report the combined number of such consumer complaints and warranty claims, as discussed below.
- *Warranty claims information.* These manufacturers must report the number of warranty claims (adjustments for tire manufacturers), including extended warranty and good will, they receive that are related to problems with certain specified components and systems that occurred in the United States. As noted above, manufacturers of child restraint systems must combine these with the number of reportable consumer complaints.
- *Field reports.* These manufacturers (other than tire manufacturers) must report the total number of field reports they receive from the manufacturer's employees, representatives, and dealers, and from fleets, that are related to problems with certain specified components and systems that occurred in the United States. In addition, manufacturers must provide copies of certain field reports received from their employees, representatives, and fleets, but are not required to provide copies of reports received from dealers.
- *Production.* These manufacturers must report the number of vehicles, child restraint systems, and tires, by make, model, and model year, during the reporting period and the prior nine model years (prior four years for child restraint systems and tires).

In addition, these manufacturers must submit to the agency, on a one-time basis, historical data relating to the number of warranty claims/adjustments and field reports for each calendar quarter during the three-year period

from July 1, 2000 through June 30, 2003.[4]

Smaller manufacturers (as defined in the early warning rule), and manufacturers of original motor vehicle equipment or replacement equipment other than child restraint systems and tires, are required to submit reports containing information about claims and notices of deaths allegedly caused by their products, but are not required to submit other information.

*B. Application of the FOIA to the Early Warning Reporting Program*

The TREAD Act's disclosure provision applies to information provided under 49 U.S.C. 30166(m), which was added to the Vehicle Safety Act in the aftermath of hearings held in connection with NHTSA's investigation of Firestone ATX and Wilderness AT tires. That statutory section mandates that the agency initiate a rulemaking ''to establish early warning reporting requirements for manufacturers of motor vehicles and motor vehicle equipment to enhance the Secretary's ability to carry out the provisions of this chapter.'' 49 U.S.C. 30166(m)(1).

Section 30166(m)(3) sets forth the type of information Congress expected the rulemaking to include. Congress specifically directed the agency to require the submission of information relating to repair and/or replacement campaigns. The Act provides for the submission of data on claims submitted to the manufacturer for serious injuries (including death) and aggregate statistical data on property damage from alleged defects in a motor vehicle or in motor vehicle equipment that may assist in the identification of defects. 49 U.S.C. 30166(m)(3)(A). Congress also specifically provided for manufacturers to submit information relating to claims of death or serious injury alleged to be caused by a defect where the manufacturer receives actual notice. 49 U.S.C. 30166(m)(3)(C).

Congress recognized that additional types of information may be useful to the agency in carrying out its mission to identify safety related defects. In Section 30166(m)(3)(B), Congress gave the agency the authority to mandate the submission of ''other data'' in addition to the information described above ''to the extent that such information may assist in the identification of defects related to motor vehicle safety in motor vehicles and motor vehicle equipment in the United States.'' Pursuant to that authority, NHTSA's early warning reporting rule requires the submission of information relating, among others, to warranty claims, field reports and consumer complaints.

Congress also considered the extent to which the data submitted as part of the early warning reporting regulation should be subject to public disclosure or, alternatively, the extent to which it should be held confidential to enhance the agency's ability to identify potential safety defects. The TREAD Act's disclosure provision, Section 30166(m)(4)(C), reads:

> None of the information collected pursuant to the final rule promulgated under paragraph (1) shall be disclosed pursuant to section 30167(b) unless the Secretary determines the disclosure of such information will assist in carrying out sections 30117(b) and 30118 through 30121.[5]

1. The TREAD Act and the FOIA Exemptions

In a letter to Secretary Slater dated October 20, 2000, days after passage of the TREAD Act, but before President Clinton signed the Act into law, Public Citizen objected to the disclosure provision.[6] Public Citizen was concerned that the provision would be construed to prohibit the disclosure of any early warning reporting data:

> The secrecy provision in sec. 3(b)(4)(c) is imposed upon all safety defect information collected as part of the bill's ''early warning reporting requirements'' rulemaking. We believe that the secrecy provision thwarts the clear purpose of the legislation—to protect the public from defect cover-ups—and may drastically reduce public access to safety defect information. Under that section, the Secretary shall not disclose defect and early warning information about lawsuits, consumer complaints, deaths, injuries, component failures or consumer satisfaction campaigns unless you determine that disclosure will assist in carrying out the law. This inverts existing law, as the current presumption of 49 U.S.C. sec. 30167(b) is to favor the disclosure over and above the disclosure requirements of the Freedom of Information Act (FOIA). Indeed, the function of this reversal in presumptions is to create a categorical exemption under FOIA's exemption three, and thus to keep information submitted under the new rule totally secret, probably indefinitely. (Emphasis in original)[7]

NHTSA's Chief Counsel considered and rejected this view of the TREAD Act's disclosure provision in an internal departmental memo, which was subsequently placed in the public record. That memo stated in part:

> Ms. Claybrook's letter seems to suggest that the variation in language could be interpreted to prevent the disclosure of any early warning information submitted to the agency in the absence of a decision by the Secretary that disclosure of the information ''will assist in carrying out'' the purposes of the Act. However, the legislation clearly requires that such a decision be made prior to disclosure only when the disclosure is being made under section 30167(b), which by its terms is invoked only when the disclosure involves information that has been determined to be entitled to confidential treatment.
>
> Moreover, section 30167(b) provides specifically that ''A requirement to disclose information under this subsection is in addition to the requirements of [the FOIA].'' Accordingly, neither section 30167(b) nor paragraph (4)(C) would affect the agency's initial decision regarding whether information submitted to the agency is entitled to confidential treatment. Such decisions will continue to be made in accordance with Exemption 4 of [the FOIA], the Trade Secrets Act and the agency's regulations concerning the treatment of confidential business information, 49 CFR part 512.[8]

In its comments to this rulemaking, Public Citizen agreed that Section 30166(m)(4)(C) permits the agency to consider the early warning information under Exemption 4 of the FOIA. Public Citizen claimed that the effect of the provision is to alter a preexisting presumption in Section 30167(b) from one of disclosure to nondisclosure in the absence of the specified findings of the Secretary. Public Citizen also clarified that its ''statements about the possible meaning of the bill were concerned with its potential for legal manipulation by the industry, *i.e.*, what in the worst case it could mean, rather than any suggestion of what it should or actually does mean in agency practice.''

The RMA argued that the TREAD Act provision falls within Exemption 3(b) of the FOIA, which negates disclosure when Congress has established particular criteria for withholding

[4] The early warning regulation contains definitions and explanations that provide further context to these requirements and that are not repeated here.

[5] Section 30167(B) provides: ''Subject to subsection (a) of this section, the Secretary shall disclose information obtained under this chapter related to a defect or noncompliance that the Secretary decides will assist in carrying out sections 30117(b) and 30118–30121 of this title or that is required to be disclosed under section 30118(a) of this title. A requirement to disclosure information under this subsection is in addition to the requirements of section 552 of title 5.''

[6] Public Citizen's letter appears in the docket as an attachment to the comments submitted by the RMA.

[7] Exemption 3 applies to material ''specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.'' 5 U.S.C. 552(b)(3).

[8] Memo from Frank Seales, Chief Counsel, NHTSA, to Rosalind Knapp, Acting General Counsel of the Department of Transportation, at 2 (Oct. 27, 2000) (emphasis in original).

information or has referred to particular types of matters to be withheld. The RMA asserted that the reference in the disclosure provision to the rulemaking required by Section 30166(m)(1) is sufficient to bring the statute within the purview of Exemption 3. According to the RMA, the analysis prepared by the agency in the October 27, 2000 memorandum would render the statutory provision meaningless and violate a central tenet of statutory construction.

The RMA, as well as individual tire makers and many other manufacturers, further argued that the information required by the early warning reporting regulation would lead to substantial competitive harm if disclosed. In addition, they suggest that disclosure would lead to less candor from field personnel, resulting in less reliable information, and would discourage marketing efforts that lead to more complete and useful data.

The Alliance suggested that the provision assumes the confidentiality of the early warning reporting data because information cannot be disclosed under section 30167(b) unless it is otherwise confidential. The Alliance asserted that the information may be found to be confidential under either Exemption 4 or Exemption 7 of the FOIA. The Alliance submitted affidavit evidence to support its claim that disclosure of the early warning reporting information would lead to substantial competitive harm within the automotive industry. General Motors also submitted comments explaining how, in its view, substantial competitive harm is likely to result if the data were disclosed.

The TREAD Act mandated that NHTSA collect and maintain information in a manner not previously followed by the agency. Historically, the agency has received information relating specifically to a particular alleged defect or noncompliance, including engineering drawings, warranty claim information, customer complaints, field reports and lawsuit information. Manufacturers submitting information in response to the agency's information requests frequently seek confidential treatment for portions of the information submitted. The agency reviews those requests in accordance with Exemption 4 of the FOIA.

