

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

[Docket No. NHTSA-06-26140; Notice 2]

RIN 2127-AJ95

**Confidential Business Information**

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), DOT.  
**ACTION:** Final rule.

**SUMMARY:** This final rule addresses the confidentiality of certain information that manufacturers of motor vehicles and motor vehicle equipment submit to NHTSA pursuant to the early warning reporting (EWR) rule. The agency is establishing class determinations that certain categories of EWR information are confidential, based on Exemption 4 of the Freedom of Information Act (FOIA). These categories of EWR data are production numbers (other than for light vehicles), the numbers of consumer complaints, the numbers of warranty claims (warranty adjustments in the tire industry), the numbers of field reports, copies of field reports and common green tire identifier information. In addition, based on the privacy interests protected by FOIA Exemption 6, the rule includes a class determination encompassing the last six (6) characters of the vehicle identification numbers (VINs) which are reported in certain EWR submissions involving deaths and injuries. This final rule also clarifies the agency's general requirements regarding confidentiality markings in submissions in electronic media.

**DATES:** This final rule is effective on November 19, 2007. If you wish to submit a petition for reconsideration of this rule, your petition must be received by December 3, 2007.

**ADDRESSES:** Petitions for reconsideration should refer to the docket number and be submitted to: Administrator, National Highway Traffic Safety Administration, 1200 New Jersey Avenue, SE., West Building Fourth Floor, Washington, DC 20590, with a copy to the DOT docket. Copies to the docket may be submitted electronically through the Federal E-Rulemaking Portal at <http://www.regulations.gov>. Follow the online instructions for submitting comments.

You may call Docket Management at 202-366-9324. The Docket room (ground floor Room W12-140, 1200 New Jersey Avenue, SE.) hours are from 9 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Michael Kido, Office of Chief Counsel, NHTSA, telephone (202) 366-5263, 1200 New Jersey Avenue, SE., Washington, DC 20590.

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**I. Background**

On October 31, 2006, NHTSA published a notice of proposed rulemaking (NPRM) regarding the confidentiality of certain early warning reporting (EWR) data submitted to the agency by manufacturers of motor vehicles and motor vehicle equipment. 71 FR 63738. In that notice, the agency proposed to create class determinations that specified EWR data would be confidential based on the criteria applicable to required submissions under Exemption 4 of the Freedom of Information Act (FOIA). In addition, some of the data in VINs would be confidential based on FOIA Exemption 6. The October 2006 NPRM also proposed to clarify requirements applicable to persons seeking confidential treatment for information contained on electronic media. In this final rule, the agency adopts the

proposed class determinations and amends the submission process for requesting confidential treatment for information on electronic media. The background and genesis of this rulemaking is summarized below.

**A. National Traffic and Motor Vehicle Safety Act**

In 1966, Congress enacted the National Traffic and Motor Vehicle Safety Act (Safety Act) with the purpose of reducing traffic accidents and deaths and injuries to persons resulting from traffic accidents. 49 U.S.C. 30101.<sup>1</sup> Since it was amended in 1974, the Safety Act has contained a series of provisions that address motor vehicles and motor vehicle equipment that contain a potential or actual defect that is related to motor vehicle safety.<sup>2</sup>

The Safety Act requires a manufacturer to notify NHTSA and the vehicle or equipment owners if it learns of a defect and decides in good faith that the defect is related to motor vehicle safety. 49 U.S.C. 30118(c). This duty is independent of any action by NHTSA.<sup>3</sup> Ordinarily, a manufacturer's notice is followed by the manufacturer's provision of a free remedy to owners of defective vehicles and equipment. See 49 U.S.C. 30120. Collectively, the manufacturer's notice and remedy are known as a recall.

Congress also provided NHTSA with considerable investigative and enforcement authority. The Safety Act authorizes NHTSA to conduct investigations and to require manufacturers to submit reports to enable the agency to determine whether the manufacturer has complied with or is complying with the statute, including its duty to conduct recalls when warranted. 49 U.S.C. 30166(b), (e). An investigation may culminate in an order to the manufacturer to provide notification of a safety-related defect or a noncompliance to owners of the vehicle or equipment. 49 U.S.C. 30118(a), (b).

**B. TREAD Act—Early Warning Reporting**

For several decades preceding the enactment of the Transportation Recall Enhancement, Accountability, and

<sup>1</sup> Pub. L. 89-563, 80 Stat. 718. This preamble will use the current citations to the United States Code. In 1994, the Safety Act, as amended, was repealed, reenacted, and recodified without material change as part of the recodification of Title 49 of the United States Code. See Pub. L. 103-272, 108 Stat. 745, 1379, 1385 (1994) (repealing); *id.* at 745, 941-73 (1994) (reenacting and recodifying without substantive changes).

<sup>2</sup> Pub. L. 93-492, 88 Stat. 1470 (1974).

<sup>3</sup> *United States v. General Motors Corp.*, 574 F. Supp. 1047, 1049 (D.D.C. 1983).

Documentation (TREAD) Act of 2000,<sup>4</sup> the Safety Act provided for limited submissions of information by a manufacturer to NHTSA prior to the manufacturer's submission of a notice of a safety-related defect. *See* 49 U.S.C. 30118(c); 49 CFR part 573. Manufacturers were required to submit copies of technical service bulletins and other communications to the agency. *See* 49 U.S.C. 30166(f); 573.8 (1999); 66 FR 6532, 6533 (Jan. 22, 2001). NHTSA also received consumer complaints. At times, this information provided a basis for opening an investigation and at times it did not. This practical limitation on NHTSA's investigations manifested itself in 2000 when it was revealed that under the limited level of reporting then required, the agency had not been provided sufficient information to identify defects in Firestone tires mounted on Ford Explorers. 66 FR at 6534. There were numerous fatalities before NHTSA opened an investigation and Firestone conducted recalls of its tires.

In response to these and other shortcomings in the Safety Act, on November 1, 2000, Congress enacted the TREAD Act. The TREAD Act added provisions to the Safety Act that expanded the scope of the information manufacturers must submit to NHTSA prior to a manufacturer-initiated recall. In relevant part, the TREAD Act required the Secretary of Transportation to publish a rule setting out the early warning reporting requirements to enhance the agency's ability to carry out the Act. 49 U.S.C. 30166(m). In general, the TREAD Act authorized the agency to require manufacturers to submit information that may assist in the early identification of defects related to motor vehicle safety.

In July 2002, pursuant to the TREAD Act, NHTSA promulgated the Early Warning Reporting (EWR) rule. 67 FR 45822 (July 10, 2002).<sup>5</sup> Generally, the EWR rule required manufacturers of automobiles and other light vehicles, medium-heavy trucks and buses, motorcycles, and trailers that produce or sell 500 or more vehicles per year in any of these industry sectors and manufacturers of child restraints and tires (except as to relatively low production tire lines) to submit data regarding production numbers (cumulative total vehicles or equipment

manufactured annually), incidents involving death or injury based on claims and notices, property damage claims, consumer complaints, warranty claims paid, and field reports on a quarterly basis. *See* 49 CFR 579.21–579.26. Collectively this information is referred to as EWR data. In this notice, we refer to the vehicle and tire manufacturers that report under 49 CFR 579.21–579.24 and 579.26 as larger manufacturers.<sup>6</sup> The information is submitted electronically to the agency in a standardized format. *See* 49 CFR 579.29.

More specifically, the categories of information on which these manufacturers of light vehicles, medium-heavy vehicles and buses, motorcycles, trailers, tires and child restraints generally report under the EWR rule are:

- *Production.* These manufacturers must report the number of vehicles, child restraint systems, and tires, by make, model, and model (or production) year, during the reporting period and the prior nine model years (prior four years for child restraint systems and tires).
- *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 a foreign country 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 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 claims.* These manufacturers (other than child restraint system manufacturers) must report the numbers of claims for property damage 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. Manufacturers of child restraint

systems must report the combined number of such consumer complaints and warranty claims.

- *Warranty claims.* These manufacturers must report the number of warranty claims (adjustments for tire manufacturers), including extended warranty and good will, they pay that are related to problems with certain specified components and systems. 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. In addition, manufacturers must provide copies of field reports received from their employees, representatives, and fleets, but are not required to provide copies of reports received from dealers and product evaluation reports.

Tire manufacturers must also provide information on their common green tire lines:

- *Common green tires.* Tire manufacturers must identify tires that are produced to the same internal specifications but that have, or may have, different external characteristics and may be sold under different tire line names.

#### C. Confidentiality of EWR Data

The EWR rule did not address the confidentiality of EWR data. It noted, however, that this issue would be considered as part of the proposed amendments to NHTSA's confidential business information rule. *See* 67 FR at 45866, n.6.

In July of 2003, NHTSA addressed the confidentiality of EWR data in its general rule on Confidential Business Information (CBI). 49 CFR Part 512, 68 FR 44209 (July 28, 2003). The 2003 CBI rule addressed the confidentiality of EWR information in a new Appendix C, which set forth class determinations treating certain EWR information as confidential based on FOIA Exemption 4. In particular, the rule determined that EWR data on production numbers (except light vehicles), consumer complaints, warranty claims, and field reports including copies of field reports, were confidential. 49 CFR Part 512 Appendix C (2003). The agency based these class determinations on the substantial competitive harm and impairment standards of FOIA Exemption 4. *See* 5 U.S.C. 552(b)(4); 49 CFR Part 512 App. C (2003). The 2003 CBI rule did not resolve the confidentiality of EWR data on deaths and injuries, or on property damage claims.

In April 2004, NHTSA amended the CBI rule in its response to administrative petitions for reconsideration of the July 2003 rule. 69

<sup>4</sup> Pub. L. 106–414, 114 Stat. 1800.

<sup>5</sup> Hereafter, NHTSA published amendments to the EWR rule. As used herein, the references to the EWR rule are to the rule as amended. The reader should note that the discussion of the EWR rule in this notice is a summary. The full text of the rule and associated Federal Register notices should be consulted for a complete description.

<sup>6</sup> Manufacturers other than larger vehicle and tire manufacturers and child restraint manufacturers have limited EWR obligations. *See* 49 CFR 579.27.

FR 21409 (April 21, 2004). Specifically, the agency added two class determinations to Appendix C. One class determination, based on FOIA Exemption 4, covered common green tire identifiers submitted by tire manufacturers under the EWR rule, 49 CFR 579.26(d). A second class determination, based on FOIA Exemption 6, covered the last six (6) characters of vehicle identification numbers (VINs) contained in EWR death and injury reports. *See, e.g.* 49 CFR 579.21(b)(2).

#### *D. Litigation Challenging the 2003–2004 CBI Rule*

Public Citizen filed a lawsuit challenging NHTSA's class determinations in Appendix C to 49 CFR Part 512. The Rubber Manufacturers Association (RMA) intervened and asserted, among other things, that in light of a disclosure provision in the TREAD Act,<sup>7</sup> NHTSA was precluded from disclosing all EWR data, subject to a limited exclusion. In a March 31, 2006 decision, the United States District Court for the District of Columbia addressed some of Public Citizen's claims. The Court upheld the agency's authority to promulgate the regulation making categorical confidentiality determinations for classes of EWR data. *Public Citizen, Inc. v. Mineta*, 427 F. Supp. 2d 7, 12–14 (D.D.C. 2006). The Court concluded, however, that NHTSA had not provided adequate notice and an opportunity to comment on those determinations in the proposed rule. *Id.* at 14–17. The Court remanded the matter to NHTSA but did not address the parties' other claims. *Id.* Thereafter, in a supplemental opinion, the Court addressed RMA's claim that the disclosure of EWR data was precluded by the disclosure provision in the TREAD Act and FOIA Exemption 3, 5 U.S.C. 552(b)(3), which provides for the withholding of information when disclosure of that information is prohibited by another statute.<sup>8</sup> *Public*

*Citizen, Inc. v. Mineta*, 444 F. Supp. 2d 12 (D.D.C. 2006). The District Court held that the TREAD Act's disclosure provision was not an Exemption 3 statute. RMA appealed the District Court's judgment to the U.S. Court of Appeals for the District of Columbia Circuit (No. 06–5304) and that case is currently pending.

#### **II. 2006 Notice of Proposed Rulemaking**

In light of the District Court's decisions, on October 31, 2006, NHTSA published an NPRM addressing the confidentiality of certain EWR information. In short, the agency proposed class determinations that production numbers for reporting sectors other than light vehicles, consumer complaints, warranty claims (warranty adjustments in the tire industry), field reports (including copies of field reports) and common green tire identifier information would be confidential. This proposal was based on the criteria in FOIA Exemption 4. 71 FR at 63741–42. Under Exemption 4, where the submission of information to the government is mandatory, as is reporting required by the EWR rule, the information is confidential if its disclosure is likely to cause substantial harm to the competitive position of the person from whom the information was obtained or to impair the Government's ability to obtain necessary information in the future. This proposal was consistent with the 2003 and 2004 rules, and was based on the docket for that rulemaking. *See* NHTSA Docket No. 2002–12150 (*available at* <http://dms.dot.gov> which is being transferred to <http://www.regulations.gov>).

More particularly, in formulating the proposal, NHTSA considered comments from a diverse cross-section of the automotive industry and a non-governmental organization. Commenters included the Automotive Occupant Restraints Council (AORC), Bendix Commercial Vehicle Systems (Bendix), Blue Bird Body Company (Blue Bird), Enterprise Fleet Services (Enterprise), Harley-Davidson Motor Company (Harley-Davidson), the Juvenile Products Manufacturers Association (JPMA), the Motor and Equipment Manufacturers Association and the Original Equipment Suppliers Association (MEMA/OESA), Hella North America (Hella) (which primarily referred to the comments from MEMA/OESA), the Motorcycle Industry Council, the Tire Industry Association (TIA), Utilimaster Corporation (Utilimaster), WABCO North America (WABCO), and Workhorse Custom Chassis (Workhorse). NHTSA also

considered comments by Public Citizen and its litigation group.

As in the previously remanded rule, the agency's October 2006 NPRM also proposed creating a class determination for the last six (6) characters of VINs of vehicles allegedly involved in deaths and injuries reported in the EWR data. *See* 71 FR at 63745 and 69 FR at 21416. This was based on Exemption 6 of the FOIA, which provides for withholding information that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy. We noted our ability to obtain personal information regarding individual owners and past owners using a VIN and expressed our concern over the disclosure of full VINs of vehicles reportedly involved in an event resulting in an injury or fatality. Notwithstanding this limited redaction, we noted that the public would be able to identify the make, model, and model year of the vehicle involved in an injury- or fatality-producing incident reported through EWR data.

