

## **Pt. 512**

APPROVED AS TO FORM AND SUBSTANCE

Date: \_\_\_\_\_.

Complaint Counsel.

Attorney for Respondent(s).

NOTE: Where intervenors appear pursuant to §511.17 the prehearing order may be suitably modified; the initial page may be modified to reflect the intervention.

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SOURCE: 68 FR 44228, July 28, 2003, unless otherwise noted.

### **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

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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: “[ ].”

(c) Submissions in electronic format—(1) Persons submitting information under this Part may submit the information in an electronic format. Except for early warning reporting data submitted to the agency under 49 CFR part 579, the information submitted in an electronic format shall be submitted in a physical medium such as a CD-ROM. The exterior of the medium (e.g., the disk itself) shall be permanently labeled with the submitter’s name, the subject of the information and the words “CONFIDENTIAL BUSINESS INFORMATION”.

(2) Confidential portions of electronic files submitted in other than their original format must be marked “Confidential Business Information” or “Entire Page Confidential Business Information” at the top of each page. If only a portion of a page is claimed to be confidential, that portion shall be designated by brackets. Files submitted in their original format that cannot be marked as described above must, to the extent practicable, iden-

tify confidential information by alternative markings using existing attributes within the file or means that are accessible through use of the file’s associated program. When alternative markings are used, such as font changes or symbols, the submitter must use one method consistently for electronic files of the same type within the same submission. The method used for such markings must be described in the request for confidentiality. Files and materials that cannot be marked internally, such as video clips or executable files or files provided in a format specifically requested by the agency, shall be renamed prior to submission so the words “Confidential Bus Info” appears in the file name or, if that is not practicable, the characters “Conf Bus Info” or “Conf” appear. In all cases, a submitter shall provide an electronic copy of its request for confidential treatment on any medium containing confidential information, except where impracticable.

(3) Confidential portions of electronic files submitted in other than their original format must be marked with consecutive page numbers or sequential identifiers so that any page can be identified and located using the file name and page number. Confidential portions of electronic files submitted in their original format must, if practicable, be marked with consecutive page numbers or sequential identifiers so that any page can be identified and located using the file name and page number. Confidential portions of electronic files submitted in their original format that cannot be marked as described above must, to the extent practicable, identify the portions of the file that are claimed to be confidential through the use of existing indices or placeholders embedded within the file. If such indices or placeholders exist, the submitter’s request for confidential treatment shall clearly identify them and the means for locating them within the file. If files submitted in their original format cannot be marked with page or sequence number designations and do not contain existing indices or placeholders for locating confidential information, then the portions of the files that are claimed to be confidential shall be described by other means

in the request for confidential treatment. In all cases, submitters shall provide an electronic copy of their request for confidential treatment on any media containing confidential data except where impracticable.

(4) Electronic media may be submitted only in commonly available and used formats.

[68 FR 44228, July 28, 2003, as amended at 72 FR 59469, Oct. 19, 2007]

**§ 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, 1200 New Jersey Avenue, SE., West Building W41-227, Washington, DC 20590.

[72 FR 59470, Oct. 19, 2007]

**§ 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 pub-

lic, 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

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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 sup-

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plement 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 agency 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.

[68 FR 44228, July 28, 2003, as amended at 69 FR 21425, Apr. 21, 2004]

**§ 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 TO PART 512—CERTIFICATE IN SUPPORT OF REQUEST FOR CON- FIDENTIALITY

##### *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 TO PART 512—GENERAL CLASS DETERMINATIONS

The Chief Counsel has determined that the following types of information would presumptively be likely to result in substantial competitive harm if disclosed to the public:

- (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;



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(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).

[68 FR 44228, July 28, 2003, as amended at 69 FR 21425, Apr. 21, 2004]

### **APPENDIX C TO PART 512—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, if released, is likely to cause substantial harm to the competitive position of the manufacturer submitting the information and is likely to impair the government's ability to obtain necessary information in the future:

(1) Reports and data relating to warranty claim information and warranty adjustment information for manufacturers of tires;

(2) Reports and data relating to field reports, including dealer reports, product evaluation reports, and hard copies of field reports; and

(3) Reports and data relating to consumer complaints.

(b) The Chief Counsel has determined that the following information required to be submitted to the agency under 49 CFR 579, Subpart C, if released, is likely to cause substantial harm to the competitive position of the manufacturer submitting the information:

(1) Reports of production numbers for child restraint systems, tires, and vehicles other than light vehicles, as defined in 49 CFR 579.4(c); and

(2) Lists of common green tire identifiers.

[72 FR 59470, Oct. 19, 2007]

### **APPENDIX D TO PART 512—VEHICLE IDENTIFICATION NUMBER INFORMATION**

The Chief Counsel has determined that the disclosure of the last six (6) characters, when disclosed along with the first eleven (11) characters, of vehicle identification numbers reported in information on incidents involving death or injury pursuant to the early warning information requirements of 49 CFR part 579 will constitute a clearly unwarranted invasion of personal privacy within the meaning of 5 U.S.C. 552(b)(6).

[72 FR 59470, Oct. 19, 2007]

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### **APPENDIX E TO PART 512—CONSUMER ASSISTANCE TO RECYCLE AND SAVE (CARS) CLASS DETERMINATIONS**

(a) The Chief Counsel has determined that the following information required to be submitted to the agency under 49 CFR part 599, if released, is likely to cause substantial harm to the competitive position of the entity submitting the information:

(1) Vehicle Manufacturer Issued Dealer Identification Code;

(2) Dealer Bank Name, ABA Routing Number and Bank Account Number; and

(3) CARS Dealer Code and Authorization Code.

(b) The Chief Counsel has determined that the disclosure of the new vehicle owner's name, home address, telephone number, state identification number and last six (6) characters, when disclosed along with the first eleven (11) characters, of the new vehicle identification numbers reported in transactions submitted to the agency under 49 CFR Part 599 will constitute a clearly unwarranted invasion of personal privacy within the meaning of 5 U.S.C. 552(b)(6).

[74 FR 37897, July 29, 2009]

### **APPENDIX F TO PART 512—OMB CLEARANCE**

The OMB clearance number for this part 512 is 2127–0025.

[74 FR 37897, July 29, 2009]

## **PART 520—PROCEDURES FOR CONSIDERING ENVIRONMENTAL IMPACTS**

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