The early warning reporting regulation requires regular periodic submissions of data that relate not simply to alleged problems, but to all of a manufacturer's products. These submissions are not necessarily indicative of any problem needing investigation. We do not believe that the language of Section 30166(m)(4)(C), and the colloquy accompanying its enactment (*See* Appendix A), expresses a Congressional mandate to treat all early warning reporting information confidentially. Instead, we believe that Congress expected the agency to review the confidentiality of early warning reporting information under Exemption 4 of the FOIA, but to apply Section 30167(b) in a more restrictive manner to that data than to other information received by the agency.[9]

As many of the commenters pointed out, Section 30167(b) applies only after we have determined that information is entitled to confidential treatment. The provision permits the disclosure of confidential information whenever the Secretary, in his discretion, believes that the information can be useful in carrying out the agency's defect identification and remediation function. In contrast, the TREAD Act's disclosure provision does not permit the disclosure of confidential early warning reporting information unless the Secretary specifically finds that disclosure is necessary to carry out the agency's responsibility to identify potential safety-related defects. Thus, the basis for justifying disclosure of the early warning reporting information is significantly more stringent than that for all other material submitted to the agency and found entitled to confidential treatment under the FOIA.

Both Public Citizen and the Alliance construed the TREAD Act provision in a manner consistent with our analysis. Public Citizen stated that the provision ''inverts existing law, as the current presumption of 49 U.S.C. § 30167(b) is to favor disclosure over and above the disclosure requirements of the Freedom of Information Act (FOIA).''[10] The Alliance similarly argued that Congress enacted the TREAD Act aware that the Vehicle Safety Act contained a provision generally favoring disclosure of information, even if it is otherwise confidential, when deemed necessary to assist in carrying out the agency's defect remediation function. According to the Alliance, Congress intended to neutralize that presumption and to disfavor disclosure of the early warning information:

> [U]nder longstanding NHTSA practice, *nonconfidential* information related to potential defects or noncompliances under investigation by the agency is routinely available in the agency's public reference reading room, without need for a Secretarial ''determination'' under § 30167(b), even though NHTSA could lawfully invoke FOIA Exemption Seven (relating to law enforcement investigations) to protect this information. Thus, as a practical matter, information in NHTSA's possession *is not even considered for release* under § 30167(b) of the Safety Act, **unless and until that information is already entitled to confidential treatment** under one of the Freedom of Information Act exemptions. (Emphases in original.)

As set forth in the October 27, 2000 memo, the agency disagrees with the assertion presented by the RMA and other business interests that the TREAD Act provision categorically prohibits the disclosure of any early warning reporting information pursuant to Exemption 3 of the FOIA. Our analysis of the arguments in favor of the application of FOIA Exemption 3, and our reasons for rejecting those arguments are amplified in Appendix A to this Final Rule. In sum, we believe the TREAD Act provision intended the Secretary initially to determine which information is entitled to confidential treatment as confidential business information, and, if so and only then, to consider whether disclosure is nonetheless necessary for the agency to fulfill its responsibilities to detect and enforce the laws governing the recall of vehicles and equipment containing safety related defects.

2. The Early Warning Reporting Information and FOIA Exemption 4

Consistent with the October 27, 2000 memo, we have determined that the confidentiality of the early warning reporting information should be construed under Exemption 4 of the FOIA. Exemption 4 protects information from disclosure that are ''trade secrets and commercial or financial information obtained from a person and privileged or confidential.'' 5 U.S.C. 552(b)(4). Information is confidential if its disclosure is likely ''(1) to impair the Government's ability to obtain necessary

[9] We must give meaning to all words and phrases of a statute, and therefore we must give meaning to the reference in Section 30166(m)(4)(C) to the preexisting Section 30167(b). *See, e.g., TRW Inc.* v. *Andrews,* 534 U.S. 19, 31 (2001) (''It is 'a cardinal principle of statutory construction that a statute ought, upon the whole, to be construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant' '') *and United States* v. *Menasche,* 348 U.S. 528, 538–539 (1955)(''It is our duty ''to give effect, if possible, to every clause and word of a statute.' '' We must also ensure that our construction of the statute does not render the TREAD Act provision meaningless or duplicative of existing law. *See, e.g., Dunn* v. *Commodity Futures Trading Commission,* 519 U.S. 465, 472 (1997) (''Our reading of the exemption is therefore also consonant with the doctrine that legislative enactments should not be construed to render their provisions mere surplusage'').

[10] In its comments, Public Citizen expressed its view that the provision is not an Exemption 3 statute, stating that ''while the TREAD Act provision may *reverse a presumption* available for certain information under Section 30167(b), the language of the statute falls far short of creating a withholding statute or exemption from FOIA.'' (Emphasis in original.)

information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.'' *National Parks,* 498 F.2d at 770. *See also Center for Auto Safety* v. *National Highway Traffic Safety Administration* (*CAS* v. *NHTSA*), 244 F.3d 144, 147–48 (D.C. Cir. 2001) (discussing application of Exemption 4 to mandatory submissions).[11]

Business interests contended that the early warning reporting information is entitled to protection under both prongs. They argued that early warning submissions would provide insight into the field experience and performance of a submitter's entire product line. Business enterprises were concerned that this information could then be analyzed by competitors to assess various factors, such as a submitter's experience with a particular supplier, production cycles, and the reliability of that submitter's products. Many of the commenters also pointed out that the disclosure of information may deter candor and discourage efforts to obtain reliable information from the field.

The RMA asserted that disclosure of early warning reporting information would harm individual competitors. The Alliance echoed these concerns and emphasized that the information would be valuable to competitors, particularly within the context of competition among its member companies, aftermarket parts manufacturers, potential new entrants, and franchised dealers. Many commenters pointed out that the early warning reporting information constitutes a unique and comprehensive compilation of information not otherwise available, and, while subject to misinterpretation by the public, is especially valuable to competitors.

The Alliance submitted affidavit evidence with its comments from an automotive marketing consultant to support its claim that the early warning reporting information relates to issues of importance to new car buyers, and therefore that the material is likely to be used (and potentially misused) in the competitive marketplace. The Alliance pointed out that the most significant factors cited by automobile consumers when choosing a vehicle relate to reliability, quality and dependability—all factors upon which the early warning reporting information is likely to shed some light.

The Alliance and others expressed concern over the potential misuse of the early warning reporting information, either by competing companies or others who may draw conclusions from the data that, according to the Alliance and others, may be unwarranted. The Alliance stated that in addition to ''[t]he unfairness of subjecting the submitting manufacturers to the competitive harm that would flow from the disclosure of [early warning information],'' any comparison of this information by the public would not be valid because of the differences in warranty periods among manufacturers.

GM reiterated this concern. Workhorse similarly wrote that disclosure of early warning information would create ''a serious risk that the public will be misled by disclosing such raw, unverified data'' and lead to ''consumer confusion and manufacturer harm.'' The RMA, while arguing that the potential misuse should support a blanket prohibition from disclosure, also asserted that the early warning reporting information is commercially valuable, and that its value is directly related to the extent of its confidentiality.

The Alliance recognized and did not take issue with NHTSA's current practice of releasing similar types of information submitted during specific defect investigations, but argued that this ''does not justify the release of the comprehensive compilations of information'' collected under the early warning reporting rule. The Alliance explained that ''[a] limited release of information that is relevant to, and specific to, an individual defect investigation is much different from a competitive standpoint than the automatic release of the continually collected, full compendium of quality and customer satisfaction information that is represented by the complete 'early warning' submission each quarter.''

Because of the comprehensive nature of the early warning information, the Alliance argued that these submissions ''should * * * be protected by a class determination presuming their confidentiality and * * * should not have to be accompanied by a traditional part 512 justification with each quarterly submission.'' The Alliance added that NHTSA's ''long-standing practice of releasing information limited in terms of scope and timeframe related to consumer complaints, warranty claims, property damage claims, field reports, etc., when this information has been submitted in connection with an individual, specific defect investigation does not defeat the presumptive confidentiality of the comprehensive collection of such information.''

AIAM asserted a similar argument in favor of protecting early warning information, claiming that its main point of contention ''lies with a comprehensive disclosure of all, unscreened early warning information.'' The AIAM added that ''we recognize that, in appropriate instances, portions of the early warning information could still be disclosed to the public.'' AIAM explained that such releases could occur ''after NHTSA has processed and evaluated early warning information and decided to pursue an investigation about a particular vehicle/component.''

GM also distinguished between the disclosures that NHTSA currently makes during defect investigations and the disclosures that would occur if the class determinations the agency proposed for warranty information were made. The company explained that its responses to agency information requests ''often include warranty data for a limited number of makes, models, and years.''

Public Citizen argued that most of the information to be submitted under the early warning reporting rule is summary in nature and not specific enough to qualify for confidential treatment. Public Citizen also contended that because information to be submitted is similar or identical to the type of information submitted as part of a defect investigation, it should be treated as it currently is in a defect investigation. Public Citizen noted that the agency had speculated early in the development of the early warning reporting regulation that it thought manufacturers may not seek confidential treatment of the early warning reporting information.

We believe that the information submitted in the course of a defect investigation is qualitatively and quantitatively different from the comprehensive compendium of pre-investigation information to be submitted under the early warning reporting rule, and further that the competitive harm caused by the disclosure of some of the early warning reporting data is substantial. While the early warning reporting information will generally not be as specific as the data submitted during a defect investigation into a defined and particular problem, each company must provide data with regard to each product it manufacturers. The information relating to certain elements of reporting provides specific information that competitors are likely to find valuable and, at the same time,

[11] A different standard applies to information that is submitted voluntarily to a government agency. *See Critical Mass Energy Project* v. *Nuclear Regulatory Commission,* 975 F.2d 871 (D.C. Cir. 1992) (en banc). Since all the information provided under the early warning reporting regulation is ''required,'' *Critical Mass* does not apply.

provides comparative data across each manufacturer's entire product line.