The NPRM published in October of 2006 explained that we were not proposing class determinations of confidentiality of other categories of EWR information, namely, information on incidents involving deaths and injuries, and on property damage claims. *See id.* at 63745–46. Further, the agency noted that the issue of whether the TREAD Act disclosure provision qualifies as a FOIA Exemption 3 statute was pending in the Court of Appeals and indicated that the agency would act in a manner consistent with that ruling once issued.

Apart from the confidentiality of EWR data, the NPRM proposed clarifications to the submission procedures to address recurring problems encountered by the agency with requests for confidential treatment contained on electronic media such as CDs or DVDs.

In response to the October 2006 NPRM, a number of trade associations representing a variety of automotive sectors, companies, consumer groups and individuals submitted comments. The industry commenters included the Alliance of Automobile Manufacturers (the Alliance), Association of International Automobile Manufacturers (AIAM), General Motors North America (GM), National Marine Manufacturers Association (National Marine), Nissan North America (Nissan), Rubber Manufacturers Association (RMA), Truck Manufacturers Association (TMA), and Utility Trailer Manufacturing (Utility)—all of which generally supported the proposed class determinations based on FOIA Exemptions 4 and 6.

<sup>7</sup> 49 U.S.C. 30166(m)(4)(C). In reference to information provided by manufacturers pursuant to the EWR rule, this provision states: "Disclosure. None of the information collected pursuant to the final rule promulgated under paragraph (1) [the EWR rule] 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."

<sup>8</sup> Exemption 3 applies when information is "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).

Non-industry commenters included numerous individual consumers and groups (Public Citizen, American Association for Justice (AAJ), and Quality Control Systems (Quality Control)).<sup>9</sup> These commenters generally criticized the proposed class determinations and asked that the agency withdraw its proposal. Many individual commenters also appear to have mistakenly believed that the proposal would affect information (e.g., consumer complaints and information produced during defect investigations) that is already made available to the public through the agency's Web site.

### III. The Final Rule

The rule that NHTSA is publishing today creates class determinations that EWR data on production numbers (other than for light vehicles), the numbers of consumer complaints, warranty claims and field reports, copies of field report documents, and common green tire identifier information are confidential. These class determinations, which are included in a new Appendix C to 49 CFR Part 512, are based on FOIA Exemption 4. Second, the rule creates a class determination based on FOIA Exemption 6 that covers the last six (6) characters of VINs contained in EWR reports pertaining to incidents involving death or injury. These 6 characters would be redacted from injury or fatality information contained in EWR submissions. Thus, absent an individual manufacturer's request for confidentiality for particular EWR death and injury reports, these reports would be released to the public, except for the last 6 characters of a VIN. This class determination is in a new Appendix D to 49 CFR Part 512.

The agency also is modifying the procedural provisions of 49 CFR 512.6 with respect to the submission of information contained on electronic media for confidential treatment. The rule adopts a slightly modified version of the changes proposed in our NPRM by permitting some flexibility in the identification of confidential information and pagination requirements. Details of the new procedures are discussed under Section VI. *Identifying Confidential Business Information Located in Electronic Files.*

Finally, this rule updates the agency's contact information to reflect the Department of Transportation's new address. This change is incorporated into 49 CFR 512.7.

Our rationale for the final rule follows.

#### A. Determinations of the Confidentiality of EWR Data Are Based on FOIA Exemptions 4 and 6

The confidentiality of most EWR data is based on FOIA Exemption 4, 5 U.S.C. 552(b)(4). FOIA Exemption 4 provides for the withholding of "trade secrets and commercial or financial information obtained from a person and privileged or confidential". Under Exemption 4, the standard for assessing the confidentiality of information that parties are required to submit to the government is whether "disclosure of the information is likely to have either of the following effects: (1) To impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial competitive harm to the competitive position of the person from whom the information was obtained."<sup>10</sup> *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). These two alternative tests are referred to as the impairment prong and the competitive harm prong.

Under the competitive harm prong of the *National Parks* test, there must be "actual competition and a likelihood of substantial competitive injury" from disclosure of the information. *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987). This standard requires only that disclosure of information would "likely" cause competitive harm, for whatever reasons. *McDonnell Douglas Corp. v. U.S. Dept. of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004); see also *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 341 (D.C. Cir. 1989). Under this prong, the agency assesses the likelihood of substantial injury; it does not make that assessment and then further balance it against other matters such as the public's interest in the information.

In fact, the D.C. Circuit has firmly rejected the contention that under Exemption 4 a court should gauge whether the competitive harm to an

entity submitting confidential information from the public disclosure of the information is outweighed by the strong public interest in the information. As discussed below, in *Public Citizen Health Research Group v. FDA*, 185 F.3d 898, 904–05 (D.C. Cir. 1999), the court held that the appropriate balancing is reflected in the test of confidentiality set forth in *National Parks*. There is no further balancing of the public's interest in the information.

#### B. Approach—Class Determinations v. Individual Assessments

As explained in the NPRM, the District Court in *Public Citizen, Inc. v. Mineta*, 427 F.Supp. 2d 7, 12–14 (D.D.C. 2006), ruled that NHTSA had the authority to promulgate the 2003 CBI rule making categorical confidentiality determinations for classes of EWR data. See 71 FR at 63740. Consistent with the District Court's opinion, the agency proposed a rule to address the confidentiality of EWR information through specific class determinations based on FOIA Exemptions 4 and 6. *Id.* We pointed out that this proposal was largely similar to our prior determinations. 71 FR at 63740 and 63741.

Both industry and non-industry commenters provided views on the proposed adoption of class determinations. Industry comments (e.g., AIAM, the Alliance, and Nissan) were predicated in part on the recurring nature of early warning reporting under 49 CFR Part 579. In connection with each quarterly submission of EWR data, manufacturers would request confidential treatment for the EWR data and would provide the same justifications in each quarterly request. This result, the manufacturers maintained, would create significant administrative burdens for both the submitting entities and the agency. Nissan added that such a burden was not anticipated by the EWR rule and would be inconsistent with the TREAD Act's premise against creating undue burdens in implementing the EWR program. See also H.R. Rep. No. 106–954, at 14 (Oct. 10, 2000) (pointing out that the agency's EWR rule "may not impose requirements that are unduly burdensome to a manufacturer, taking into account the manufacturer's cost of complying with such requirements").

Non-industry commenters criticized the agency's proposed class determination approach. For example, Quality Control suggested that the agency apply a presumption of non-confidentiality (i.e., of disclosure) to whatever class determinations that the

<sup>9</sup> The vast majority of individuals who commented appeared to believe that the agency, in light of the class determinations, would cease making public information pertaining to defect investigations and recalls. The class determinations adopted today address only EWR data and do not pertain to other information that the agency currently discloses to the public. The agency will continue to make this information publicly available.

<sup>10</sup> The term "trade secrets" has been narrowly defined by the Court of Appeals for the District of Columbia Circuit for the purpose of FOIA Exemption 4 as encompassing "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." *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983).

agency adopts. Public Citizen asserted that the District Court's holding regarding the agency's authority to promulgate class determinations based on FOIA exemptions was in error. Thus, Public Citizen disputed the legality of creating class determinations. It also pointed out that the agency had previously proposed the creation of presumptively nonconfidential categories that in Public Citizen's view would cover complaints, property damage and paid warranty claims. In comments to the agency's prior rulemaking, Public Citizen expressed support for class determinations that applied a presumption in favor of broad disclosure of EWR information.

As noted in the summary of this rule, NHTSA has decided to promulgate class determinations on the confidentiality of some but not all categories of EWR data. In adopting this approach, we have considered a number of matters. First, we have considered whether class determinations may lawfully be adopted. As explained by the District Court, NHTSA may adopt categorical rules to manage the tasks assigned to it by Congress under the TREAD Act. *Public Citizen*, 427 F. Supp. 2d at 13.

Second, we have identified and assessed the alternatives. One alternative is to require manufacturers to submit individual requests for confidentiality for each quarterly submission of EWR data. A second alternative is to adopt binding class determinations. Class determinations could be adopted on a category-by-category of EWR data basis, where warranted, as was proposed in the October 2006 NPRM and had been adopted in the rule that was remanded by the District Court. A variation on this approach, which was not proposed, would be class determinations that cover all EWR data. A third alternative is presumptive categorical determinations of confidentiality.

In considering the alternatives, two significant concerns are the provision of direction to the regulated entities and predictability. About 500 manufacturers regularly report EWR data. One general concern is providing direction to them regarding the confidentiality of EWR data. A related and more specific concern is that the agency convey its views, not only on procedures, but on the substance of what they must show in seeking confidentiality and/or on whether some or all of the information is confidential.

Another concern is consistency. As detailed in the EWR rule, there are common data elements in the EWR submissions. NHTSA is concerned that it provides consistent determinations of

the confidentiality of data reported on the common data elements. The common data elements in EWR submissions exist both across and within EWR categories of vehicle and equipment manufacturers. For example, most categories of larger manufacturers regulated under the EWR rule submit consumer complaint data. *See* 49 CFR 579.21(c) (light vehicles), 579.22(c) (medium heavy vehicles and buses), 579.23(c) (motorcycles), 579.24(c) (trailers).<sup>11</sup> And most reporting sectors submit warranty claims data. *See* 49 CFR 579.21(c) (light vehicles), 579.22(c) (medium heavy vehicles and buses), 579.23(c) (motorcycles), 579.24(c) (trailers), 579.26(c) (warranty adjustments in the tire industry).<sup>12</sup> All the categories of vehicle manufacturers submit field reports, as do child restraint manufacturers. *See* 49 CFR 579.21(c) (light vehicles), 579.22(c) (medium heavy vehicles and buses), 579.23(c) (motorcycles), 579.24(c) (trailers); 579.25(c) (child restraints).

Within the categories of manufacturers that submit EWR data, there are common data elements. For example, all light vehicle manufacturers report on the same 18 different systems and components. These include, for example, steering systems, air bags, seat belts and wheels. *See* 49 CFR 579.21(b)(2), (c). Child restraint manufacturers report on the same elements such as buckles and harnesses, and handles. 49 CFR 579.25(b)(2), (c). And tire manufacturers report on the same items, such as the tread and sidewall. 49 CFR 579.26(b)(2), (c). In addition, most of the vehicle categories include some of the same and similar reporting elements, including brakes, electrical, exterior lighting, tires, and wheels. *See* 49 CFR 579.21(c) (light vehicles), 579.22(c) (medium heavy vehicles and buses), 579.23(c) (motorcycles), 579.24(c) (trailers). The data elements are largely the same.

Third, the agency is concerned about the burden on the manufacturers in submitting individual requests for confidentiality, and the burden on the agency of processing individual requests and ruling on them. Also, if NHTSA staff denies a request, the party may petition for administrative reconsideration by NHTSA's Chief Counsel, who issues the final agency action on the request. 49 CFR 512.19. This creates additional burdens on persons seeking confidentiality and on the agency.

<sup>11</sup> *See also* 49 CFR 579.21(c) (child restraint manufacturers report combined consumer complaints and warranty claims).

<sup>12</sup> *See* previous footnote.

NHTSA is also concerned about other aspects of the administration of its programs. For example, the agency considers the burdens on small businesses.

If NHTSA were simply to require individual requests for confidential treatment with the submission of EWR data on a quarterly basis under 49 CFR Part 512 without the Appendices on the confidentiality of EWR data (Appendices C and D in today's rule), a large number of manufacturers would submit requests for confidentiality, without meaningful direction from the agency. In the absence of the direction that would be provided by a class determination, manufacturers likely would submit a wide variety of requests. They would be written in different ways (as requests under 49 CFR 512.8 now are), with a broad range of statements of fact and opinion, and rationales. NHTSA would make ad hoc determinations of the confidentiality of the EWR data for which confidentiality was requested. Some requests would meet the standards for confidential treatment under Exemption 4 of the FOIA, and some would not. Agency denials of requests likely would be followed by requests for reconsideration. The process would be anything but orderly.

Moreover, there would be a large number of submissions. Based on the assumption that almost all of the 500 larger manufacturers that regularly submit EWR data would request confidentiality on a quarterly basis, there would be about 2000 requests for confidential treatment of EWR data per year.

The EWR submissions include separate data entries for numerous makes/models/model years and systems and components, and the amount of information is substantial. Since the inception of the EWR rule, NHTSA has received a large volume of data and documents from reporting manufacturers. For the period from 2004 through the end of 2006, the agency received millions of items of aggregate data from the approximately 500 entities that regularly report EWR data to the agency.<sup>13</sup> From the approximately 60 light vehicle manufacturers who regularly submit EWR data, the agency has received information pertaining to nearly 163 million warranty claims, nearly 9.5 million consumer complaints, over 5.8 million field reports, and over half a million distinct field report

<sup>13</sup> The term "aggregate data" refers to the quarterly submissions of the numbers of paid warranty claims, consumer complaints, field reports, and property damage claims received by the agency.

documents. Manufacturers in other EWR reporting sectors, in addition to reporting detailed quarterly production data, likewise submitted large amounts of data. Medium-heavy bus and truck manufacturers submitted information regarding over 8.6 million warranty claims, nearly 277,000 complaints, over 301,000 field reports, and nearly 20,000 distinct field report documents; trailer manufacturers submitted information covering over 1.3 million warranty claims, nearly 77,000 complaints, over 20,000 field reports, and over 400 distinct field report documents; and motorcycle manufacturers provided nearly 889,000 warranty claims, nearly 41,000 complaints, over 26,000 field reports, and nearly 26,000 distinct field report documents. Motor vehicle equipment manufacturers submitted large volumes of EWR data as well. Child restraint manufacturers submitted information on over 50,000 complaints and warranty claims, over 8,500 field reports, and provided over 4,500 distinct field report documents. Tire manufacturers provided data on over 1.3 million warranty adjustment claims.

If the agency were to review requests for confidentiality from individual manufacturers, inevitably there would be inconsistent resolutions on the confidentiality of data submitted in the numerous data elements in EWR reports. These different outcomes would stem from the different approaches in manufacturers' requests and different assertions in them, different agency staff reviewing different requests, and pressure to resolve requests in order to minimize the inevitable backlog, discussed below. Thus, a third problem would be consistency.