The U.S. Court of Appeals for the D.C. Circuit has also recognized that a collection of information may be found likely to cause substantial competitive harm even if some of the individual pieces of data are not independently entitled to confidential treatment. *See Trans-Pacific Policing Agreement* v. *United States Customs Service*, 177 F.3d 1022 (D.C. Cir. 1999).[12] *See also Center for National Security Studies, et. al.* v. *U.S. Dept. of Justice*, 331 F.3d 918 (D.C. Cir. 2003) (finding that Exemption 7 protects a comprehensive list of names and other personal information even though individual pieces of information have been otherwise revealed). We further note that the D.C. Circuit has acknowledged that potential consumer misuse, with competitive consequences, is a legitimate factor to consider when determining the confidentiality of the information required to be submitted to the agency. *See Worthington Compressors* v. *Costle*, 662 F.2d 45, 52 n.43 (D.C. Cir. 1981)(trial court should consider ''whether competitors or consumers may misuse the information to the detriment'' of the submitters' competitive positions).[13]

NHTSA has consistently recognized the importance of providing accurate (and complete) information to the public about motor vehicle safety. The agency issues Consumer Advisories to help instruct consumers on the proper use of automotive products and encourages the public to refer to its New Car Assessment Program (NCAP) when choosing a vehicle to purchase. In developing the NCAP program, the agency expressed its belief that ''if consumers have valid comparative information on important motor vehicle characteristics, they will use that information in their vehicle purchase decisions.'' *See* 52 FR 31691 (Aug. 21, 1987). The agency has even rescinded certain aspects of its Consumer Information programs after concluding that the data may mislead consumers and, therefore, will not provide valuable safety information. *See* 60 FR 32918 (June 26, 1985).

Some of the commenters also raised the possibility that NHTSA's release of early warning information would impair both the agency's ability to obtain this information in the future and the quality of the information that the agency receives. For example, AIAM noted that ''[d]espite the manufacturer's intent to the contrary, individuals who prepare field reports may be less thorough or candid if they know that their reports will be available to the general public and not just to experienced, sophisticated analysts employed by the manufacturer and the government.'' Similarly, TIA asserted that, under the proposed presumptive categories, submitters ''will produce the bare minimum required.'' TIA added that if the information were protected, submitters ''will be more likely to provide robust amounts of data.''

The purpose of the TREAD Act's mandate to develop a regulation requiring the submission of the early warning data to the agency is made clear in the language of the law itself. The purpose of the early warning reporting regulation is ''to enhance *the Secretary's* ability to carry out the provisions of this chapter,'' 49 U.S.C. 30166(m)(1), which includes reducing both the number of traffic accidents and the fatalities and injuries arising from them. (Emphasis added). The Secretary has delegated those responsibilities to NHTSA. *See* 49 CFR 501.2. The agency's ability promptly to identify safety related defects would not be ''enhanced'' if disclosure of all or part of the data diminishes the volume and/or reliability of the information, nor would the public interest in motor vehicle safety be served if disclosure has the result of discouraging manufacturers from being responsive to consumer concerns that may relate to motor vehicle safety or imposing greater costs on consumers who need to address such concerns.[14] Therefore, we must consider whether the disclosure of each reporting element has the potential to impair our early detection of possible safety related defects.

The Alliance argued that all early warning data are entitled to confidential treatment under Exemption 4, although both it and General Motors placed particular emphasis on the confidential nature of warranty information. Conversely, Public Citizen argued that all of the early warning data should be categorically considered public in order to achieve what it perceives to be the purpose of the TREAD Act—that is, to give the public complete access to the data required pursuant to the TREAD Act so that the public can make its own decisions relating to products. Public Citizen contended that some Members of Congress voted for the TREAD Act only because they believed the information required by it would be publicly available, citing unreported conversations between NHTSA's and Congressional staff. [15] Public Citizen also argued that business interests failed to establish that early warning reporting submissions qualify for blanket confidential treatment under Exemption 4.

We do not believe that Exemption 4 should be applied to the early warning reporting information on a wholesale basis, whether in favor or against disclosure. Instead, we will consider the application of Exemption 4 to each ''reporting element'' to be submitted under the early warning reporting regulation. In doing so, we consider whether the disclosure of each element of information is either likely to cause substantial competitive harm or likely to impair the agency's ability to obtain necessary information in the future (and thereby impair an important government function). An analysis of the case law applying *National Parks* and its progeny, and discussing the impairment prong in particular, is included as Appendix B.

### *C. Specific Types of Information To Be Provided Under the Early Warning Regulation*

Congress provided for the agency to collect from manufacturers reports of safety related recalls and campaigns conducted outside the United States, and reports relating to claims for deaths

[12] We do not agree with Public Citizen's assertion that the analysis in *Trans-Pacific* is limited to its facts and has no applicability to other, similar situations. *Trans-Pacific* neither compels the protection of the information here, nor does it compel its disclosure. The case supports consideration of any substantial competitive harm arising from the disclosure of a comprehensive compendium of information, even if the disclosure of individual pieces of that compendium are not competitively harmful.

[13] NHTSA has long maintained that public embarrassment per se (that is, in the absence of substantial competitive harm or a deleterious effect on a government program) is not a basis for confidential treatment. The record here, however, provides support that public disclosure of some of the early warning reporting information may lead to mischaracterizations causing substantial competitive harm and may lead to less, rather than more, reporting.

[14] Section 30166(m)(4)(B) provides that ''the regulations promulgated by the Secretary under paragraph (1) may not require a manufacturer of a motor vehicle or motor vehicle equipment to maintain or submit records respecting information not in the possession of the manufacturer.''

[15] Public Citizen neither provided evidence to support this claim, nor identified those Members who might have voted differently. Further, the analysis in the memo was prepared in response to the October 20, 2000 letter and post-dated the Congressional votes. The TREAD Act passed in the House of Representatives on October 10, 2000 and in the Senate on October 11, 2000. The letter to Secretary Slater was dated October 20, 2000, and the memo was dated October 27, 2000. The TREAD Act was signed into law on November 1, 2000. The memo was placed in the public docket in March 2001. There is no reference to the memo in the Congressional record. Nor are we aware of any public dissemination of the memo, or its analysis, prior to its placement in the docket approximately five months after the TREAD Act was passed.

and serious injuries.[16] These mandates grew directly from information arising from the Ford/Firestone tire problem—reports of foreign safety related service actions and a plethora of lawsuits, neither of which had been reported to the agency. Congress also directed the agency to collect aggregate statistical information on property damage claims and authorized it to collect any other data that would assist the agency in its efforts to identify safety related defects in the field.

The purpose of the early warning reporting rule is to ensure that the agency has information from which it can detect potential safety problems and investigate them in a timely manner. We are concerned that our decisions on whether information will be disclosed could discourage manufacturers from collecting the information in the first instance, thereby reducing the information available to the agency to serve this critical function. We are also worried that the public interest in motor vehicle safety will be adversely affected if disclosure has the result of causing manufacturers to be less responsive to consumer safety concerns or to impose greater costs on consumers who need to address problems with their vehicles and equipment, thereby reducing the likelihood of repairing potential safety issues.

The case law construing Exemption 4 makes clear that, while the functioning of our early warning defect detection program is an appropriate consideration when construing the confidentiality of the data, assertions that the data may be useful in a broader public context is not. (*See* Appendix B) We must consider whether each element required to be submitted pursuant to the early warning reporting regulation is entitled to confidential treatment either because its disclosure will likely cause substantial competitive harm or because its disclosure will likely impair our ability to obtain in the future information important to our early warning defect detection program.

[16] The provision requiring the reporting of safety related recalls and other safety campaigns conducted in foreign countries on vehicles that are identical or substantially similar to those offered for sale in the United States is section 30166(l). The disclosure provision in Section 30166(m)(4)(C) does not apply to this category of information. We mention it, however, because it is a critical element of the information Congress thought important for the agency to obtain. As in the case of information delineating safety recalls in the United States and other widely distributed technical information, we do not consider this category of information confidential and will not protect it from public disclosure.

1. Production Numbers

The early warning reporting rule requires certain manufacturers to submit the number of vehicles, tires and child restraint systems, by make, model, and model (or production) year, produced during the model year of the reporting period and the prior nine model years (prior four years for child restraint systems and tires). The agency previously noted in the early warning reporting NPRM that it has generally granted confidential treatment to production data on child restraints and tires submitted to NHTSA, but that light vehicle production numbers are generally available to the public through the automotive press and have generally not been granted confidential status.

Many business interests discussed their efforts to maintain the confidentiality of their production figures. Harley Davidson and MIC stated that production numbers by model have never been generally available in the motorcycle industry. Cooper Tire submitted an affidavit, further confirmed through RMA's comments, with regard to the competitive harm that disclosure of otherwise confidential production numbers would have in the tire industry. JPMA argued that disclosure of these data would provide new entrants and competitors in the child restraint industry with information about production capacities, sales and market performance not otherwise available in the absence of considerable investment in market research. Bluebird (buses, school buses and motor homes), Utilimaster (final stage walk-in vans and freight bodies for commercial use) and the AORC (occupant restraint systems and other components) also each stated that production numbers in their segment of the industry are confidential and likely to lead to substantial competitive harm if released.

The comments substantiate that production numbers in many sectors of the automotive and equipment industries are competitively protected information, revealing otherwise unobtainable data relating to business practices and marketing strategies. Production numbers for manufacturers other than light vehicle manufacturers have been treated confidentially in the past and their disclosure is likely to cause substantial competitive harm to the businesses engaged in these industries. Accordingly, we are establishing a class determination applicable to such information.

2. Claims and Notices Involving Death, Personal Injury and Property Damage

The early warning reporting rule requires all vehicle and equipment manufacturers, including those producing less than 500 vehicles annually, to report certain information about each incident involving a death that occurred in the United States that is identified in a claim against and received by the manufacturer. They must also report information about incidents involving a death in the United States that is identified in a notice received by the manufacturer alleging or proving that the death was caused by a possible defect in the manufacturer's product. Finally, they must report on each death occurring in a foreign country that is identified in a claim against and received by the manufacturer involving the manufacturer's product, if it is identical or substantially similar to a product that the manufacturer has offered for sale in the United States.

Certain manufacturers are also required to report specified information about each incident involving an injury that occurred in the United States that is identified in a claim against and received by the manufacturer, or that is identified in a notice received by the manufacturer alleging or proving that the injury was caused by a possible defect in the manufacturer's product.

In general, the information that must be reported includes, for each claim or notice: the make, model, model year and Vehicle Identification Number of the vehicle involved, the date of the incident, the number of deaths and/or injuries involved, the state or foreign country in which the incident occurred, and each system or component that is referred to in the claim or notice. In addition, the larger vehicle manufacturers and tire manufacturers must report the numbers of claims for property damage that occurred in the United States that involve certain specified components and systems, regardless of the amount of such claims.

Industry commenters, such as TMA and MEMA/OESA, alleged that release of death and injury data will result in substantial competitive harm. Public Citizen claimed that such reports do not reveal detailed competitive information, but rather reveal only summary information about the incidents reported.

The submissions relating to claims and notices of death, personal injury or property damage involve a collection of information, many of the pieces of which are publicly available. While the data are not generally available to the

public in this type of compilation, the disclosure of this collected information is not likely to reveal business strategies or other data that can be used competitively. These kinds of claims tend to be more historical than other types of information required by the early warning reporting regulation, with any apparent trends arising over longer periods of time. Given the nature of the data, we consider it unlikely that information about claims of death, personal injury or property damage will lend itself to cross-company comparison. We further note that the claims about a particular issue against a particular manufacturer, and in particular a developing set of claims, often receive media attention and are already in the public domain.

Nor are we concerned that disclosure will detract from the future availability or reliability of this information. Manufacturers receive claims based on incidents occurring in the field, not as the result of proactive efforts to obtain data or customer feedback. They are required under 49 CFR part 576 to retain this information and do not have the option to refuse to amass it. Further, the required information relating to these claims does not involve subjective determinations or require companies to make any admissions relating to facts or legal conclusions in dispute. The reports simply reflect the existence of allegations made with regard to events that occurred in the field.

For these reasons, we have decided not to create a class determination to cover the early warning reporting information relating to claims and notices of death or personal injury, or property damage claims. We have determined that release of that data generally will neither lead to substantial competitive harm nor impair our ability to obtain such information in the future.

3. Information Regarding Warranty Claims

Manufacturers of more than 500 vehicles per year and tire manufacturers must report quarterly the number of warranty claims (adjustments for tire manufacturers), including extended warranty and good will, they paid that involved certain specified components and systems and that arose in the United States. Manufacturers of child restraint systems must combine these with the number of reportable consumer complaints. In addition, these manufacturers must provide similar historical information relating to warranty claims paid during each calendar quarter from July 1, 2000 to June 30, 2003. The information is provided on a make/model basis and categorized with reference to the twenty-two categories defined as part of implementation of the early warning regulation.

Public Citizen argued that the information is summary in nature and typical of that generally provided as part of particularized defect investigations. Conversely, almost all the corporate commenters decried the potential disclosure of warranty data claims as the revelation of vital competitive information. Comments from the Alliance and Cooper Tire included affidavits providing evidence relating to the competitive harm that would be associated with the disclosure of warranty data within the light vehicle and tire industry, respectively.

As suggested by the affidavit from AutoPacific, Inc., submitted by the Alliance, knowledge of the warranty experience of one of the specified components or systems on a make/model level can provide other manufacturers with information about the reliability of a component or system not otherwise available to them, except perhaps through extensive investment in market research. GM offered the following example:

> If supplier A offers a newly-designed system to OEMs, any OEM can tear it down and test it, but no practical test duplicates the experience that is gained from having the system in hundreds of thousands of vehicles. If OEM1 makes the investment to put the system in some of its vehicles, it would gain that field experience and could use it to make better decisions about the future use of the system. With early warning warranty data disclosure, other OEMs would have access to some of the same information and would be able to make their decisions with less extensive testing and analysis. Through the loss of its confidential information, OEM1 is forced to subsidize the other OEMs, reducing their costs at OEM1's expense.

General Motors also makes the further point that warranty cost information is critical in the competitive automotive marketplace. While particular warranty information (such as that submitted as part of a particular defect investigation) does not reveal a company's cost structure, when aggregated by make, model and model year and applied across systems, a cost index is created. As GM notes, cost structure information has consistently been considered data likely to cause substantial competitive harm if released.

Cooper Tire raised concerns that competitors could mischaracterize the data and use it to their competitive advantage. In an affidavit submitted to the docket, Cooper Tire's expert explained that the release of ''a few statistics, such as the warranty adjustment rate, without the complete background behind those statistics could lead to a very misleading picture of tire performance.'' The company indicated that the differences between warranties among otherwise identical tire lines sold to different types of users ''could lead to erroneous inferences about tire safety which, in turn could lead to erroneous and justified competitive harm.'' Many other commenters echoed this same concern, asserting that because warranty practices differ and because the raw data do not reflect any technical evaluation, the data can be used and abused competitively.

In addition to the comments filed in the docket, additional public information illustrates the extent to which the industry as a whole relies on and uses sensitive warranty information. For example, GM uses its warranty data to help it pinpoint problem areas and to help it reduce its warranty costs. *See, e.g.*, Gregory L. White, ''GM Takes Tips from CDC to Debug its Fleet of Cars,'' Wall St. J., April 8, 1999, at B1 (noting GM's adaptation of the epidemiological system used by the Centers for Disease Control and Prevention to warranty issues) *and* ''A Message to Dealers Regarding the Ford Recall of Firestone Wilderness AT Tires and General Motors Continued Use of Firestone Tires on its Vehicles'' (May 25, 2001)(stating that GM and Firestone tire engineers ''are on site at GM's tire and wheel laboratory two days a week'' to ''monitor tire warranty data''), published on GM's Web site at *http://www.gmfleet.com.*

The comments and affidavits submitted support a conclusion that the warranty information required by the early warning reporting rule—that is, the number of claims associated with specific components and systems broken down by make, model and model year (with slightly different breakouts for tires and child restraint systems)—is likely to provide competing manufacturers with sufficient information about the field experience of those components and systems to provide commercial value to competitors who may be deciding whether to purchase similar components, the price at which to purchase those components and which suppliers to choose.

While manufacturers are likely to explore the practices and policies of their competitors when reviewing any publicly available warranty claims information, the public is more likely simply to rely on generic cross-company comparisons. The warranty claims information may be used as part of

vehicle comparisons, even though the warranty terms and conditions and corporate warranty practices may differ. As a result, the potential for the warranty claims information to give rise to misleading comparisons and cause substantial competitive harm is also strong.

For the reasons set forth above, we have determined that the early warning reporting of warranty information, both as regards the quarterly reports and the one-time seeding of the system, is entitled to confidential treatment because its disclosure is likely to cause substantial competitive harm.[17]

The warranty data required by the early warning reporting regulation are also entitled to confidential treatment because their disclosure is likely to impair the agency's ability in the future to obtain and use reliable warranty information as part of its program to identify potential safety related defects. Warranty claims data—which begin to accumulate as soon as vehicles are sold and continue for the length of any given warranty policy—will be a significant indicant of potential defects. The quarterly warranty claims reports, combined initially with the historical seeding material, will help the agency to identify trends involving particular equipment and systems or components in a particular make, model and model year of a given product.

The more warranty information available to the agency, the more useful the warranty data will be in assisting the agency in identifying areas for further investigation. Warranty information is particularly important since it is generated early in the life of the vehicle, thus assisting in the prompt identification of potential defects. The record is replete with comments explaining why disclosure is likely to impair corporate willingness to provide expansive warranty coverage or to apply warranty policy in a more generous and less restrictive way. Longer warranties, and more liberal applications of warranty policy, will increase the number of claims paid by manufacturers and, therefore, the amount of data available to the agency. Moreover, changes in warranty policy caused by a reaction to disclosure of warranty data would likely reduce the ability of the agency to compare current data with historical data and to explore apparent changes in the data.