In addition, a requirement that manufacturers submit individual requests for confidentiality would pose a substantial burden on the manufacturers and the agency. As noted above, there likely would be about 2000 requests for confidentiality of EWR data per year. Most would cover the range of EWR data, including production data, consumer complaints, warranty claims and field reports. Some, such as would be expected from Goodyear based on its historic practices,<sup>14</sup> would cover EWR information on deaths and injuries and property damage claims, which are not covered by today's rule. The preparation of these requests would impose a substantial burden on the manufacturers. The burden would fall

disproportionately on the manufacturers that are not comparable in size to companies such as Toyota and General Motors, and have limited to no experience in requesting confidentiality from NHTSA. The preparation of the initial requests would be particularly burdensome. Ultimately, NHTSA would deny some of these requests and manufacturers would file petitions for reconsideration. Over time, we expect that most manufacturers, perhaps with outside assistance, would likely be able to submit a request for confidentiality that NHTSA would grant. In the long run, the process would become routinized. At this stage, a manufacturer would largely repeat what it had said in a previous request for confidentiality of EWR data that the agency had granted, making that and subsequent quarterly individual assessments duplicative. As a result, requiring EWR data submitters to provide a detailed written justification for each quarterly submission would be difficult to justify, as it would impose burdens on manufacturers that are unnecessary given the availability of class determinations under the District Court's decision in *Public Citizen*.

In contrast to these projected 2000 requests, the agency normally receives approximately 450 requests for confidential treatment annually.<sup>15</sup> A portion of these are addressed with limited effort because they involve information submitted voluntarily, which is subject to an objective standard that ordinarily is met based on a limited review.<sup>16</sup> Adding the 2000 requests for confidential treatment that would likely accompany EWR submissions, on an annual basis, would significantly add to the burden faced by the agency.

The agency's experience in processing and responding to confidentiality requests, such as those submitted during the course of enforcement investigations, provides a foundation for an assessment of the burden and its implications. A comparison of the expected number of EWR submissions to the number of confidentiality requests that manufacturers now submit, which do not involve EWR data, while taking content to account, indicates that if the agency were to attempt to process individualized requests for confidentiality of EWR data from each or most manufacturers that

regularly report EWR data, the agency would be overwhelmed. There would be considerable additional work from logging in, to assigning and controlling assignments, to analyzing the requests, to preparing draft letters, to review, to preparation and execution of final letters to logging them out. There would also be an overall management burden. There are no available resources to do this work. A backlog would develop and delays in responding to requests for confidentiality of EWR data and other requests for confidentiality would ensue. Requests for confidentiality that likely would have merit and those that likely would not be favorably received by the agency would be caught in the backlog. Consistent with our customary practices, the information would be withheld until the agency decides whether it is confidential. Disclosure to the public of information, including both EWR and non-EWR information, that is the subject of a request for confidentiality but that ultimately is determined not to be entitled to be withheld under Exemption 4 would be hindered and delayed. This likely would include at least some EWR data on deaths and injuries. Based on historical actions, it likely would include some information submitted by manufacturers in defect investigations. Ultimately, the public interest would be impacted. Another effect would be the likely diversion of some resources from other agency safety efforts, including pursuing other enforcement activities, in order to mitigate the delay.<sup>17</sup>

In view of the foregoing, requiring and processing individual requests for confidential treatment for all EWR data is not a viable alternative.

A second alternative is to proceed by binding rule. If NHTSA were to proceed by issuance of class determinations, the agency would take advantage of the benefits of rulemaking. Interested parties would know NHTSA's assessment of the confidentiality of most of the EWR data.<sup>18</sup> The Supreme Court has long recognized the general preference for rulemaking over ad hoc adjudications. In *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947), the Court observed that since an agency, unlike a court, does have the ability to make new

<sup>17</sup> *Public Citizen*, within the context of disclosing EWR data, noted that "[t]he categorical disclosure of documents and data obtained under the early warning system is essential for the proper functioning of the early warning rule".

<sup>18</sup> The confidentiality of EWR data on deaths, injuries and property damage claims is not resolved by today's rule. Most manufacturers have not reported claims for deaths. Of those that have, NHTSA expects that most manufacturers, except tire companies, will not submit individualized requests for confidentiality.

<sup>14</sup> Goodyear submits quarterly requests for confidentiality of EWR data notwithstanding a stay pending a decision by the court on the RMA claim that the TREAD Act is a FOIA Exemption 3 statute. These requests provide insight into the nature of requests for the confidentiality of certain EWR data.

<sup>15</sup> This number was derived from the number of requests for confidential treatment that the agency has received over the past three calendar years and the expectation that we will receive requests for confidentiality of EWR information that would not be resolved by this rulemaking.

<sup>16</sup> *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992).

law prospectively through the exercise of its rulemaking powers, it has less reason to rely upon ad hoc adjudication to formulate new standards of conduct. The Court recognized that the function of implementing the act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future.

Binding determinations for EWR data are appropriate mechanisms to address the confidentiality of the EWR data report submissions. The submissions are standardized. The EWR reports contain identical informational elements for each regulated manufacturer category under the EWR rule. See 49 CFR Part 579, Subpart C. EWR reports are submitted pursuant to standardized electronic reporting templates that are used repeatedly from reporting period to reporting period. Each manufacturer in a regulatory category reports on the same systems and components. Each quarterly report provides a snapshot of that manufacturer's experience for each of the standard informational elements, making these submissions identical with respect to the nature of their content between reporting periods.

Binding determinations eliminate the problems with ad hoc determinations. They provide direction to the regulated community. They assure consistency. They avoid resource burdens, particularly for small businesses. They eliminate the substantial workload that the agency would face in processing and addressing requests for confidentiality. They also avoid a substantial backlog on processing of requests for confidentiality that impacts not only EWR data but other information submitted to NHTSA as well. This would result in quicker disclosure to the public of information that is not confidential. This is in the public interest.

The District Court recognized the suitability of adopting class determinations when it ruled that limited categorical rules that address the confidentiality of EWR data are necessary "to allow the agency to administer the EWR program effectively," *Public Citizen*, 427 F. Supp. 2d at 13, and that the agency was "justified in making categorical rules to manage the tasks assigned to it by Congress under the TREAD Act." *Id.* Consistent with this approach, the agency is adopting an appropriate method to help it manage the EWR program while satisfying its obligations under the FOIA. By adopting class determinations, the agency ensures that it applies a consistent and reliable approach when addressing the treatment of EWR data. Commenters on

both sides of this issue also recognize the value of class determinations but each favors class determinations that result in opposite results—disclosure or withholding.

A third alternative is presumptive class determinations. In the October 2006 NPRM, we explained the practical differences between adopting "binding" as opposed to "presumptive" determinations. Binding determinations would alleviate the need for submitters to provide a formal written request for confidentiality and supporting justification, whereas presumptive determinations would still require submitters to provide a written request and supporting justification pursuant to 49 CFR Part 512. 71 FR at 63745 n. 19. The agency currently uses presumptive determinations for certain classes of information detailed in Appendix B of 49 CFR Part 512.

Presumptive determinations are a middle ground between ad hoc determinations and class determinations. In our view, presumptive determinations of the confidentiality of EWR data are inappropriate. While a presumptive determination would provide direction to the regulated community and the public and should avoid inconsistent rulings on the confidentiality of the EWR data submitted in satisfaction of EWR information requirements, it would not eliminate the requirement for individualized requests for confidentiality of EWR data. Since the elements and the basis for withholding them would be the same, individualized requests for confidentiality of EWR data would, as a practical matter, be unnecessary. Thus, they would impose an unnecessary burden on manufacturers. Also, the agency would face a substantial burden in processing requests for confidentiality under the presumptive determination alternative.<sup>19</sup>

The EWR data differ from the presumptive classes in 49 CFR Part 512 Appendix B in important respects. The presumptive class determinations in Appendix B cover information that has limiting factors such as a finite period of time for which confidentiality is sought or after which it ends (e.g., new product plan information for the upcoming model year expires once that product arrives or becomes public knowledge). Additionally, when reviewing requests for confidential treatment covering new product

information (e.g., introduction of a new model) the agency not infrequently discovers that a manufacturer's media center has already publicly released that information, which makes it necessary for the agency to check the accuracy of a given confidentiality request. As a result, the nature of the information covered by Appendix B requires individualized agency review to ensure that non-confidential information is readily disclosed to the public. The EWR information (other than death, injury and property damage claims data, which are not covered) does not raise these concerns.

### C. Class Determinations Based on FOIA Exemption 4

Exemption 4 of the FOIA covers information in federal agency records that is commercial or financial information obtained from a person that is privileged or confidential. EWR information. 5 U.S.C. 552(b)(4).

The terms "commercial" or "financial" information are given their ordinary meanings. *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983). Records are commercial so long as a submitter has a commercial interest in them. *Id.* EWR data meet this element of Exemption 4.<sup>20</sup>

Second, the information must be obtained from a "person." The word "person" encompasses business establishments, including corporations. See *FlightSafety Servs. v. Dep't of Labor*, 326 F.3d 607, 611 (5th Cir. 2003). EWR data is obtained from manufacturers, which are corporate business establishments. Thus, EWR data is obtained from persons within the meaning of Exemption 4.

Third, the information must be confidential.<sup>21</sup> As noted above, in *National Parks* the Court declared that the term confidential should be read to protect governmental and private interests in accordance with a two part test: commercial or financial matter is "confidential" for the purposes of Exemption 4 if disclosure of the information is likely to have either of the following effects: (1) To impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial competitive harm to the competitive position of the person from

<sup>20</sup> See the discussion of the categories of EWR information below. Those discussions demonstrate that the manufacturers have a commercial interest in the data.

<sup>21</sup> Alternatively, privileged information may be withheld under Exemption 4. EWR data is not privileged. See 49 CFR 579.4(c) (definition of field report).

<sup>19</sup> Public Citizen had suggested presumptions in favor of disclosure. In view of the general thrust of disclosure under FOIA in the absence of an exemption, this is not meaningful.

whom the information was obtained. 498 F.2d at 770.<sup>22</sup>

Actual competitive harm need not be demonstrated for the purposes of the competitive harm prong. Rather, actual competition and a likelihood of substantial competitive injury is all that need be shown. *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987). Vehicle and equipment manufacturers that submit EWR data operate in a highly competitive environment that is expected to become even more competitive.<sup>23</sup> There is competition for sales.<sup>24</sup> The industry is subject to a variety of competitive factors, including costs, competition in consumer-based surveys, and production differences.<sup>25</sup>

We now turn to certain categories of information that manufacturers must submit under the EWR rule.

### 1. Production Numbers

The EWR rule requires larger volume manufacturers of light vehicles, medium-heavy vehicles and buses, motorcycles, trailers and tires and all child restraint manufacturers to submit

production figures stating the number of vehicles, tires and child restraint systems, generally 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). See 49 CFR 579.21(a), 579.22(a), 579.23(a), 579.24(a), 579.25(a), 579.26(a).

In the NPRM, NHTSA proposed to make a class determination that production figures in EWR data for motor vehicles, other than light vehicles, and for child restraints and tires would not be released to the public. The agency based this proposed class determination on the competitive harm prong of FOIA Exemption 4, as interpreted in *National Parks*.<sup>26</sup> 71 FR at 63742.

Numerous parties have provided information to NHTSA on the question whether the disclosure of EWR production data, other than for light vehicles, would be likely to cause the manufacturer submitting the data to suffer competitive harm from the use of the information by competitors. The parties have addressed a number of related issues including whether EWR production data from reporting sectors other than light vehicles is publicly available and the consequences of the release of this production information, as well as the potential benefits of releasing it.

Industry commenters stated that the production information was not publicly available in the detail that submitters must provide pursuant to the EWR rule.<sup>27</sup> Non-industry groups did not show otherwise.

The Truck Manufacturers Association (TMA) noted that that medium-heavy

truck manufacturer EWR production data are detailed by model. They provide a compendium of detailed production data revealing the production history and sales trends for each individual model over time. TMA explained that these data can provide valuable insights into a manufacturer's production and marketing strategies. Since truck manufacturers offer a variety of different model lines, if the production data were released, competitors would gain valuable insights into the marketplace performance of a particular model or group of models without bearing any market risk. Competitors could analyze a reporting manufacturer's production data for all or select models to reach conclusions about a company's production and marketing strategies, production capacities, customer preferences and other commercially valuable information not otherwise obtainable. Using this information, TMA asserted, manufacturers can chart the strengths and weaknesses of their competitors' businesses within specific make, model and model years. The competitive impact of the disclosure of such information is of particular significance to medium truck producers since their collective customer base consists largely of fleet purchasers. A manufacturer can use medium-heavy vehicle production data to react more quickly to its competitors by changing its model offerings and shifting its sales and marketing strategies while avoiding the substantial costs and risks associated with new product development.<sup>28</sup> TMA used an example to make its point:

Manufacturer A offers a medium-duty truck equipped with a diesel engine as standard equipment, and is considering whether to offer an optional gasoline engine on this model. Manufacturer A could access the EWR data of its competitors, identify similar models, and track their sales of similar vehicles equipped with gasoline engines to determine (i) its competitors' production capacity for such vehicles, (ii) the market acceptance for the gasoline option at

<sup>22</sup> Impairment to the Government's ability to obtain this information in the future serves as an independent basis for withholding under Exemption 4. See *National Parks*, 498 F.2d at 770. The case law also strongly points to the availability of a "third prong" under Exemption 4—that of protecting other Governmental interests, such as compliance and program effectiveness. This third prong has been recognized, but not formally adopted, by the D.C. Circuit. See *Critical Mass v. NRC*, 975 F.2d 871, 879 (D.C. Cir. 1992) (noting that Exemption 4 can protect interests beyond impairment and competitive harm). See also *9 to 5 Org. for Women Office Workers v. Bd. of Governors of the Fed. Res. System*, 721 F.2d 1, 11 (1st Cir. 1983) (adopting a third prong under Exemption 4 based on the Government's interest in administrative efficiency and effectiveness).

<sup>23</sup> See, e.g., *GM Looks to Future*, USA TODAY, at 10A (Feb. 7, 2007) (observing that the changing auto industry and fierce competition are forcing GM to undergo structural changes), Micheline Maynard, *Car Parts Maker Moves to Break its Union Deals*, NY TIMES, April 1, 2006, at A1 (noting increasingly stiff competition in the U.S. auto market), and Joann Muller, *Autos: A New Industry*, BUSINESSWEEK, July 15, 2002, at 98 (reporting on the changing U.S. auto market as "intense" competition changes the shape of the auto industry).