We are aware that, for marketing purposes, manufacturers may choose to make available to their customers warranties of longer duration and broader mileage (*e.g.,* a company may offer a 5 year/50,000 mile warranty or a 3 year/36,000 mile warranty), making more warranty claims information available to the agency. DaimlerChrysler, for example, lengthened its engine warranty period to gain in the competitive market. *See, e.g.*, Jeff Green, ''DC Emphasizes Warranty,'' Bloomberg, Sept. 6, 2002, available at *http://www.theautochannel.com.* Not only do warranties differ by manufacturer, they also differ based on the targeted market (*e.g.* luxury v. non-luxury) and on system components. *See*, 2003 Manufacturers' Warranties, available at *http://www.enterprise.com.*

Similarly, companies can choose strictly to adhere to their warranty limitations or, alternatively, they may adopt policies of avoiding customer dissatisfaction by covering repairs arguably no longer covered under warranty, either because they may not fall within the terms of the warranty or because they fall outside their time or mileage parameters. As pointed out in the comments, the disclosure of early warning warranty data may deter ''good will,'' customer satisfaction, and early dispute resolution efforts since such efforts will increase the number of warranty claims.[18] If these data were made public, it could lead consumers to assume that the product was of poorer quality than a similar competing product made by a manufacturer with a stricter approach to allowing warranty or ''good will'' claims.

The disclosure of early warning warranty information could lead to contraction of current warranty policies, and discourage their expansion, resulting in substantially less information available to NHTSA to screen for signs of early field problems. Thus, the disclosure of the comprehensive compendium of warranty data will likely impair the agency's defect detection program. Because disclosure of the early warning reporting warranty information is likely to cause substantial competitive harm and will likely impair the ability of the agency to obtain comprehensive warranty information in the future, we have decided to create a class determination covering this information.

4. Field Reports

Larger vehicle manufacturers and manufacturers of child restraint systems must report on a quarterly basis the total number of field reports they receive from the manufacturer's employees, representatives, and dealers, and from fleets, that are related to problems with certain specified components and systems, with respect to vehicles and restraints offered for sale, sold or leased in the United States. In addition, these manufacturers must provide copies of certain field reports received from their employees, representatives, and fleets, but are not required to provide copies of reports received from dealers. Like information relating to warranty claims, the agency is requiring the submission of historical field report information from these manufacturers to provide it with a seeding of data it can use immediately to detect any trends within the manufacturers' product lines.

The nature, quality and quantity of field reports vary significantly from company to company. Some companies actively pursue field feedback, whether directly from customers or through dealers and manufacturer representatives. Our experience in conducting defect investigations, in which we routinely receive field reports about the specific problem under investigation, shows that companies obtain information from the field in differing ways and with differing degrees of specificity and technical evaluation. Some manufacturers collect field reports that are little more than customer complaints, collected through dealers and field personnel. For others, a field report is more akin to technical investigation into a problem detected through warranty, consumer complaint or other data available to the company.

Field reports reflect the in-use experience of a manufacturer's product, collected by the company at its expense and with the intent of identifying problems associated with its products in the field. Such information would be of substantial value to competitors, who could—if this information were to be made public—avert similar issues or improve their products without the need to invest in market research, engineering development or actual

[17] In its comments, the Alliance pointed out the competitive value of warranty information by identifying publications available through sale, including one called the Automotive Industry Status Report. Public Citizen, in turn, points out that the Alliance both claims that warranty claim data are competitively protected and that they are generally available for sale. Having reviewed the website on which that publication is sold, we believe that the report provides certain summary information relating to aftermarket equipment, but that it is not comparable to the compendium of more specific data required to be submitted under the early warning reporting regulation.

[18] We recognize that this is not a matter of corporate generosity. Some companies may choose as a matter of marketing or customer relations to apply their warranty policies liberally, thus generating additional numbers of warranty claims. Other companies may make decisions aimed primarily at avoiding potential warranty liability in the context of real or potential disputes. In either event, disclosing early warning warranty claims data may discourage customer satisfaction and early dispute resolution efforts.

market experience. Competitors (and others) may also use the field report information competitively, just as with warranty data, to suggest comparisons that may merely result from differing policies and practices.

Public Citizen maintains that, because field reports are often disclosed as part of individual defect investigations, field reports and/or field report information should also be disclosed in a wholesale fashion when submitted as part of early warning data. On the other hand, manufacturers such as Utilimaster and Enterprise Fleet Services described the harmful competitive effects of disclosing the confidential field reports relating to the performance of their products. As stated by Utilimaster, ''public and private parcel delivery operations do not under any circumstances want their competitors (or competitors of their respective customers) to be aware of and exploit delivery vehicle fleet performance, maintenance or durability issues which might impact on the operational capability of the delivery company in a particular region/trading area, or on the operations of particular customer accounts.''

The same is true for other manufacturers, who collect equally proprietary information about their products that allows them to conform future design and production to field experience. Because they would have access to comprehensive data covering all products, competitors would obtain data revealing which product features, components and systems have met with consumer acceptance (and which have not), as well as what problems may be associated with particular components and systems. The information may also reveal which aspects of a vehicle's performance (whether potentially safety related or not) a manufacturer deems important in its commercial efforts. As a result, and as commenters have illustrated, the disclosure both of the hard copies of field reports and information about the number of reports associated with the components and systems specified is likely to cause substantial competitive harm. This is true both for the quarterly reports and with regard to the historical seeding field report information.

The field report data are also entitled to protection because their disclosure is likely to lead to fewer and less reliable field reports available to the agency in its efforts to identify potential safety defects promptly. The agency has required the submission of hard copies of certain field reports, as well as the numbers of all field reports, because the agency believes that this information will be especially helpful in identifying the existence of possible safety-related problems. We recognize that we cannot compel the preparation of field reports, but rather only require that manufacturers submit to the agency information about, and copies of, those field reports that companies choose to prepare and/or obtain. *See* 49 U.S.C. 30166(m)(4)(B). Therefore, we do not want to do anything to discourage manufacturers from preparing accurate and comprehensive field reports about problems with their products. Nor do we want to detract from the candor and specificity with which field reports are written.

As made clear throughout the comments, disclosure of field reports is likely to discourage candor on the part of field personnel and could adversely affect corporate policies and practices with respect to their preparation. The available evidence shows that the disclosure of the field reports and the field report data would likely inhibit a significant feature of the agency's program to encourage the collection and reporting of information and to identify the potential existence of safety defects as soon as they begin to manifest themselves in the field. It would also reduce the amount of valuable information available to the agency during our defect investigations.

Because disclosure of the field report information required by the early warning reporting rule is likely to cause substantial competitive harm and will likely impair the ability of the agency to obtain comprehensive field report information in the future, we have decided to create a class determination applicable to these data.

5. Consumer Complaints

The early warning reporting regulation also requires larger vehicle manufacturers and child restraint manufacturers to submit complaints received each quarter relating to specified components and systems.[19] Consumer complaints are defined by the regulation as:

> [A] communication of any kind made by a consumer (or other person) to or with a manufacturer addressed to the company, an officer thereof or an entity thereof that handles consumer matters, a manufacturer website that receives consumer complaints, a manufacturer electronic mail system that receives such information at the corporate level, or that are otherwise received by a unit within the manufacturer that receives consumer inquiries or complaints, including telephonic complaints, expressing dissatisfaction with a product, or relating the unsatisfactory performance of a product, or any actual or potential defect in a product, or any event that allegedly was caused by any actual or potential defect in a product, but not including a claim of any kind or a notice involving a fatality or injury.[20]

The definition recognizes that companies may receive customer input in a variety of ways and may establish differing practices for the receipt of customer complaints. Companies may enhance their ability to receive consumer complaints, for example, by increasing the staff at their toll free telephone numbers or by creating web-based systems through which consumers can make complaints instantly by email. The more consumer inputs a company receives, the more reliable the information available to it, and the agency, to assess its products' performance in the hands of consumers.

We are concerned that release of the consumer complaint information will discourage companies from actively pursuing or will restrict their ability to receive consumer feedback.[21] Consumer complaint information is a critical aspect of the data the agency intends to use to identify potential vehicle problems. Like warranty data and field reports, the aggregate information is likely to be a useful pointer to areas that, after appropriate inquiry, may lead to defect investigations and ultimately to the remedy of safety defects.

Our experience in defect investigations has been that companies generally receive considerably more consumer inputs than does the agency on any given vehicle problem. Indeed, the importance of this material increases as warranties expire and the availability of warranty claims information correspondingly diminishes. The early warning reporting regulation will make available to the agency information about the volume of complaints received by manufacturers as to each of the specified components or systems, thus considerably enhancing the agency's ability to review field experience as it arises. The disclosure of this information is likely to discourage manufacturers' proactive efforts to obtain the data or to expend sums to establish systems to receive more information or to use it more effectively.

[19] Child restraint system manufacturers will report consumer complaints and warranty data together. As to those manufacturers, the data are considered warranty data for purposes of this rule.

[20] 49 CFR 579.4(c).

[21] Harley-Davidson noted its proactive efforts to pursue consumer feedback that might not otherwise be brought to the company's attention. Efforts such as those of Harley-Davidson show that consumer complaint data may be developed by manufacturers at their own expense and for their own proprietary purposes. The record, however, does not indicate that efforts like those described by Harley-Davidson are prevalent among all manufacturers.

Consequently, such disclosure could impair the effective and efficient implementation of the agency's early warning process.

Manufacturers argued that release of consumer complaint information is likely to cause substantial competitive harm because it will be used by competing manufacturers and potentially others in the public to make cross-company comparisons. If misinterpreted, the information may result in unwarranted product disparagement, leading to substantial competitive harm. As many of the comments pointed out, consumer complaints reveal the raw, unverified perceptions of vehicle owners. They neither reflect a repair that was conducted (which is revealed by warranty claims) nor an evaluation of an event by a manufacturer's employee or dealer (which is often the source of field reports). Furthermore, the consumer complaint information is not subject to any controls or analytic rigor that we believe are imbedded into the development of public acceptance surveys.

Competitors with access to complaint data would obtain, to a certain extent, information revealing which product features, components and systems have met with consumer acceptance (and which have not) and what perceived problems may be associated with particular components and systems. The information may also reveal which aspects of a vehicle's performance (whether potentially safety related or not) a manufacturer deems important in its commercial efforts. Thus, the public disclosure of complaint data is likely to cause substantial competitive harm.

Because we have determined that the disclosure of the consumer complaint data required by the early warning reporting rule will likely impair the ability of the agency to obtain comprehensive consumer complaint information in the future and is likely to cause substantial competitive harm, we have decided to create a class determination covering these data.

## VII. Appendix A—FOIA Exemption 3 and the TREAD Act Disclosure Provision

Exemption 3 of the Freedom of Information Act prevents the disclosure of information provided to the government when Congress evidences a clear intent through a statutory scheme that prohibits disclosure. The RMA argued that Congress referred specifically to all of the information submitted under the regulations issued to implement Section 30166(m)(1), and therefore all such information must be withheld from disclosure under Exemption 3.

Exemption 3 is designed to incorporate into the FOIA exemptions other statutes that, on their face, clearly exempt information from FOIA's disclosure requirements. *See, e.g., Reporters Comm'n for Freedom of the Press* v. *Department of Justice*, 816 F.2d 730, 735 (D.C. Cir.), *modified on other grounds*, 831 F.2d 1124 (D.C. Cir. 1987), *rev'd on other grounds*, 489 U.S. 749 (1989) (providing that ''a statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure''), *and Irons & Sears* v. *Dann*, 606 F.2d 1215, 1220 (D.C. Cir. 1979) (stating that ''[o]nly explicit nondisclosure statutes that evidence a congressional determination that certain materials ought to be kept in confidence will be sufficient to qualify under the exemption.''). An Exemption 3 statute must either make clear that the agency has no discretion on whether to disclose the information or must clearly circumscribe the determination by setting forth particular criteria or specifically identifying the information to be withheld from disclosure. The RMA claims that the TREAD Act's disclosure provision does the latter.

We disagree. Had Section 30166(m)(4)(C) stated only that ''none of the information collected pursuant to the final rule promulgated under paragraph (1) shall be disclosed,'' then the provision would have provided unambiguous direction to the agency and clearly identified the information to be withheld. But that is not what the disclosure provision states. Instead, the provision makes reference to Section 30167(b) and states that ''[n]one of the information collected pursuant to the final rule promulgated under paragraph (1) shall be disclosed pursuant to section 30167(b) unless the Secretary determines the disclosure of such information will assist in carrying out sections 30117(b) and 30118 through 30121.'' By making reference to preexisting Section 30167(b), the provision suggests that Congress intended the Secretary to determine initially which of the early warning reporting information is entitled to confidential treatment as confidential business information, and, if so and only then, would consider whether disclosure was nonetheless necessary for the agency to fulfill its responsibilities.

The colloquy between Congressmen Markey and Tauzin during the TREAD Act hearings suggests that Congress intended the agency to consider the confidentiality of the early warning reporting information by applying the same legal standards otherwise applicable to information the agency requires to be submitted:

> Mr. MARKEY: First, under the section entitled ''early warning requirements,'' we provide for the reporting of new information to NHTSA generally at an earlier stage than the stage when an actual recall takes place based on the finding of a defect. To protect the confidentiality of this new early stage information, the bill provides in Section 2(b) in the subsection titled ''disclosure'' that such information shall be treated as confidential unless the Secretary makes a finding that its disclosure would assist in ensuring public safety, but with respect to information that NHTSA currently requires be disclosed to the public *it is my understanding of the committee's intention that we not provide manufacturers with the ability to hide from public disclosure information which under current law must be disclosed. Would the gentleman from Louisiana (Mr. Tauzin) agree that this special disclosure provision for new early stage information is not intended to protect from disclosure [information] that is currently disclosed under existing law* such as information about actual defects or recalls?
>
> * * * * *
>
> Mr. TAUZIN: Mr. Speaker, the gentleman is correct.[22]

The RMA and other commenters, however, pointed to other statutory schemes in which Congress' intent to ensure the confidentiality of submitted information was made clear. The AIAM, citing the practices of several State and Federal agencies, noted that these ''regulatory agencies receive product quality-related information from regulated parties for compliance evaluation purposes'' and have ''consistently follow[ed] policies of withholding such information from public disclosure.'' AIAM admitted, however, that the statutory provisions for these agencies ''differ from those affecting NHTSA'' and ''do not * * * provide controlling legal authority for NHTSA's handling of the early warning report information.''

For example, the Supreme Court has held that the statute governing the activities of the Consumer Product Safety Commission (CPSC) contains a provision constituting an Exemption 3 statute. *CPSC* v. *GTE Sylvania*, 447 U.S. 102 (1980). The Court noted that Section 6(b) of the Consumer Product Safety Act, 15 U.S.C. 2055, sets forth specific procedures that CPSC must follow prior to the release of information to the public. *Id.* at 105. Under that provision, the CPSC must ensure the accuracy of the information it plans to release, notify the manufacturer and provide it

[22] 146 Cong. Rec. H9629 (daily ed. Oct. 10, 2000) (emphasis added).

with a summary of the information that the CPSC intends to release if the summary would enable one to readily ascertain the identity of that manufacturer. *Id.* The manufacturer is also afforded an opportunity to comment on the CPSC's summary. *Id.*

Similarly, some of the statutory provisions regarding the disclosure of information the Federal Aviation Administration (FAA) receives involve very specific instances or types of information. For example, in *Public Citizen* v. *FAA*, 988 F.2d 186 (D.C. Cir. 1993), the court determined that information concerning air transportation security could be withheld under the agency's Air Security Improvement Act of 1990. Under the provisions of that Act, the court determined that ''Congress's intent was to *broaden* the FAA's power to withhold sensitive information'' held by the agency. *Id.* at 195 (emphasis in original).

Indeed, the extent of protection afforded to submitters of information under federal programs varies.[23] For example, while the Food and Drug Administration (FDA) must adhere to a statutory scheme that governs the public disclosure of information (21 U.S.C. 360j), the D.C. Circuit noted that a lower court's reading of the FDA statute as an Exemption 3 provision was ''contradicted by the language of Section 360j(h), its legislative history, and its interrelation with other provisions of the Medical Device Amendments.'' *Public Citizen Health Research Group* v. *FDA*, 704 F.2d 1280, 1284 (D.C. Cir. 1983). Under the FDA's statutory provisions, the agency must release a summary of information relating to the safety of medical devices. The court noted that the statutory provision's ''legislative history repudiates the proposition that Section 360j(h) specifically prohibits the disclosure of health and safety data that do not qualify for protection under Exemption 4 to the FOIA or [Trade Secrets Act].'' *Id.* at 1285.

The Tenth Circuit Court of Appeals considered whether another provision of the FDA statute, 21 U.S.C. 331(j), qualifies as an Exemption 3 statute. *See Anderson* v. *HHS*, 907 F.2d 936, 950 (D.C. Cir. 1990). Section 331(j) provides that any information acquired under the FDA's various information-collection statutes must not be disclosed if the information ''concern[s] any method or process which as a trade secret is entitled to protection.'' *Id.* While the court indicated that Section 331(j) qualified as an Exemption 3 statute, it held that the scope of the statute is not broader than Exemption 4 and ''cannot provide any independent justification for nondisclosure.'' *Id.*

The colloquy between Congressmen Markey and Tauzin suggests no intent to create a statutory scheme like that governing the disclosure of information from the CPSC or other provisions prohibiting disclosure. Rather, the limited legislative history of Section 30166(m)(4)(C), and the reference to Section 30167(b) in that provision, shows that Congress intended the agency to determine the confidentiality of the early warning reporting information in accordance with its long standing practice of considering whether the data constitutes confidential business information. Congress is presumed to be aware of agency practice when promulgating statutes and, therefore, is presumed to have been aware of NHTSA's practice of analyzing confidentiality claims pursuant to Exemption 4 of the FOIA. See *e.g.*, *U.S.* v. *Wilson,* 290 F.3d 347, 356 (D.C. Cir. 2002) (''Congress is presumed to preserve, not abrogate, the background understandings against which it legislates'').[24]

## VIII. Appendix B—Confidential Business Information Case Law Analysis

In assessing whether Exemption 4 applies to required submissions the Government must examine whether the disclosure is likely to impair the Government's ability to obtain necessary information in the future or is likely to cause substantial competitive harm to the submitter. Substantial competitive harm can arise when the information has significant commercial value to competitors, such as: from revealing fundamental data (such as price, cost or other proprietary business structure); from revealing information that would otherwise require investment, through reverse engineering or other means, to obtain; or from revealing business strategies by making information that otherwise would be unobtainable available to competitors.