<sup>24</sup> See comments of the Alliance and others on competition, discussed below under consumer complaints.

<sup>25</sup> See, e.g., *Ford Ahead on Cost Savings Target for Materials*, REUTERS, Mar. 16, 2007 (available at <http://www.autonews.com>) (noting challenges to Ford's ability to achieve future cost savings), Tony Lewin, *Nissan Factory Expertise Will Boost Laguna Quality*, AUTOMOTIVE NEWS, Oct. 30, 2006 (available at <http://www.autonews.com>) (describing implementation of Nissan-developed quality control systems into Renault-manufactured vehicles), and *Domestics Gain in Quality Derby*, AUTOMOTIVE NEWS, Aug. 14, 2006 (available at <http://www.autonews.com>) (reporting improvements by U.S. domestic automobile manufacturers in J.D. Power and Associates' Vehicle Dependability Study results).

<sup>26</sup> The basis for excluding EWR production data on light vehicles ("any motor vehicle, except a bus, motorcycle, or trailer, with a gross vehicle weight rating of 10,000 lbs or less," 49 CFR 579.4) from the class determination on confidentiality, as noted in the NPRM, is that those data are publicly available. Information that is already publicly available cannot be withheld by an agency under Exemption 4. *Niagara Mohawk Power Corp. v. Dep't of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1999). We note that there are limits to the production information on light vehicles that is publicly available and which therefore is not withheld. The agency has granted confidential treatment for data on production of light vehicles with particular consumer features.

<sup>27</sup> For example, some manufacturers' total production of tires is publicly available, but the breakdown by model, size and production in a specified period is not. Vehicle production data that are available, other than for light vehicles, are limited and do not approach the same level of detail that these submitters provide to the agency in their EWR submissions. See Harley-Davidson Form 10-K Annual Report at 31 (Feb. 2, 2007) (stating production plans for 2007 by total motorcycle production). See also <http://www.jama.org> (offering total production numbers for individual Japanese motorcycle manufacturers).

<sup>28</sup> Manufacturers not only withhold this information from their competitors but also from their own suppliers. See Steve Konicki, *Just-In-Time Autos*, Techwebnews, 2001 WLNR 3151365 (May 7, 2001) (reporting that Ford Motor Company does not share its production data regarding medium and heavy truck applications with one of its largest diesel engine suppliers—International Truck and Engine Corporation). It is also commonly known that sales numbers, which closely track production numbers, are commercially sensitive data that companies do not routinely disclose. As an example of this practice, ArvinMeritor—a large supplier of various vehicle components—declined to disclose its diesel engine sales data, citing the data's competitively sensitive nature. Transcript of ArvinMeritor, Inc. Analyst Meeting at 38 (Dec. 22, 2005).

given points in time, and (iii) customer preference trends over time. Based upon this information, Manufacturer A can decide whether to offer this option before it invests money and other resources, and without bearing the same market risk and uncertainties as its competitors. (A similar analysis could be conducted model-by-model to evaluate the market acceptance of various vehicle configurations and features.)

Utilimaster, a final stage manufacturer of walk-in vans for parcel delivery and baking products industry applications, as well as freight bodies for general commercial use, stated that production data, if disclosed, would likely be used by competitors in their marketing and promotional efforts to obtain a competitive advantage against the EWR data submitter. Blue Bird, a large manufacturer of buses, school buses and motor homes, described production data for its industry, which are not publicly available, as highly proprietary and sensitive information that would benefit competitors who could use the information to chart the strengths and weaknesses of Blue Bird's business within specific make, model and model year classifications. The information would provide a tool for competitors in conducting market research and strategic planning.

Harley-Davidson, a motorcycle manufacturer, noted that detailed motorcycle production data such as submitted under the EWR rule are unavailable publicly and explained that the motorcycle business is essentially a bundle of niches, including touring, sport trails and a number of others. Companies base their product mix decisions on various factors. Future company plans are often based on an evolution of product direction and experience, including past production. The information reveals a company's internal future planning, providing competitors with information on a company's future production efforts. The Motorcycle Industry Council similarly observed that motorcycle production and sales data by model have not been publicly available.

Utility, a trailer manufacturer, noted that EWR data are organized by make, model and model year. This information reflects a company's production capacity, sales performance and, in turn, the relative success of a company's marketing strategy. Utility asserted that competitors could use this sensitive information to monitor a manufacturer's current production capacity and over time to ascertain the amount of resources that a manufacturer has expended in adding to that production capacity. Similarly, it stated that a supplier examining the production data

of one of its customers, the vehicle manufacturer, can confirm its status as a sole supplier, which can enhance its position during supply contract negotiations. National Marine, a trade group representing boat trailer manufacturers, and its affiliate the Trailer Manufacturers Association, added that because boat trailer manufacturers typically produce a smaller number of units, the disclosure of quarterly production data would permit competitors to ascertain information about the number of units sold, potential costs, and production concerns of the manufacturers. Such information, it noted, can be used competitively against a trailer manufacturer.

The Juvenile Products Manufacturers Association (JPMA), representing manufacturers of child restraint systems, which are commonly known as child car seats, explained that the release of EWR quarterly production data would provide competitors and new entrants to the market with invaluable "real-time" ongoing competitive information about the reporting manufacturer's production capacity, sales and market performance. Such information, which would otherwise either be unobtainable or obtainable only through expensive market research, would give competitors invaluable insights into the operational and market strengths and weaknesses of submitters, enabling competitors to target their production and marketing efforts to areas where they detect vulnerabilities in a submitter's market position.

Cooper Tire submitted a study, further confirmed through comments from the Rubber Manufacturers Association (RMA), regarding the competitive harm that disclosure of otherwise confidential tire production numbers would have in the tire industry. The RMA, a trade association that includes tire manufacturers, stated that tire manufacturers can change the course of tire production in a relatively short period of time. If production numbers were released, manufacturers could change the production of types, sizes and lines of tires after reviewing a competitor's data. The data could indicate whether a competitor, for example, could produce sufficient quantities to supply a market or could be planning a promotion. EWR production data are valuable since they allow competitors to change production depending on the production output of a competitor. In addition, if released, production volume by stock keeping unit (SKU) could reveal marketing plans and vulnerabilities, facilitating targeting

by competitors.<sup>29</sup> Similarly, disclosing production volume by tire line (and by SKU) could reveal private label (brand) customers' purchases.

In comments, RMA expanded on the Cooper study, noting that because tire manufacturers can alter their production within a relatively short period of time, this ability to change production dependent on the production output of competitors could significantly affect competition. RMA asserted that the quarterly tire production data reveal snapshots of the different segments within which a given company operates and its concentration of resources within those segments.

In contrast to the statements by the vehicle, child restraint and tire industries on the substantial competitive harm that would result from the disclosure of EWR production data, Public Citizen asserted that a class determination covering production is irrational. It expressed its view that there is no evidence that competitive harm has occurred for light vehicle manufacturers whose production numbers have been released and stated that NHTSA did not show why disclosure of EWR production data will harm only vehicle manufacturers other than light vehicle manufacturers.<sup>30</sup> Public Citizen did not present specifics to justify its view favoring the disclosure of the EWR production numbers. While Public Citizen's comments on the October 2006 NPRM were filed almost a month after the close of the comment period and well after other commenters submitted their comments, significantly, Public Citizen did not rebut the industry commenters' statements on the competitive harm that would flow from the release of EWR production data. Other non-industry entities also objected to the proposed class determination of confidentiality of EWR production numbers, but none provided facts to refute the claims or

<sup>29</sup> See 49 CFR 579.26(a). The regulations define a stock keeping unit as "the alpha-numeric designation assigned by a manufacturer to uniquely identify a tire product. This term is sometimes referred to as a product code, a product ID, or a part number." 49 CFR 579.4(c).

<sup>30</sup> Public Citizen's Litigation Group had criticized the agency's class determination for production numbers. It stated that there is no history of prior administrative decisions concluding that these data are confidential under Exemption 4 and no comprehensive examination of the competitive value of the information to each affected industry sector. In the footnote that follows, we address competing views of historical decisions which generally involve a single product that is the subject of an investigation. This notice addresses comments regarding various sectors, which Public Citizen did not rebut.

explanations by industry commenters on the competitive effects of disclosure.

The literature further indicates that production numbers, by their very nature, are competitively valuable and useful in helping manufacturers improve their efficiency and in learning what their competitors are producing. See Sidney Hill, Jr., *Real Time's Role in Product Quality*, Manuf'g Bus. Tech., May 1, 2005, at 22 (commenting on the value of mining real-time production data to manufacturers). Knowledge of what a competitor manufactures and sells are basic pieces of information sought by companies. See Laurence A. Carr, *Front-Line CI*, Competitive Intelligence Magazine, March 2001, at 11 (indicating that company staff should have detailed information on competitor products, marketing strategies, tactics, and programs). Companies operating in the automotive sector are no different in this regard. See Agostino von Hassell & Mark Bella, *Making the Most of Automotive Data*, Modern Plastics, June 1, 2004, at 16 (noting the importance of production and sales numbers in helping to predict the likely volume of new orders).

After carefully considering the comments and other information of record, NHTSA has determined that the release of EWR production numbers on medium-heavy vehicles and buses, motorcycles, trailers, child restraint systems and tires would be likely to result in competitive harm to the manufacturer submitting the data.

The EWR production data, in pertinent part, are a comprehensive compendium of information by make, model and model year, for medium-heavy vehicles and buses, motorcycles, trailers, child restraint systems and tires. They are real time data that are updated quarterly. They are not publicly available. As noted by numerous commenters, the production data are proprietary. The industry expends efforts to maintain the confidentiality of their production figures. This was not disputed by non-industry commenters.<sup>31</sup>

<sup>31</sup> One matter raised in the comments is the availability of production data in individual investigations by NHTSA's Office of Defects Investigations, which investigates potential defects in vehicles and equipment. The agency noted in the NPRM, for example, that production data on child restraints and tires are not available. At the opening of an investigation, NHTSA often withholds production data or it groups it, as for example grouping a number of sizes of tires so that production of individual sizes is not stated. At later times in the process, NHTSA has disclosed the number of tires in recalls. E.g., Recall (NHTSA) number 07T-005 involving certain tires made by Cooper Tire. RMA and Public Citizen have made different assertions regarding the agency's historical practices. These issues need not be resolved here.

As substantiated by the comments, production numbers reveal otherwise unobtainable data relating to business practices and marketing strategies. The EWR production data can be used by competitors to monitor the evolving and current production, on a model-by-model basis, of the company that submitted the data. The data also reveal a manufacturer's capacity to produce certain products. Using this information (if released), competitors could adjust their own production volumes to better compete against the manufacturer that submitted the EWR data and make other production or marketing-related decisions to the substantial detriment of the submitter.

In a very real sense, production numbers reveal significant parts of a company's business plan to competitors. Production numbers reveal how the submitting manufacturer concentrates its production efforts. For example, RMA explained that the disclosure of tire production data would enable manufacturers to analyze their competitors' businesses. Cooper Tire added that production numbers reveal substantial information related to marketing plans and strategies. Cooper Tire further explained that because of the intense level of competition within the tire industry and the size differences among competitors, the disclosure of production data would make the risk of substantial competitive harm high, particularly for smaller manufacturers that produce for the replacement market.

In addition, because production is closely related to sales in the ordinary course of business, EWR production data can be used to assess a competitor's sales and market performance,<sup>32</sup> through means otherwise unavailable without considerable market research expense. Sales data are generally regarded as having high competitive importance. This market-related information would be valuable to the

More importantly, in terms of depth and scope, there are significant differences between the body of EWR data and data on the production of vehicles in individual investigations. While some production data on limited segments may be available for some reporting sectors, these data do not approach the level of detail or coverage contained in EWR submissions that is likely to cause substantial competitive harm to submitters. EWR production data are submitted quarterly and cover all models and model lines. In contrast, data involving vehicles and equipment in investigations typically involve a particular vehicle or equipment model or platform across one or several model or production years. The release of the production data on a single item is not comparable in terms of the scope of information released or the competitive effects of the release if the full compendium of EWR production data were released.

<sup>32</sup> See, e.g. <http://www.claritas.com/claritas/Default.jsp?ci=2&pn=cs&bmwusa>.

reporting manufacturer's competitors, who commonly want to know how well their competitors' products have been and are selling. The competitors would use the production information in their own product planning and marketing. Knowledge of what competitors are selling can change marketing tactics, result in the redevelopment of strategic plans, and lead to key recruitments. Also, since product plans are based upon an evolution of production direction and experience, disclosure of production information would expose important aspects of manufacturers' future product plans to competitors.

Similarly, EWR production data reveal a variety of valuable information related to the success of a competitor's marketing strategies. Through common monitoring activities, a company may know that a competitor has launched a new product or marketing campaign. But the critical information on the success of the campaign is not public. EWR data could be used to monitor the success of the campaign, without the cost of market research. The competitor could also avoid or minimize business risks by using the EWR production data to decide whether to launch a parallel effort. Using EWR production data, operating strengths and weaknesses of individual submitters would be discovered without resorting to costly market research and competitors would chart this information and use it to target a submitter's vulnerabilities.

Suppliers to an EWR submitter can, in some instances, use the production information to gain a competitive advantage over that submitter. Suppliers compete with vehicle manufacturers in negotiations over prices. Suppliers can use production information during pricing negotiations with EWR submitters to confirm their positions as sole suppliers, which can help them secure higher prices for their equipment.

Although non-industry commenters opposed the proposed class determination for EWR production data and suggested that production data are publicly available, they did not provide facts demonstrating that these data are available to the same extent as required by the EWR regulation.

The non-industry commenters also did not provide facts contradicting the competitive value of production data to competitors or the competitive effects on the submitters that would be likely to accompany their disclosure. Their argument on the light vehicle sector is largely a *non sequitur*. Production data for light vehicles have been released for a long time. But that does not demonstrate that if they had not been

released, there would not be any competitive harm from a change in policy of release. For example, Honda and Toyota went to considerable effort to design and produce their initial hybrid vehicles, the Insight and the Prius. Each of these vehicles is different. If a competing manufacturer were considering entering the regenerative hybrid market, information on which models sold well and which did not would be of considerable value. Honda and Toyota would have undertaken the market risk, but the competitor would benefit from the production numbers with highly reduced market research costs. Also, the mere statement that it has been released in the light vehicle sector is not a sufficient rebuttal to the specific comments from members of other industry sectors regulated under the EWR rule.

For the foregoing reasons, in light of the competitive value of the EWR production data on medium-heavy vehicles and buses, motorcycles, trailers, child restraints and tires, the manner in which these data would be used by competitors and the competitive effects that would be likely to follow if the data were disclosed on a wholesale basis to competitors, their disclosure is likely to cause substantial harm to the competitive positions of the manufacturers that submit the data.<sup>33</sup> This harm would flow from the affirmative use of the proprietary data by competitors.

## 2. Consumer Complaints

The EWR rule requires larger volume manufacturers of light vehicles, medium-heavy vehicles and buses, motorcycles, and trailers to submit the number of consumer complaints that they have received broken out, for each make and model, by specific component categories (e.g., steering, brakes), fires and for certain categories (rollovers), all of which are binned by code. See 49 CFR 579.21(c), 579.22(c), 579.23(c), 579.24(c). Manufacturers of child restraints submit combined numbers of consumer complaints and warranty claims. See 49 CFR 579.25(c). Consumer complaints are defined in the EWR 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 Web site 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.<sup>34</sup>

Manufacturers are required to submit EWR data on consumer complaints regardless of whether they allege or appear to involve safety-related defects. 67 FR at 45849 (July 10, 2002). When NHTSA published the EWR rule, the agency expressly contemplated that the manufacturers would report a large volume of data and that the agency would then screen through this mass of information, looking for potential defect trends. See 67 FR 45822, 45865 (July 10, 2002); see also 71 FR 63738, 63741 (Oct. 31, 2006); 72 FR 29435, 29437–38 (May 29, 2007). This has proven true. NHTSA's experience with EWR data has shown that the vast bulk of EWR consumer complaint data has not been indicative of defect trends. Some consumer complaint EWR data have been helpful in identifying a potential defect trend.

In the NPRM, the agency proposed to make a class determination that EWR consumer complaint numbers would not be released to the public. 71 FR at 63742. The agency based this proposed class determination on information on both the competitive harm and impairment prongs of *National Parks*. We first address the likely competitive harm from the release of consumer complaint data, then we discuss the impairment to the agency's ability to obtain as complete consumer complaint information as possible if the information was released.

### Competitive Harm

Numerous parties have provided information to NHTSA on the question whether the disclosure of EWR complaint data would be likely to cause the submitting manufacturer to suffer competitive harm. This includes commenters from the automotive industry and non-industry commenters.

Commenters from across different sectors of the automotive industry addressed the competitive value and use of consumer complaint data. At the outset of its comments, the Alliance stressed that there is actual competition

in the auto industry. Manufacturers compete vigorously for new vehicle sales. Two of the elements over which manufacturers compete and expend substantial amounts of research money are consumer satisfaction and quality in the market for new vehicle sales. The Alliance supported its statement by information from Maritz Marketing Research, which identified factors considered by consumers in purchasing new vehicles, including overall quality and reliability (dependability).

The Alliance further showed that EWR information, including consumer complaints, is proprietary and comprehensive in nature. Its competitive value is enhanced by its comprehensive nature (for light vehicles they involve 18 vehicle systems and components as well as fires and rollovers, 49 CFR 579.21(b)(2), (c)) and continuing content which permits a model-to-model comparison on the numerous systems and components in EWR reports. The release of EWR consumer complaint data would permit wholesale industry-wide comparisons of the quality or durability of all significant systems or components on models chosen for comparison.

As explained by the Alliance, EWR consumer complaint data provide an extremely valuable window into the customer satisfaction of vehicle owners and the perceived quality of vehicle models on a make/model/year and system basis. Additionally, the EWR data provide valuable insights into a given manufacturer's business practices and decisionmaking, including, the methods used to collect consumer complaints.

The Alliance maintained that the comprehensive nature of these submissions—covering all makes and models over a multi-year timeframe—makes them a valuable compendium of consumer satisfaction and quality information that could not be replicated easily at any price and could be used by competitors. Citing *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981), the Alliance pointed out that the release of information collected at considerable cost by an entity that submitted information to the Government could easily have competitive consequences. In the immediate context, the submitters have expended considerable sums to gather large volumes of EWR data and the release of it would be contrary to the competitive interests of these entities and to the benefit of their competitors.

AIAM's comments focused on the totality and comprehensive nature of the EWR data, including consumer complaint data, which give the data

<sup>33</sup> The regulatory language adopted in Appendix C to Part 579 at the end of this notice varies slightly from the language in the NPRM. The language in Appendix C includes clarifications and the words "is likely to cause". The latter is consistent with the terms of NHTSA's assessments of the consequences of the release of the EWR information addressed in Appendix C and the standard of *National Parks*.

<sup>34</sup> 49 CFR 579.4(c).

value that is enhanced by the EWR rule's standardized reporting format. AIAM stated that a knowledgeable competitor can view this mosaic of information and reach valuable conclusions. The comprehensive body of information facilitates manufacturer-to-manufacturer comparisons. It would enable one company to use the experience of another to select an optimal design, production process and pricing strategy, while avoiding the cost and risk that would otherwise be encountered. The data would provide useful information about cost and quality. AIAM provided examples.

AIAM also explained that EWR complaint data would provide competitors useful information about the quality levels achieved by the submitting manufacturer or its suppliers, both for technologies used in vehicles and in their accompanying production processes, which permit competitors to evaluate a particular technology, process or supplier, at a risk and cost that is lower than otherwise attainable, as the competitor would not have to develop that information. Using this information, AIAM noted, competitors might be able to base decisions to pursue certain technologies to a substantial degree on their reviewing a submitter's EWR complaint information. Without this information, the competitor may have reached a different conclusion. The submitter may have expended substantial resources to help it decide whether to pursue a particular technology, while the competitor would gain a real world evaluation free of cost or the effort of a real world evaluation. This would impair the competitive position of the submitter.

AIAM added that the EWR information would also provide a competitor with information about the submitters' cost structure. Competitors could evaluate the information and make decisions whether to pursue various products or marketing strategies based on an assessment pertaining to the submitter's costs. A submitter's relative costs can also be evaluated using these data.

Nissan's comments noted that it uses inputs from customer call centers to gauge market responses to new features, to identify areas requiring consumer education and to help identify issues that could potentially require field or production adjustments. Customer inputs including consumer complaints help identify areas where field experience is showing an issue warranting further investigation. Nissan emphasized that the information is pointer information that may suggest

further inquiry and is not necessarily indicative of a safety-related defect. The information primarily serves independent business reasons. If EWR consumer complaint information were publicly available, competitors could track that information and learn whether there is a market reaction to any new technology, supplier or product changes or new marketing effort. It is valuable, as a market reaction can lead a competitor to focus on it. The information would be valuable to competitors who may be considering deploying similar or competing technology. They could rely on Nissan's information in making a critical decision such as when to enter the market, which technology or suppliers to use, or how to best market the technology. It may be indicative of consumer confusion over a new technology. The value of this information is in that it would enable competitors to use information created by significant input to advance their own commercial interests. Complaints, Nissan explained, also reveal company practices and the performance of materials and components that are successful and those that are not.

TMA stated that the EWR data that medium-heavy vehicle manufacturers report are comprehensive—they involve 22 vehicle systems as well as fires and rollovers. The compendium of consumer complaint data, laid out model-by-model and system-by-system has great competitive value and there are numerous ways in which competitors could use these data to their competitive advantage. TMA characterized the data as a data bank of quality control information that competitors can use to evaluate the performance, reliability and durability of various components and systems without the expense and risk associated with product development that would normally occur with field-testing and "trial and error" efforts, while shortening the amount of time competitors need to market competing products.

TMA endorsed a comment by GM as applying with equal force to the truck industry. GM had explained that if a supplier offers a newly-designed system to a vehicle manufacturer, a manufacturer can undertake a tear down evaluation and test it, but no practical test duplicates the experience gained from hundreds of thousands of miles on the road. A vehicle manufacturer that installs the system gains the field experience. If EWR data were made available, other manufacturers would have access to some of the same information and would be able to make

their decisions with less testing and analysis. The disclosure of the data would force the first manufacturer to subsidize its competitors, reducing their costs at the first manufacturer's expense.

TMA presented a scenario to demonstrate how the information can be used:

[i]t may be well known that Truck Manufacturer A uses Lighting Assembly X on one of its truck models. (The manufacturer of lighting equipment is typically identifiable on the lamp or lamp assembly.) If Manufacturer B is deciding whether to use the same assembly on one of its models, Manufacturer B could review the EWR warranty, consumer complaint and field report data to evaluate Manufacturer A's field experiences with its lighting equipment on that model. As a result, Manufacturer B will get all of the benefits of Manufacturer A's field experiences with that product—good or bad—while avoiding the costs, effort and risk that Manufacturer A has incurred. Moreover, Manufacturer B could *immediately* benefit from that experience data, while it took Manufacturer A years to be in the same position. (Emphasis in original.)

TMA stated that the disclosure of consumer complaint data would provide competitors with valuable and previously unavailable insight into the field experience and performance of a submitter's entire product line and individual systems and components. TMA stated that competitors could use this information to assess the in-use performance of parts and systems. It would be used in purchasing, pricing, and sourcing decisions, all of which would have competitive impacts. TMA added that the release of the information would adversely affect these manufacturers' customers, in terms of fleet performance and durability.

Utility observed that the EWR regulation requires trailer manufacturers to provide information relating to each make and model as well as for system components. Trailer manufacturers can use EWR complaint data to evaluate trailer performance, help identify technological and engineering improvements that might better satisfy customers and provide guidance to prioritize resources to implement these improvements. If these data were released, competitors would gain product and component performance data that they could implement into marketing strategies. Accordingly, Utility said it would be irreparably harmed.

Harley-Davidson stated that it aggressively seeks consumer contact, including opinions. Consumer input would be counted in EWR reports when it meets the EWR rule's broad definition of consumer complaint. Harley's continued success depends on satisfying

motorcycle enthusiasts. It asserted that disclosing this added feedback, which it obtained through considerable effort, would cause it harm. It added that the data are not likely to be related to a potential safety issue.

The Juvenile Products Manufacturers Association (JPMA) observed that different manufacturers maintain different information on consumer complaints. If the EWR information were disclosed, those with more limited submissions would obtain more information about their competitors' products than they would be disclosing, which would give them unequal access to competitively significant information. In addition, EWR information could be used by new entrants to the market to obtain valuable competitive information at virtually no cost that would otherwise be very expensive or impossible to obtain. JPMA added, for the compendium of EWR information on consumer complaints and warranty claims broken down by make and model of child car seat, this type of quality information on individual products is highly proprietary to individual manufacturers. These real time data provide ongoing competitive information about each submitter's market performance. According to JPMA, the data provide insights into a submitter's operational and market strengths and weaknesses by revealing the relative field performance through reports on consumer complaints and warranty claims of a manufacturer's product line. These data are either unobtainable or obtainable only through expensive market research.

Several manufacturers addressed another consequence of disclosure: misleading and unfair comparisons of the data. The Alliance stated that the disclosure of the comprehensive compendiums of EWR information would be misleading to consumers and unfair to the submitting manufacturers because consumers would attempt to make comparisons of the performance of one model to another, across multiple model years, on a quarterly basis, which, as the Alliance observed, can not be done. Similarly, AIAM stated that public disclosure of the data would create a great potential for misunderstanding and mischaracterization. Reports with simple comparisons could affect the competitive positions of manufacturers in a way that was unfair. Also, TMA stated, with supporting explanation, that manufacturers and consumers could misuse it to draw unfair and unsubstantiated and misleading comparisons regarding competitors' products. JPMA added that the release

of the encyclopedia of quality information encompassed in EWR data would cause submitters unwarranted competitive harm because the reports will include reports that are not safety related. This, JPMA said, will result in unwarranted disparagement.

Several entities acknowledged the limited releases of information submitted by the manufacturers during investigations by NHTSA's Office of Defects Investigation (ODI). The Alliance stated that the release of limited consumer complaint information on specific models in a limited number of model years in investigations conducted by NHTSA does not support the release of the comprehensive compendium of information in EWR data submissions. A limited release 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 quarterly EWR data submissions. Unlike EWR data, the release of data from investigations does not permit industry-wide comparisons of the quality or durability of all significant components across entire product lines and they are not a compendium of quality and customer satisfaction information developed over time. Thus, the Alliance concluded that the confidentiality of EWR information on consumer complaints should be maintained.

Similarly, JPMA explained that although its members do not object to the release of the numbers of complaints on a specific make or model of child restraint within the context of a specific defect investigation, the wholesale disclosure of consumer complaint numbers by make and model would reveal highly proprietary information competitors, providing them with a compendium of quality information developed by a submitter.<sup>35</sup>

On the other hand, non-industry commenters argued that EWR consumer complaint data should not be held confidential. Public Citizen agreed with NHTSA's statements in the NPRM that "the commercial value of complaint data is well recognized" and that "complaint data are a valuable data source used by companies to help them identify areas of concern including product performance, to consumers and provide guidance on where to allocate

<sup>35</sup> The Motor Equipment Manufacturers Association/Original Equipment Suppliers Association (MEMA/OESA) also opposed treating complaint data as not confidential and stressed that quantitative differences between defect investigation and EWR submissions made comparisons between the two inapposite.

their limited resources." Public Citizen added that "[c]onsumer feedback is vital for companies striving to maintain a profitable business."

Public Citizen raised issues of public availability of information, including information other than EWR data and EWR data.<sup>36</sup> It indicated that, to some extent, information is available through industry guides that are available to manufacturers for a fee and suggested that NHTSA should explore that. It said that NHTSA must prove that other industry groups do not have access to this information. In its view, industry can afford expensive trade publications. However, the public which would benefit from the data, often has severely limited access to these avenues of information, if access even exists.