The *National Parks* test also recognizes that the Government requires the submission of certain information because it is needed to serve an important government function. In describing this aspect of Exemption 4, the court in *National Parks* noted that:

> The ''financial information'' exemption recognizes the need of government policymakers to have access to commercial and financial data. Unless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials and the ability of the Government to make intelligent, well-informed decisions will be impaired. *Id.* at 767.

The DC Circuit nonetheless decided that the information at issue—financial information of concessionaires in national parks—did not qualify as confidential under the impairment prong because it was required by government regulation and therefore the government's ability to obtain it in the future would not be impaired by its disclosure. The court remanded the case to the district court for a determination of whether the data would cause competitive harm if released.

That the *National Parks* test was intended in part to ensure the proper functioning of government business was further made clear in *Washington Post Co.* v. *HHS*, 865 F.2d 320 (D.C. Cir. 1989). In remanding the case for the development of a more complete record, the court emphasized that it had no intention of undermining the impairment prong of *National Parks*. Instead, the *Washington Post* court prognosticated that the impairment prong would tend to focus on protecting the reliability of data, rather than the availability of data. *Id.* at 328. Thus, the court reiterated the fundamental concept that the receipt of valid information on which the government can rely in performing its programmatic functions is a critical component of considering Exemption 4 claims.

The DC Circuit once again considered its policy of encouraging the submission of information to the government in *Critical Mass Energy Project* v. *Nuclear Regulatory Commission,* 975 F.2d 871 (D.C. Cir. 1992) (en banc). In *Critical Mass,* the court distinguished between information the government compels and that which is voluntarily submitted to help further governmental functions, such as rulemakings. The court held that information voluntarily submitted to the government should be treated as confidential under Exemption 4 as long as the submitter can show that it is not customarily released to the public. *Id.* at

[23] We note that the U.S. District Court for the District of Columbia has rejected the notion that the Vehicle Safety Act generally provides Exemption 3 protection for information the agency requires be submitted. *Ditlow* v. *Volpe*, 362 F. Supp. 1321, 1324 (D.D.C. 1973) (specifically rejecting application of Exemption 3 to the Motor Vehicle Safety Act), *rev'd on other grounds, Ditlow* v. *Brinegar*, 494 F.2d 1073 (D.C. Cir. 1974).

[24] The Alliance suggests that Exemption 7 may also be applicable. Exemption 7 protects records from disclosure relating to law enforcement purposes when disclosure could reasonably be expected to interfere with the enforcement proceedings. NHTSA has historically not invoked Exemption 7 to withhold information received from manufacturers during the course of defect investigations. *See CNA* v. *Donovan*, 830 F.2d 1132, 1139 (D.C. Cir. 1987).

880. In contrast, information compelled by the government would continue to be considered under the two prongs enunciated in *National Parks.*

The Exemption 4 jurisprudence in the aftermath of *Critical Mass* makes clear that the determination of whether information should be protected under Exemption 4 may include additional considerations, but only to the extent that those considerations relate to the government functions for which the information is sought. Underpinning the jurisprudence surrounding Exemption 4 has been the acknowledgement that ''it is intended to protect the interests of both the Government and the individual,'' including advancing the efficiency of government operations. *National Parks,* 498 F.2d at 767. The concern that disclosure policy should not impair government programs remains strong whether the information is compelled (and its disclosure governed by the two prongs of *National Parks*) or voluntarily submitted (and its disclosure governed by the *Critical Mass* test). *See CAS* v. *NHTSA,* 244 F.3d at 148 (D.C. Cir. 2001) (explaining that ''[w]hen the Government obtains the information as part of a mandatory submission, the Government's access to the information *normally* is not seriously threatened by disclosure; the private interest is the principal factor tending against disclosure, and the harm to the private interest must be significant to prevent public access to information'') (emphasis added).

For example, the government may withhold information that, if disclosed, would diminish the effectiveness of a licensing program even when the basis for disclosure would arguably advance an underlying public interest. *See Public Citizen Health Research Group* v. *National Institutes of Health (PCHRG* v. *NIH*), 209 F. Supp. 2d 37, 46 (D.D.C. 2002) (finding certain royalty information confidential under Exemption 4 because ''disclosure of the royalty information would impair the efficient and effective performance of [the government's] licensing program'').

It is not sufficient, therefore, to argue that some public need unrelated to the government's function warrants the disclosure of information under Exemption 4. *Public Citizen Health Research Group* v. *Food & Drug Administration (PCHRG* v. *FDA*), 185 F.3d 898 (D.C. Cir. 1999) (rejecting the argument that a company's clinical studies, which were required to be submitted to the FDA, should be disclosed because disclosure would allow the public to learn from the company's experience). As the D.C. Circuit stated in *PCHRG* v. *FDA:*

> It is not open to Public Citizen, however, to bolster the case for disclosure by claiming an additional public benefit in that, if the information is disclosed, then other drug companies will not conduct risky clinical trials of the drugs that Schering has abandoned. That is not related to ''what the [ ] government is up to'' and the Court has clearly stated ''whether disclosure of a * * * document * * * is warranted must turn on the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny * * * rather than on the particular purpose for which the document is being requested. In other words, the public interest side of the balance is not a function of the identity of the requester * * * or of any potential negative consequences disclosure may have for the public * * * nor likewise of any collateral benefits of disclosure. *Id.* at 904 (citations omitted).

In most of the cases discussing the *National Parks* test, the courts were considering the kind of commercial information that would be created independent of any government mandate, and thus the courts have generally considered the inquiry under the impairment prong to focus on the reliability, rather than the availability, of the data. Yet, the courts have carefully maintained the vitality of the impairment prong as applied to compelled submissions and, in doing so, have maintained an analytic framework within which to ensure that the disclosure of information does not unduly impair the government's functions by reducing both qualitatively and quantitatively the data available to the government. Thus, as in *CAS* v. *NHTSA,* the Court was careful to state that ''when the Government obtains the information as part of a mandatory submission, the Government's access to information normally is not seriously threatened by disclosure,'' and in *PCHRG* v. *NIH,* the impairment of the government's program served as an independent basis for the court's refusal to require disclosure.

## IX. Regulatory Analyses and Notices

### *A. Executive Order 12866 and DOT Regulatory Policies and Procedures*

NHTSA has considered the impact of this rulemaking action under Executive Order 12866 and the Department of Transportation's regulatory policies and procedures. This rulemaking document is not economically significant. It was, however, reviewed by the Office of Management and Budget under E.O. 12866, ''Regulatory Planning and Review.'' The rulemaking action has been determined to be significant under the Department's regulatory policies and procedures, given the degree of public interest in the treatment of the early warning reporting information.

This final rule simplifies and clarifies the agency's regulation on confidential information and updates specific sections of the regulation to reflect legal developments. In addition, this final rule creates a series of class determinations applicable to those portions of the data to be submitted pursuant to the early warning reporting regulation that are determined to be entitled to confidential treatment under the procedures set forth in this final rule.

The procedural aspects of this final rule impose no new, significant burdens on submitters of information. The treatment of the early warning reporting information addresses the manner in which the agency will handle the data, and also imposes no new, significant burdens on submitters of information. Because no additional burdens are imposed, there are no costs requiring the development of a full cost/benefit evaluation.

### *B. Regulatory Flexibility Act*

We have considered the effects of this rulemaking action under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) This rule does not have a significant economic impact on a substantial number of small entities. Therefore, a regulatory flexibility analysis is not required for this action. This final rule imposes no additional obligations on the submitters of information to NHTSA beyond those otherwise required by the Vehicle Safety Act and the early warning reporting regulation. This final rule addresses the agency's treatment of early warning reporting data and simplifies procedures for all submitters, including small entities, when submitting information to the agency. The rule protects from disclosure early warning reporting information found likely to cause competitive harm. It permits the disclosure of that early warning information determined neither to cause competitive harm if released nor to impair the ability of the government to obtain the information in the future.

### *C. National Environmental Policy Act*

NHTSA has analyzed this rule for the purposes of the National Environmental Policy Act and determined that it does not have any significant impact on the quality of the human environment.

### *D. Executive Order 13132 (Federalism)*

The agency has analyzed this rulemaking action in accordance with the principles and criteria set forth in Executive Order 13132 and has

determined that it does not have sufficient federalism implications to warrant consultation with State and local officials or the preparation of a federalism summary impact statement. The rule has no substantial effects on the States, or on the current Federalism-State relationship, or on the current distribution of power and responsibilities among the various local officials.

*E. Unfunded Mandate Reform Act*

The Unfunded Mandate Reform Act of 1995 requires agencies to prepare a written assessment of the costs, benefits and other effects of proposed or final 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 more than $100 million annually (adjusted for inflation with base year of 1995). This rule will not result in the expenditure by State, local or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually.

*F. Executive Order 12778 (Civil Justice Reform)*

This rule will 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. The rule does not require submission of a petition for reconsideration or other administrative proceedings before parties may file suit in court.

*G. Paperwork Reduction Act*

The existing 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 part 512 regulation was submitted to and approved by OMB pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). These requirements were approved in February, 2002 through February 28, 2005. This final rule does not revise the existing currently approved information collection under Part 512.