Public Citizen asserted that under the EWR rule, only total numbers of complaints are provided to the agency, which greatly hinders its usefulness. It viewed these data as extremely basic and requiring no unnecessary details about company operations or future company plans. AAJ raised a policy argument to support its view that the data should be disclosed. AAJ argued that in proposing this class determination, NHTSA did not adequately mention that complaint data are crucial for consumers to make an expensive purchase of an item that has the potential to cause bodily injury. It said consumers are entitled to all available data to render their decision to purchase a motor vehicle. It also asserted that complaints would be valuable to a jury to render a verdict. Therefore, in AAJ's view, NHTSA did not reasonably consider the public's interest in disclosure and the public has a compelling interest in the information, financially and for safety. Neither Public Citizen, which filed its comments long after the close of the rulemaking comment period and long after the industry representatives had submitted comments, nor AAJ provided information rebutting the industry commenters' explanations of how the complaint data can be used competitively to the significant detriment of the competitive positions of the submitters.<sup>37</sup>

<sup>36</sup> Public Citizen referred to the Automotive Industry Status Report, noting vaguely that it already makes some of the proposed exempt information available to manufacturers for a fee. But it did not say what information, or compare the breadth or detail of EWR reporting to that in the Automotive Industry Status Report. We have placed a copy of the Report in the docket. Based on our review, in the absence of any specifics from Public Citizen, we do not accept its conclusion.

<sup>37</sup> Public Citizen's comments also incorrectly assume that the collected EWR data only relate to potentially unsafe products.

In the literature, the commercial value of consumer complaint data is well recognized. See e.g., Edward Bond & Ross Fink, *Meeting the Customer Satisfaction Challenge*, 43 Industrial Management, Issue 4 (July 1, 2001) (Noting the importance of measuring customer satisfaction, describing customer complaints as a data source to a company that can create a "big benefit" from small changes); John Goodman & Steve Newman, *Six Steps to Integrating Complaint Data into QA Decisions*, 36 Quality Progress, Issue 2 (Feb. 1, 2003) (Stressing the importance of complaint data in helping to identify issues with products and the data's effectiveness in assisting companies with resource allocation decisions to address quality assurance issues); Dep't of Commerce, *Managing Consumer Complaints* (1992) (Complaint data may signal how products and services meet or do not meet consumer expectations and how products can be better designed. They may signal a need for better quality control. Complaint management can save business unwanted costs); Michael Graver, *Listening to Customers* (Recognized as a key component to various business strategies, world-class companies now measure and manage customer value and satisfaction. These are often a key performance measure, a leading indicator of financial performance, an important diagnostic measure for continuous improvement and a tool to manage competitive advantage); Robert Woodruff, *Customer Value: The Next Source for Competitive Advantage* (1997) (Managers consider their customers when determining which improvements are needed. Competition for advantage in markets through superior customer value delivery); Jane Goodman-Delahunty, *Promoting Consumer Complaints in the Financial Sector* (2001) (Industry providers should affirmatively encourage consumer complaints. Consumer complaints can be a valuable resource regarding defects in products and services that can otherwise result in a loss of business and market share).<sup>38</sup>

After carefully considering the comments and other information of record, NHTSA has determined that the release of EWR consumer complaint data on light vehicles, medium-heavy vehicles and buses, motorcycles, trailers, and child restraint systems is likely to cause substantial harm to the competitive positions of the manufacturers that submit the data.

The EWR consumer complaint data amount to compendiums of comprehensive information on consumer complaints. The manufacturers' reports cover broad landscapes of makes and models of motor vehicles and child restraints, providing information on current models and those produced in the previous 10 years for motor vehicles and 4 years for child restraints. They address numerous components and systems of vehicles and equipment and, for certain vehicles, include rollovers and fires. See, e.g., 49 CFR 579.21(b)(2); 49 CFR 579.22(b)(2). The comprehensive nature of the compendiums of EWR data on consumer complaints is enhanced by their continuing content, which is updated by quarterly reports, and by their standardized reporting format. They can be used for industry-wide comparisons on these numerous systems and components. The amount of consumer complaint data is substantial. For the first 15 quarters of EWR data, an average of 65 light vehicle manufacturers per quarter reported over 12 million consumer complaints; an average of 87 medium-heavy vehicle and bus manufacturers reported over 365,000 consumer complaints; an average of 18 motorcycle manufacturers per quarter reported nearly 51,000 consumer complaints; an average of 285 trailer manufacturers per quarter reported nearly 97,000 consumer complaints and an average of 20 child restraint manufacturers reported a combination of nearly 65,000 consumer complaints and warranty claims.

The manufacturers that submit the data expend considerable sums to collect the information. This includes staffing phone centers, reviewing mail and considering electronic communications.

The consumer complaints that are amassed and binned by individual manufacturers for EWR reporting are collected for each manufacturer's internal use. The data are not publicly available and are highly proprietary.<sup>39</sup> The data could not be replicated easily at any price.

Manufacturers compete and expend substantial amounts of research money on consumer satisfaction and quality in the market. There is competition to introduce new models and features that meet customer satisfaction. Companies seek to keep customers satisfied in order to maintain and grow their customer base. At the same time, companies seek

to avoid expenses incurred in rectifying quality problems and the associated customer dissatisfaction that attends such problems. It is well recognized that consumer complaints are commercially valuable. This is recognized in the literature. They are particularly valuable in the highly competitive motor vehicle and equipment industries.

EWR consumer complaint data are a very valuable information compendium on customer satisfaction of vehicles and child restraints. This data base provides information on perceived problems with the company's product. As Harley-Davidson explained, the data are reflective of opinions from consumer contact. This is valuable to companies, which depend on satisfying customers. Disclosing this added feedback, which a submitter obtained through considerable effort, would provide useful information to competitors.

More broadly, the data also reveal market responses to various aspects of vehicles and equipment. They provide feedback on new features, areas requiring consumer education and issues that could potentially require field or production adjustments, regardless of safety. Customer inputs such as complaints help identify areas where field experience is showing an issue.

Companies track what competitors are introducing, including product modifications and new technologies. Suppliers, which commonly promote the introduction and use of their equipment, are known. What is not known is whether a product was well received. If the consumer complaint information were publicly available, competitors could and likely would use it to learn whether there is a market reaction to any new technology, supplier or product changes or new marketing effort. The information would be valuable to competitors who may be considering deploying similar or competing technology. Competitors could rely on EWR information in making critical decision such as when to enter the market, which technology or suppliers to use, or how to best market the technology. The value of this information is in that it would enable competitors to use information created by significant input to advance their own commercial interests.

In addition, the EWR consumer complaint information amounts to a data bank of quality control information of a manufacturer's products, model-by-model and system-by-system. It provides in-use information on technologies. Competitors can engage in "tear downs" of another company's products. They can run lab tests. But

<sup>38</sup> See also *Heller v. Shaw Industries*, 1997 WL 786542 (E.D. Pa.) at \*5 (consumer complaints held confidential).

<sup>39</sup> The disclosure of consumer complaint data in investigations is limited. It does not involve a compendium of information that is fairly comparable to the EWR data.

efforts such as these fall short of providing a good understanding of the quality of a product in operation in the field. EWR consumer complaint data provide information on the reliability and durability of various systems and components. Competitors would use this information to evaluate a particular technology or supplier, at a lower risk and cost than otherwise attainable, because the competitor would not have to develop that information. Using this information, competitors could base decisions whether (or not) to employ certain technologies or suppliers to a substantial degree on their reviewing a submitter's EWR complaint information. While the manufacturer submitting the data would have expended substantial resources in deciding whether to install a particular technology, the competitor would gain a real world evaluation without the time, expense and risk associated with product development that would normally occur with field-testing and associated pre-production modifications. Beyond selection of a technology, there are often questions on the preferable design approach. The EWR complaint data would enable one company to use the experience of others to select an optimal design. If released, a competitor could view this information, a model-to-model comparison on the numerous systems and components in EWR reports, and reach valuable conclusions. The release of the data would permit wholesale industry-wide comparisons of the quality or durability of significant components on models chosen for comparison.

In a similar vein, EWR consumer complaints are useful in evaluating field experience and product performance. Complaints (or the absence thereof) reveal the performance of materials and components that are successful and those that are not. The disclosure of consumer complaint data would provide competitors with valuable and previously unavailable insight into the field experience and performance of a submitter's entire product line and individual systems and components. Competitors could use this information to assess the in-use performance of parts and systems. EWR consumer complaint data help identify where technological and engineering improvements that might better satisfy customers and provide guidance to prioritize resources to implement these improvements. It could also be used to select a production process or make purchasing, pricing, and sourcing decisions, while avoiding the cost and risk that would

otherwise be encountered. This would have competitive impacts.

The EWR consumer complaint information would also provide a competitor with information about the submitter's cost structure. In some contexts, the data would reveal rates of problems. These rates are an important factor in the costs of various technologies. Competitors could evaluate the information and make decisions whether to pursue various products or marketing strategies based on an assessment of the submitter's costs.

Additionally, the EWR data provide competitors with valuable insights into a given manufacturer's business practices and decisionmaking, including the methods used to collect consumer complaints.

Public Citizen agreed that consumer complaint information has value. But it disagreed in a general and conclusory manner with the proposal's view that EWR consumer complaint data is competitively valuable. Public Citizen filed its comments in 2007 long after both the close of the comment period on the NPRM and after the industry commenters had submitted comments. Its opinions that the reporting of only numbers of complaints greatly hinders the data's usefulness and that these data are extremely basic and require no unnecessary details about company operations or future company plans were contrary to the weight of the comments. Public Citizen did not provide facts to rebut the statements of the industry commenters.<sup>40</sup> Moreover, the industry has experience in considering consumer complaints and explained the value of these EWR data.

As the court recognized in *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 51–52 (D.C. Cir. 1981):

If \* \* \* competitors can acquire the information only at considerable cost, agency disclosure may well benefit the competitors at the expense of the submitter. \* \* \* Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government. \* \* \* [T]he essential test is the same: whether

<sup>40</sup> Some of Public Citizen's comments were based on a misunderstanding of the proposed rule. Public Citizen referred to fatalities, injuries and property damage claims, but those were outside the scope of the proposed rule.

release of the requested information, given its commercial value to competitors and the cost of acquiring it through other means, will cause substantial competitive harm to the business that submitted it.

The release of EWR consumer complaint information collected at considerable cost by manufacturers would have competitive consequences, as recognized in *Worthington Compressors*. The submitters expend considerable sums to gather large volumes of EWR data. Their information is valuable and could be used by competitors. The release of it would be to the significant benefit of the competitors of the submitters and to the detriment of the competitive position of the manufacturers that submitted the information.<sup>41</sup>

Public Citizen suggested that the data should be released because they involve safety concerns.<sup>42</sup> This is not a valid characterization of the data. By definition, consumer complaint data go well beyond safety data. 49 CFR 579.4. Also, our experience over 4 years has been that the vast bulk of consumer complaint data are not indicative of defect trends.

Public Citizen had also raised issues about the availability of the EWR

<sup>41</sup> As an alternative basis for confidentiality, the disclosure of the comprehensive compendiums of EWR information would likely result in result in consumer misuse. In *Worthington Compressors*, 662 F.2d at 53 n.43, the court permitted the consideration of consumer misuse of commercial information that is otherwise unavailable. (On remand, if the court finds the tests cannot be accurately duplicated, it should consider whether competitors or consumers may misuse the information to the detriment of appellants' competitive positions). The disclosure of the EWR information would be misleading to consumers and unfair to the submitting manufacturers. Consumers would attempt to make comparisons of the performance of one model to another across multiple model years, on a quarterly basis, which can not be done. The underlying foundations for the data are not the same. Different manufacturers have different systems for collecting consumer complaints. Some have wider nets than others. The net result would be unfair, unsubstantiated, and misleading comparisons. These comparisons would adversely affect the competitive positions of manufacturers in a way that was unfair.

Public Citizen has asserted that this analysis amounts to an unwarranted product disparagement theory, and contends that the harm occurring from the disclosure of these data amounts to adverse public reaction, which is not a cognizable harm under Exemption 4. The agency disagrees with this attempt to recharacterize the harm. Since the EWR data are competitively sensitive for a valid reason under Exemption 4, other potential consequences such as adverse public reaction, do not dictate that we treat the information as non-confidential. *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 341 (D.C. Cir. 1989).

<sup>42</sup> Public Citizen referred to dangerous products that injure and kill people. It also stated that the release of the data will encourage the production of better products which ultimately will benefit industry. Public Citizen did not support this statement, and it is outside the considerations under Exemption 4.

complaint data. These data are not publicly available, as repeatedly stated by industry commenters, and Public Citizen has not shown otherwise. The limited disclosures of limited consumer complaint data by the agency in ODI defect investigations of particular problems in specific products do not resemble the breadth or scope of the information that is submitted pursuant to the EWR rule. The agency's valid reasons for choosing to disclose certain data during investigations (e.g., to elicit additional consumer attention concerning a possible, specific defect, or to inform consumers of the specific scope of an investigation or recall) are not applicable in the EWR context. Similarly, the data collected by third-parties such as Consumer Reports and other publications is not comparable in depth, breadth or scope, and Public Citizen did not show otherwise.

As the Alliance and others explained, NHTSA's current practice of generally disclosing limited, model- and model-year-specific consumer complaint numbers when such information relates to specific defect investigations does not justify the wholesale release of the EWR data. To the extent such limited disclosures are competitively useful, it is primarily to identify whether another manufacturer may have a similar issue (e.g., uses the same part and has a similar failure experience). These limited disclosures do not offer the same market-oriented base of information as the comprehensive collection of trend data provided pursuant to the EWR rule. Non-industry commenters did not dispute these points. As a result, a comparison between publicly available complaint data and the compendium of EWR complaint data submitted by manufacturers is not valid.

### Impairment

In addition to proposing to hold EWR consumer complaint data confidential on grounds of competitive harm from their release, the NPRM proposed to hold these data confidential under the impairment prong of FOIA Exemption 4, 71 FR 63743. As reflected in that notice, manufacturers may obtain and receive customer input and feedback on product performance in a variety of ways, and establish differing practices for the receipt of customer complaints. The nature and level of effort expended by a company is discretionary. It is beneficial to NHTSA if a company expends considerable effort. More consumer input channels increase the robustness of the available data, which is submitted under the EWR program. Consumer complaints provide feedback

on product performance that can be valuable to NHTSA in identifying problems, including potential defects that may point to the presence (or absence) of a safety problem. The agency seeks to ensure that it receives as much information as possible to identify possible defect trends.

Under the early warning reporting provisions of the Safety Act, however, NHTSA 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. 49 U.S.C. 30166(m)(4)(B). In other words, NHTSA may require manufacturers to submit reports based on information that they have collected but may not require manufacturers to collect and submit information not otherwise collected. In view of the fact that the quantity and comprehensiveness of the EWR consumer complaint data depend in part on the willingness of manufacturers to collect this information through a broad and multi-input approach, NHTSA does not want to take steps that discourage the collection efforts.

Both industry and non-industry commenters addressed the agency's proposal. Industry commenters stated that a class determination for consumer complaints was justified on the basis that disclosure would impair the agency's ability to obtain this information in the future.

The Alliance stated that there are variations in how manufacturers conduct their consumer complaint programs. Manufacturers can alter the manner in which these programs are conducted based on a variety of internal considerations, benefits, and costs. The Alliance cited a purpose of the TREAD Act, which is to enhance the ability to carry out the Safety Act, a purpose of which is to reduce the number of accidents and the fatalities and injuries arising from them. The Alliance reiterated an earlier statement by NHTSA (which is of continuing validity) that the agency's ability promptly to identify safety related defects would not be enhanced if disclosure of EWR data diminishes the volume or reliability of the information. Nor would the public interest in 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. Confidential treatment of those data is necessary to avoid creating a disincentive to the continued voluntary creation of the information,

since there is no requirement to collect the information in the first instance. The Alliance concluded that NHTSA's ability to collect comprehensive EWR information and, thus, its ability to address defect trends indicated by EWR data, will be impaired if the data are released. The Alliance also noted that apart from the early warning context, a reduction in consumer complaint data would have a deleterious effect on NHTSA's ability to conduct the defect investigations that it has opened.

Utility emphasized that the quality and quantity of information relating to consumer feedback that NHTSA receives depends largely on a manufacturer's willingness to expend financial and administrative efforts to collect such information. It advised that manufacturers who currently collect and organize this information would be less inclined to do so if the information were disclosed and ended up generating frivolous lawsuits, the defense of which further raises the cost of doing business.

AIAM stated that the public disclosure of the complaint information would impair NHTSA's interests in promoting safety. If less complete information relating to safety issues is provided to the agency faulty decisions could follow.

In contrast, Public Citizen asserted that NHTSA has not shown that making the data public would hinder its ability to collect this information in the future. In Public Citizen's view, in light of the extreme value of consumer complaints to manufacturers, they are unlikely to stop collecting this information and unlikely to alter their practices in collecting complaints. It added that companies could not cease receiving complaints. Public Citizen also asserted that past events, such as the Ford/Firestone problems, illustrate the interest of the public in EWR data. Public Citizen further stated, without citation, that Congress intended for the public to use the data to monitor whether NHTSA is fulfilling its obligation to investigate significant safety issues. Finally, Public Citizen contended that the standard for withholding information under the impairment prong has not been met.

Public Citizen has maintained that the impairment prong of FOIA Exemption 4 requires a rough balancing of the importance of the information and the extent of the impairment against the public interest in disclosure, citing *Washington Post v. HHS*, 690 F.2d 252, 269 (D.C. Cir. 1982); *Washington Post v. HHS*, 865 F.2d 320, 326-27 (D.C. Cir. 1989). However, in *Public Citizen Health Research Group v. FDA*, 185 F.3d 898, 904-05 (D.C. Cir. 1999), the

Court rejected “a consequentialist approach to the public interest in disclosure” as “inconsistent with the ‘[balan]ce of private and public interests’ th[at] Congress struck in Exemption 4.” The Court went on to state that “[t]hat balance is accurately reflected in the test of confidentiality” established by *National Parks* and that a requester cannot “bolster the case for disclosure by claiming an additional public benefit” in release. *Id.* at 904. In other words, “the public interest side of the balance is not a function of” among others “any collateral benefits of disclosure.” *Id.* Accordingly, an Exemption 4 case may not be bolstered by claiming an additional public benefit from disclosure of data is beyond the test of *National Parks*.<sup>43</sup> In the following discussion, we will address the impairment that would result from disclosure. While we do not accept the balancing test under Exemption 4 advanced by *Public Citizen*, in the alternative, we will address a rough balance between the importance of the information and the extent of the impairment against the public interest in disclosure.

NHTSA’s Office of Defects Investigations (ODI) has long viewed consumer complaints as a critical aspect of the data the agency considers to identify potential vehicle and equipment problems. 67 FR at 45847 (July 10, 2002). For this reason, NHTSA included consumer complaints in EWR reports. 67 FR at 45847–51. Consumer complaint information is a useful pointer to areas that, after appropriate assessment, may lead to defect investigations and ultimately to the remedy of safety defects. The importance of consumer complaints increases as warranties expire and the availability of warranty claims information correspondingly diminishes. The EWR regulation assures that the agency receives information about the amount of complaints received by manufacturers as to each of the specified components or systems.

Our experience in defect investigations has been that companies generally receive considerably more consumer inputs than does the agency on any actual or potential vehicle

problem. 67 FR at 45848. Because manufacturers ordinarily receive more complaints than consumers send to the agency, the agency must rely on manufacturer efforts to continue to amass as much information as possible. Companies may receive customer input and feedback on product performance in a variety of ways and establish differing practices for the receipt of complaints. The EWR definition takes this possibility into account. Companies may increase available staff at their toll-free telephone numbers or create web-based systems to accept complaints via electronic mail. Additional input sources increase the robustness of available data, which can be valuable both to the company collecting it and to NHTSA in identifying problems—including problems that may point to the presence (or absence) of a safety-related defect.

The disclosure of consumer complaint information would be likely to discourage manufacturers’ proactive efforts to obtain these data or to expend sums to receive more information or to use it more effectively. The release of the EWR information would not eliminate manufacturers’ collection of consumer complaints, but they likely would take steps to reduce the collection of complaint data in order to improve their numbers. As a direct result, NHTSA would collect considerably less data in the future. The agency would be faced with attempting to conduct analyses with less robust reporting from manufacturers. NHTSA’s ability to identify potential safety defect trends would be impaired. Such a result would affect the agency’s ability to carry out the early warning program.<sup>44</sup> In sum, the disclosure of the information would be likely to impair NHTSA’s ability to obtain necessary information in the future.

On the other hand, the public would not receive significant, if any, safety benefits from the release of EWR

consumer complaint information. The EWR data cover a wide range of consumer satisfaction issues. As explained in the preamble to the EWR rule, we sought to obtain complaint information beyond that which would be likely to involve safety issues:

The agency is unwilling to adopt the recommendation that the complaint must allege a safety-related defect, as this would unduly limit the reporting of consumer complaint information that NHTSA is seeking to collect through the early warning reporting rule. As stated in the NPRM, based on its past experience with defect investigations, the agency does not “believe that [it] would be appropriate to simply require reporting of ‘safety-related’ problems, since manufacturers often have a much more narrow view of what constitutes a safety-related problem tha[n] we do.” [66 FR] at 66202. If the term “consumer complaint” were limited to complaints specifically alleging a safety-related defect, communications expressing dissatisfaction with a product or relating that the product did not perform in a satisfactory manner would not necessarily be reported to the agency. 67 FR at 45849.

The agency included this category of information in the early warning program to ensure the collection of a comprehensive amount of data for it to use in its analysis. This has proven true. The vast majority of this information has not been indicative of defect trends.

NHTSA also has balanced the importance of consumer complaints and the extent of the impairment to the government against the public interest in disclosure. The importance of complaints is well-established. The magnitude of the numbers of complaints is important to us, as in our screening we will look for trends based in part on relatively high rates. We believe that, given manufacturers’ substantial control over information collection, if the numbers of consumer complaints were disclosed to the public, it is likely that the numbers of consumer complaints would be reduced considerably and, as a consequence, our ability to detect potential safety problems would be substantially diminished.

On the other hand, the public interest in disclosure of consumer complaints is limited. If the data were released, the public would have a generalized awareness of consumer dissatisfaction or a perception of a potential or actual problem broken out by the elements provided in 49 CFR Part 579. But based on EWR complaint data alone, it is not possible to identify a safety defect in a particular product. And, unlike ODI investigations, a specific potential defect is not identified in EWR data. Thus, to the extent balancing is required, the impairment prong

<sup>43</sup> Public Citizen asserted that a guiding tenet of both FOIA and the TREAD Act’s early warning system is to ensure that the public has the ability to monitor government institutions and protect themselves by being informed of potential defects. This is unsupported. This is not the guiding tenet of FOIA Exemption 4 and this was not the purpose of the early warning rule. The purposes were to enhance the Secretary’s ability to carry out the Safety Act and assist in the identification of defects related to motor vehicle safety. 49 U.S.C. 30166(m)(1), (3)(A).

<sup>44</sup> Limited disclosure of consumer complaint data collected by manufacturers during ODI investigations is different from the disclosure of EWR data sought by Public Citizen and others. The consumer complaint data released in the course of agency investigations is limited. It involves limited models and model years and specific alleged problems. EWR data amount to full compendiums, across makes, models and model years involving numerous systems. The release of consumer complaint data in investigations does not negate the competitive value of the EWR data or the likely impact that wholesale (rather than piecemeal) disclosure would have on submitters. We also note that there are benefits of releasing information in investigations, such as providing for public input which could enhance the agency’s understanding of an issue. Also, data collections on consumer assessments by third parties are not comparable to the volume and depth of information received under the EWR rule.

balancing weighs in favor of nondisclosure of consumer complaint data.

### 3. Warranty Claims

The EWR rule requires larger volume manufacturers of light vehicles, medium-heavy vehicles and buses, motorcycles, and trailers to submit the number of warranty claims, without regard to whether they are safety-related, that they have paid, broken out, for each make and model, by numerous specific categories of vehicle systems (e.g., steering, brakes), fires and for certain categories rollovers—all of which are binned by code. See 49 CFR 579.21(c), 579.22(c), 579.23(c), 579.24(c). In addition, the rule requires manufacturers of tires to report warranty adjustments they paid, other than for relatively low volume tire lines, on a number of categories of tire failures, such as the tread and sidewall. 49 CFR 579.26(c). In the child restraint category, warranty claims are combined with consumer complaints. 49 CFR 579.25(c). Repairs made outside of warranties that are covered by “good will” are also reported under warranty claims and warranty adjustments.<sup>45</sup> 49 CFR 579.4.

The EWR warranty data reflect the costs that manufacturers have incurred in satisfying claims for payments arising from problems with their products. Ordinarily, those costs are the costs of repairs of vehicles or the repair or replacement of equipment. The early warning data on warranty claims involve a wide range of issues. For the most part they do not reflect defect trends.

In the NPRM, the agency proposed to make a class determination that warranty claims (warranty adjustments in the tire industry) in EWR data would not be released to the public. 71 FR at 63743. The agency based this proposed class determination on both the competitive harm and impairment prongs of *National Parks*. We first address the competitive harm from the release of EWR warranty claims data, then we discuss the impairment to the agency’s ability to obtain as complete warranty information that would follow the release of the information.

#### Competitive Harm

Numerous commenters have provided information to the agency on whether

the disclosure of EWR warranty claims and warranty adjustment data (collectively warranty claims) would be likely to cause the submitting manufacturer to suffer competitive harm. This includes both industry and non-industry groups.

Commenters from various sectors of the automotive industry explained the competitive value and use of EWR warranty claims data as well as the competitive harm that the release of the data likely would cause. As noted in the discussion of consumer complaints above, at the outset of its comments, the Alliance showed manufacturers compete vigorously for sales of new vehicles. Similarly, there is substantial competition for tire sales. The manufacturers expend substantial amounts of research money annually related to quality and consumer satisfaction in the market for new sales.

The EWR warranty data are a comprehensive compendium of warranty claims. They cover numerous systems and components (e.g., 18 for light vehicles and 22 for medium heavy vehicles), as well as fires and rollovers for many reporting industry sectors. They cover makes and models going back many years and are updated quarterly. As noted by the Alliance, their value is enhanced by their continuing content, which permits a model-to-model comparison on the numerous systems and components in EWR reports. The data are proprietary and are not publicly available.

Manufacturers have submitted a significant volume of warranty claims data to NHTSA under the EWR program. According to comments, the manufacturers have expended tens of millions of dollars in reporting under the program. The release of EWR warranty data would permit wholesale industry-wide comparisons of the quality or durability of all significant systems or components on models chosen for comparison. Disclosure of this information, as the Alliance explained, would financially benefit others who obtain and use the data for purposes that would be contrary to the competitive interests of the submitting manufacturers.

The Alliance’s discussion of EWR warranty data addressed the competitive aspects of those data including the competitive consequences of the release of warranty information in a context that also addressed consumer complaints and field reports. The Alliance explained that the EWR data provide valuable information on quality and consumer satisfaction of vehicle owners on a make/model/model-year

basis.<sup>46</sup> The Alliance emphasized that warranty claims information is particularly sensitive from a competitive standpoint. Additionally, the Alliance noted that EWR data provide valuable insights into a given manufacturer’s business practices and decisionmaking, including the application of warranty terms and conditions, the coverage of products and systems by a given warranty, and the manufacturer’s willingness to provide good will adjustments after the end of an official warranty period.

The Alliance referred to a report from a consultant, AutoPacific, which made several observations regarding the value and use of warranty data. Under a competitive harm analysis heading, AutoPacific stated that it is well-known that automobile and component manufacturers closely guard their warranty data for competitive product design and pricing reasons. Comparative component warranty, reliability, and durability experiences strongly influence component pricing and sourcing decisions. If an original equipment manufacturer (OEM)<sup>47</sup> purchases a component and obtains field experience with that component, it can be expected to use that information to make decisions about purchases and the prices it will pay. Providing that field experience to other manufacturers gives them a free ride at the submitter’s expense. Auto Pacific also observed that component manufacturers can use vehicle manufacturer warranty data in preparing bids for new business, planning new business marketing strategies, and estimating the likely costs and pricing positions of vehicle manufacturers, with whom they may compete for sales in the aftermarket. The warranty claim experience at the component level could be useful to them, to the detriment of the vehicle manufacturers.

The Alliance pointed out two aspects of warranty claims data that are

<sup>46</sup> The Alliance asserted that the comprehensive nature of these submissions—covering all makes and models over a multi-year timeframe—makes them a valuable compendium of quality and consumer satisfaction information that could not be replicated easily at any price and could be used by competitors to follow warranty trends that provide a window into submitters’ warranty costs. The Alliance, citing *Worthington Compressors*, pointed out that the release of information collected at considerable cost by an entity that submitted information to the Government could easily have competitive consequences. The submitters expend considerable sums to gather large volumes of EWR data and the release of it would be contrary to the competitive interests of entities that submit the information and to the benefit of competitors.