Commenters to the Notice of Proposed Rulemaking objected to the submission of a ''third version'' of information for review, a request for submitters to redact personal identifiers and certain other features of the form with which the agency had proposed the submission of information claimed to be confidential. This agency has considered and addressed these concerns, including the number of copies to be submitted. These proposals, whether intended or otherwise interpreted, were not adopted.

*H. Executive Order 13045*

Executive Order 13045 (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be ''economically significant'' as defined under E.O. 12866, and (2) concerns an environmental, health or safety risk that NHTSA has reason to believe may have a disproportionate effect on children. This regulatory action does not meet either of these criteria.

*I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) requires NHTSA to evaluate and use existing voluntary consensus standards [25] in its regulatory activities unless doing so would be inconsistent with applicable law (*e.g.*, the statutory provisions regarding NHTSA's vehicle safety authority) or otherwise impractical. This requirement is not relevant to this rulemaking action.

*J. Data Quality Act*

Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (the ''Data Quality Act'') requires agencies to take certain affirmative steps to maximize the utility, objectivity, and integrity of data agencies disseminate to the public. This final rule establishes a series of class determinations applicable to those portions of the early warning reporting information determined likely, if released, to cause substantial competitive harm and to impair the government's ability to obtain data necessary to the operation of the agency's defect detection and remediation program. Such submissions are entitled to confidential treatment under Exemption 4 of the Freedom of Information Act.

The early warning reporting information determined not to be entitled to confidential treatment—reports of claims and notices of deaths, personal injury and property damage and some production numbers—involves factual matter and does not constitute data relied on or developed as part of a determination by the agency. The remainder of the early warning information is similarly factual, but will not be disclosed to the public. This rule does not implicate Data Quality Act concerns.

*K. Regulation Identifier Number (RIN)*

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in 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 amends title 49, Code of Federal Regulations, by revising Part 512 as set forth below.

**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 many copies should I submit?
512.6 How should I prepare documents when submitting a claim for confidentiality?
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 How will confidentiality determinations be made?
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 What can I do if I disagree with the determination?

[25] Voluntary consensus standards are technical standards developed or adopted by voluntary consensus standards bodies. Technical standards are defined by the NTTAA as ''performance-based or design-specific technical specifications and related management systems practices.'' They pertain to ''products and processes, such as size strength, or technical performance of a product, process or material.''

**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?
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—Certificate in Support of Request for Confidentiality
Appendix B—General Class Determinations
Appendix C—Early Warning Reporting Class Determinations
Appendix D—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 procedures and standards by which NHTSA will consider claims that information submitted to the agency is entitled to confidential treatment under 5 U.S.C. 552(b), most often because it constitutes confidential business information as described in 5 U.S.C. 552(b)(4), and to address the treatment of information determined to be entitled to confidential treatment.

### § 512.2 Applicability.

(a) This part applies to all information submitted to NHTSA, except as provided in paragraph (b) of this section, for which a determination is sought that the material is entitled to confidential treatment under 5 U.S.C. 552(b), most often because it constitutes confidential business information as described in 5 U.S.C. 552(b)(4), and should be withheld from public disclosure.

(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, as described in 5 U.S.C. 552(b)(4).

(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 if it has not been publicly disclosed and:

(i) If the information was required to be submitted and its release is likely to impair the Government's ability to obtain necessary information in the future, or is likely to 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 is customarily not 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, other than information in a class identified in Appendix C of this Part, and requesting that the information be withheld from public disclosure pursuant to 5 U.S.C. 552(b) 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 many copies should I submit?

(a) Except as provided for in subsection (c), a person must send the following in hard copy or electronic format to the Chief Counsel when making a claim for confidential treatment covering submitted material:

(1) A complete copy of the submission, and

(2) A copy of the submission containing only the portions for which no claim of confidential treatment is made and from which those portions for which confidential treatment is claimed has been redacted, and

(3) Either a second complete copy of the submission or, alternatively, those portions of the submission containing the material for which confidential treatment is claimed and any additional information the submitter deems important to the Chief Counsel's consideration of the claim.

(4) If submitted in electronic format, a copy of any special software required to review materials for which confidential treatment is requested and user instructions must also be provided.

(b) A person filing comments to a rulemaking action must additionally submit to the rulemaking docket a copy of the submission containing only the portions for which no claim of confidential treatment is made and from which those portions for which confidential treatment is claimed has been redacted.

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

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

(a) Information claimed to be confidential must be clearly identified to enable the agency to distinguish between those portions of the submission claimed to constitute confidential business information and those portions for which no such claim is made.

(b) The word ''CONFIDENTIAL'' must appear on the top of each page containing information claimed to be confidential.

(1) If an entire page is claimed to be confidential, the submitter must indicate clearly that the entire page is claimed to be confidential.

(2) 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: ''[ ].''

(3) If submitted in electronic format, a comparable method to of identifying the information claimed to be confidential may be used. If submitted on CD–ROM or other format, the item containing the information shall be labeled as containing confidential information.

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

A claim for confidential treatment must be submitted in accordance with

the provisions of this regulation to the Chief Counsel of the National Highway Traffic Safety Administration, Room 5219, 400 Seventh Street, SW., Washington, DC 20590.

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

When 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;

(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; and

(5) The information is otherwise entitled to protection, pursuant to 5 U.S.C. 552(b).

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

(e) Indicate the time period during which confidential treatment is sought; and

(f) 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 supporting information provided under § 512.4 if the submitter obtains information upon the basis of which the submitter knows that the supporting information was incorrect when provided, or that the supporting information, though correct when provided to the agency, is no longer correct and the circumstances are such that a failure to amend the supporting information is in substance a knowing concealment.

### § 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.

### § 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) 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 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.

(b) 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 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 Chief Counsel will determine whether an item of information will be afforded confidential treatment under this part.

### § 512.15 How will confidentiality determinations be made?

Information may be afforded confidential treatment if the 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 was not customarily 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).

### § 512.16 Class determinations.

(a) The Chief Counsel may issue class determinations of categories of information to be entitled to confidential treatment if the Chief Counsel determines that one or more characteristics common to each item of information in that class, will, in most cases, result in identical treatment, and further 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 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 made by the Chief Counsel are listed in Appendices B and C 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 of this part;

(2) Satisfies one or more of the applicable substantive criteria; or

(3) Satisfies one or more of the substantive criteria, but only for a certain period of time.

### § 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 Chief Counsel for good cause shown or on request from any person. An extension will be made 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 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, by certified mail, return receipt requested. The information may be made available to the public twenty (20) working days after the submitter of the information has received notice of the denial, unless a request for reconsideration is filed. The information may be released publicly on an earlier date, if the Chief Counsel determines in writing that the public interest requires that the information be made available to the public on such date.

### § 512.19 What can I do if I disagree with the determination?

(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 Chief Counsel prior to the date on which the information would otherwise be made available to the public. The determination by the Chief Counsel upon such petition for reconsideration shall be administratively final.

(b) If a person is unable to submit a petition for reconsideration within twenty (20) working days of receiving notice that a claim for confidential treatment was denied, that person may submit a request for an extension of time. The Chief Counsel must receive any request for an extension of time 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 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 twenty (20) working days after the petitioner has received notice of the denial. The information may be released publicly on an earlier date, if the Administrator 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 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 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.

(c) Should the Chief Counsel, after considering a petition for reconsideration, decide that information is not entitled to confidential treatment, the information may make the information available after twenty (20) working days after the submitter has received notice of that decision from the Chief Counsel unless the agency receives direction from a court not to release the information.

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

(a) The Chief Counsel 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 the Chief Counsel 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 the Chief Counsel 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 twenty (20) working days from the date of receipt of the notice of modification. The information may be released publicly on an earlier date, if the Administrator determines in writing that the public interest requires that the information be made available to the public on such date. 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, may be disclosed when relevant to a proceeding under the chapter.

(3) Except as specified in the next sentence, information obtained 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 is required to be disclosed under 30118(a) of title 49, except as provided in paragraph (a)(4) of this section.

(4) 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 twenty (20) 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.

(b) 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 of competent 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's name, title) and I am authorized by (company) to execute this certificate on its behalf;

(2) I certify that 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) This certification is based on the information provided by 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 that information, 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) 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

(7) 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—General Class Determinations

The Chief Counsel has determined that the following classes of information will cause substantial 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).

## Appendix C—Early Warning Reporting Class Determinations

(a) The Chief Counsel has determined that the following information required to be submitted to the agency under 49 CFR 579, subpart C, will cause substantial competitive harm and will impair the government's ability to obtain this information in the future if released:

(1) Reports and data relating to warranty claim information;

(2) Reports and data relating to field reports, including dealer reports and hard copy reports; and

(3) Reports and data relating to consumer complaints.

(b) In addition, the Chief Counsel has determined that the following information required to be submitted to the agency under 49 CFR 579, subpart C, will cause substantial competitive harm if released: Reports of production numbers for child restraint systems, tires, and vehicles other than light vehicles, as defined in 49 CFR 579.4(c).

## Appendix D—OMB Clearance

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

Issued on: July 21, 2003.

**Jeffrey W. Runge,**

*Administrator.*

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## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 648

**[Docket No. 030509120–3171–02; I.D. 033103D]**

**RIN 0648–AQ32**

## Fisheries of the Northeastern United States; Recreational Measures for the Summer Flounder, Scup, and Black Sea Bass Fisheries; Fishing Year 2003

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

**ACTION:** Final rule.