<sup>47</sup> OEMs may be contrasted to aftermarket equipment manufacturers that produce replacement equipment.

<sup>45</sup> These data include “good will” repairs that are conducted and paid for by the manufacturer outside of the warranty. “Good will” means “the repair or replacement of a motor vehicle or item of motor vehicle equipment, including labor, paid for by the manufacturer, at least in part, when the repair or replacement is not covered under warranty, or under a safety recall reported to NHTSA under part 573 of this chapter.” 49 CFR 579.4.

particularly sensitive from a competitive standpoint and explained that vehicle manufacturers and their dealers would be placed at a particular competitive disadvantage should EWR warranty claims information be released. Vehicle manufacturers, often through their franchised dealers, compete with independent aftermarket parts manufacturers for sales of parts used in repairs. Those independent aftermarket parts manufacturers would gain a significant competitive advantage from having routine access to warranty claims experience on the detailed level of EWR reporting. As an example, they would know the trends in warranty experience on brakes of various makes and models. The value of such information to aftermarket parts manufacturers is evidenced by publications sold by the Motor and Equipment Manufacturers Association/Original Equipment Suppliers Association (MEMA/OESA) that include forecasts and historical trend data where available. Aftermarket sales in the light duty market, the Alliance estimated, were \$197 billion in 2005.<sup>48</sup> The sale of these data by aftermarket parts manufacturers illustrates the value of the data and the associated competitive harm from the release of a comprehensive collection of warranty claims experience. With this information, the Alliance explained, aftermarket parts manufacturers would know where to target their marketing efforts when vehicles come off warranty and benefit from this information at the direct expense of the vehicle manufacturers' competitive positions and their franchised dealers.<sup>49</sup>

The Alliance also stated that warranty claims should be withheld from public release on grounds of the existence of competition from new and potential new entrants to the U.S. market. In particular, it noted several Korean-based companies and the possibility of

Chinese, Russian and European companies entering or reentering the United States market. Release of EWR information, it argued, would provide these potential competitors with access to an otherwise unavailable collection of comprehensive data about manufacturers' experiences with various components. These new entrants could benefit by reviewing EWR warranty data to estimate the probable ranges of warranty claims rates (and by inference, the associated costs), without having to expend resources to try to obtain this information privately, such as by paying for market research, or to take the risk of entering the market without the benefit of this information. Providing this field experience, the Alliance stated, would provide them with a free ride at the expense of the first manufacturer. The Alliance asserted that this is a competitive harm within the meaning of *Worthington Compressors*, 662 F.2d at 51–52.

GM, a manufacturer of both light vehicles and medium-heavy vehicles, pointed out it maintains the confidentiality of warranty data. It views the data as proprietary and does not disclose voluntarily warranty data of the type and scope submitted under the EWR rule.<sup>50</sup> GM explained that manufacturers will be harmed by the competitive use of EWR warranty data. Because the EWR warranty claims represent costs incurred by manufacturers, counts of warranty claims provide an index of a manufacturer's costs. Cost information is competitively sensitive.<sup>51</sup>

<sup>50</sup> GM also explains that its own suppliers do not have full access to its warranty data and that any data that GM shares must be treated by those suppliers as proprietary information.

<sup>51</sup> GM supported the statements in its comments with several examples of the manner in which competitors could use the information to their benefit and the detriment of the entity submitting the data, including reduced testing and analysis, and performance issues in the field:

- A supplier offers a newly designed system to OEMs. While reverse engineering and testing by multiple OEMs is possible, those approaches do not duplicate field experience in numerous vehicles. If one OEM (OEM1) installs the system in vehicles, it would gain field experience and could use it to make better decisions about the future use of the system. If the EWR warranty claims data were disclosed, 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.

- Two OEMs may purchase systems with similar designs from the same supplier, but the OEM with a greater sales/production volume may learn something about its performance first and use its knowledge to improve its product. If the other OEM has access to this company's information, it may be able to respond sooner and offset OEM1's competitive advantage.

- If two OEMs are using the same systems/components from the same supplier, differences in performance of those systems may be exposed in

GM stated that since vehicle manufacturers increasingly purchase entire systems (i.e. all components used to perform a specific function such as steering, suspension, heating and cooling, occupant restraints, or seats) from suppliers, the disclosure of these data would provide competitor vehicle manufacturers with the warranty claims experience of systems made by various potential suppliers (e.g., for GM) that would give these competitors an advantage in selecting suppliers, at the expense of the manufacturer whose experience underlies the data.

Also, competitors could use these data to assess the effectiveness of a particular OEM's systems and processes to identify and resolve quality and lead time issues. As GM explained, the loss of confidential information would force it or another OEM to subsidize other OEMs, reducing their costs at GM's expense and destroying GM's competitive advantage. GM also pointed out that OEMs compete for replacement part sales with other companies and that the release of warranty claims data can be used by these aftermarket competitors to make decisions on what parts to produce, in what quantities and at what price. This, GM noted, is a source of competitive harm.

AIAM focused on the totality and comprehensive nature of the EWR data. AIAM's comments, which were discussed above in the context of consumer complaints, applied with at least equal force to warranty claims. AIAM stated that EWR warranty data would provide competitors useful information about the quality levels and the cost structure of the submitter. It would enable one company to use the experience of another to select an optimal design, production process and pricing strategy, while avoiding the cost and risk that would otherwise be encountered. We refer by reference to the discussion of AIAM's comments above.<sup>52</sup>

the field due to differences in how each of those OEMs integrated those systems/components into its vehicle designs. After reviewing its competitor's EWR warranty data, an OEM "may be able to alter its vehicle design integration sooner based on differences in field performance, which would offset the other OEM's competitive advantage.

- Warranty claims information on newly released vehicles can be used by competitors to decide what to emulate and what not to emulate without the expense of implementing those systems and processes.

<sup>52</sup> AIAM stated, for example, that a knowledgeable competitor can view this mosaic of information and reach valuable conclusions. The comprehensive body of EWR information facilitates manufacturer-to-manufacturer comparisons. EWR warranty data would provide competitors useful information about the quality levels achieved by the submitting manufacturer or its suppliers, both for

<sup>48</sup> The Alliance stated that this figure was based on estimates from the Automotive Aftermarket Industry Association. However, the Association estimates that the amount of business in this area is much larger—nearly \$270 billion. See <http://www.aftermarket.org/> (Press Release No. AAIA-26-06 (June 15, 2006) (reporting that aftermarket business related to light vehicles for 2006–2007 increased to \$267 billion)).

<sup>49</sup> Comments by the MEMA/OESA lend further support to the value of the data. MEMA/OESA pointed out that the warranty data of original equipment manufacturer (OEM) suppliers are of particular value to replacement parts and equipment manufacturers and that their wholesale disclosure would likely cause these suppliers to suffer serious competitive injury if the data are disclosed. It explained that this information is highly sought and competitively sensitive marketing intelligence. Suppliers would undoubtedly benefit from the disclosure of this information.

Nissan stated that, in addition to their role as an accounting system between manufacturers and their dealers that is designed to maintain customer satisfaction, a purpose of warranty systems is to quickly identify issues. Warranty data assist manufacturers in implementing production adjustments or service actions to ensure that products are operating as intended and meeting consumer expectations. Nissan pointed out, for example, that warranty claims help the company identify areas where the field experience information suggests further investigation. The vast majority of these issues, it added, are not safety related.

Nissan discussed the competitive consequences of the release of EWR warranty information together with consumer complaints and field reports.<sup>53</sup> Of particular note, warranty data would be valuable in the context of vehicle manufacturers' changes of suppliers. Competitors could, for instance, learn that the aggregate number of warranty claims in a category

technologies used in vehicles and in their accompanying production processes, which permits competitors to evaluate a particular technology, process or supplier, at a risk and cost that is lower than otherwise attainable. Using this information, AIAM explained, competitors might be able to base decisions and reach conclusions to pursue certain technologies to a substantial degree on their reviewing a submitter's EWR warranty information. The submitter may have expended substantial resources to help it decide whether to pursue a particular technology, while the competitor would gain a real world evaluation free of cost or the effort of a real world evaluation. This would impair the competitive position of the submitter. The EWR information would also provide a competitor with information about the submitters' cost structure. Claims are an important factor in the costs of various technologies. Competitors could evaluate this cost information and make decisions about whether to pursue various products or marketing strategies based on the submitter's costs without undertaking the risks of producing a vehicle with the particular technology.

<sup>53</sup> Nissan pointed out the competitive aspects of EWR warranty data. EWR warranty claims data help identify areas where field experience is showing an issue. The data can reveal market trends in both company costs and consumer reaction. Competitors could consider the data before deploying new technologies. They would rely on Nissan's information in making critical decisions on which technology or suppliers to use and when to enter the market and how best to market the technology to consumers. Competitors can use this information to determine market reactions, supplier or product changes, and new marketing efforts. Nissan further noted that this information is competitively valuable irrespective of whether the specifics of each claim are accessed by competitors because competitors can use these data to focus on a particular factor that can then be readily identified through reverse engineering.

Nissan explained that it develops warranty information only after significant investment in engineering and/or market research. Competitors, including suppliers, could use the information created by the significant investment of the manufacturer that submitted the data. These data could be used competitively against a submitter.

rose with a change of suppliers. Warranty data also provide insight into a company's warranty practices, particularly "good will" after a warranty expires.

TMA addressed warranty information as part of its overall comments on the competitive harm from disclosure of EWR information. It stated that public availability of detailed, comprehensive warranty data for each model and model year across numerous components and systems will provide significant market intelligence to competitors. TMA pointed out that the release of the information would provide competitors with valuable information to evaluate the performance, reliability and durability of various components, without the expense and risk associated with product development that would normally occur with field-testing efforts, while shortening the amount of time competitors need to market competing products, to the competitive disadvantage of the submitting manufacturer.<sup>54</sup>

Blue Bird asserted that EWR warranty data are highly proprietary and have a high level of competitive sensitivity. If these data were available, competitors would have a free ride in learning about warranty experiences for various vehicle systems, components, and parts. It also stated that their wholesale disclosure would result in competitive harm.

Harley-Davidson stated that warranty data are generally not disclosed by individual motorcycle companies. Warranty claims are part of continuous improvement, training programs and efforts to satisfy customers. The Motorcycle Industry Council echoed this concern, in light of the reservoir of information about customer satisfaction and quality concerns, and urged against the disclosure of warranty data.

<sup>54</sup> TMA stated that the EWR data that medium-heavy vehicle manufacturers report are comprehensive as they involve numerous vehicle systems as well as fires and rollovers. This compendium of EWR warranty data, model-by-model and system-by-system, has significant competitive value. TMA stated that the disclosure of EWR data would provide competitors with valuable and previously unavailable insight into the field experience and performance of a submitter's entire product line and individual systems and components. There are numerous uses that competitors could make of these data to their competitive advantage. TMA characterized the EWR information as a data bank of quality control information that competitors could use to assess the in-use performance of parts and systems. A competitor could use the reporting manufacturer's field experience, good or bad, while avoiding the costs, effort and risks that the reporting manufacturer has incurred. It would be used in purchasing, pricing, and sourcing decisions, all of which would have competitive impacts. TMA also cited a discussion by GM of EWR warranty data as a competitively valuable cost index and explained how EWR warranty data can be used.

Utility explained that it uses warranty claims to help identify potential problems early in the life of a trailer and spot trends associated with potential problems. By analyzing such data, with its suppliers, Utility is able to update components, incorporate new technologies and achieve cost savings. Such information in the hands of competitors would enable them to assess the in-use performance of component parts, which in turn could be integral components of its purchasing, pricing and sourcing decisions.

RMA, on behalf of tire manufacturers, asserted that NHTSA has treated tire manufacturer warranty adjustment data as confidential business information in the past. RMA asserted that because tire manufacturers use warranties as a marketing tool, adjustments are not necessarily an indication of tire performance.<sup>55</sup> It argued in favor of a class determination to cover all tire warranty adjustment data.<sup>56</sup> It further contended that since warranty data have been held confidential in the context of some investigations, the broader EWR warranty data base should be held confidential. As RMA observed, the tire industry competes tire line-by-tire line and even size-by-size. Tires are marketed by size in a given line.

Several manufacturers advanced another consequence of disclosure: Misleading and unfair comparisons of the data. The Alliance explained that the disclosure of the comprehensive compendiums of EWR information would be misleading to consumers and unfair to the submitting manufacturers because consumers would attempt to make comparisons of the performance of one model to another, across multiple model years, on a quarterly basis, which, as the Alliance observed, can not be done. Similarly, AIAM stated that public disclosure of the data would create a great potential for misunderstanding and mischaracterization. AIAM pointed out that automotive warranties vary in

<sup>55</sup> RMA stated that it is a party to a consent order with the Federal Trade Commission prohibiting the association from collecting or disseminating competitively sensitive information, including warranty information. It submitted a copy of the order with its comments. The order reflects a concern about tire company competitors sharing information.

<sup>56</sup> RMA suggested that this rulemaking should apply to warranty claim data submitted during defect investigations. Such a proposal is clearly outside the scope of this rulemaking, which applies to EWR data. As RMA has maintained (correctly) in legal proceedings, the vast majority of EWR data are not indicative of defect trends. Brief at 5-6 and 22; Reply Brief at 1 in *Public Citizen v. Peters*, No. 06-5403 (D.C. Cir.). We are declining RMA's suggestion.

length and scope of coverage. A model having a higher claims rate may simply have a more comprehensive warranty than the second model, rather than inferior quality. Reports with simple comparisons could, in AIAM's view, affect the competitive positions of manufacturers in a way that was unfair. Also, TMA stated, with supporting explanation, that manufacturers and consumers could misuse the data to draw unfair and unsubstantiated and misleading comparisons regarding competitors' products.

JPMA added that the release of the encyclopedia of quality information encompassed in EWR data would cause submitters unwarranted competitive harm because the reports will include activities that are not safety related. This, JPMA said, will result in unwarranted disparagement.

RMA noted that warranty policies differ among tire manufacturers, and from tire to tire. Both consumers and the marketplace influence the terms of these warranties. TIA noted that the disclosure of warranty data can provide a misleading picture of a tire model's performance that would competitively harm the manufacturer. Workhorse Custom Chassis also asserted that the wholesale disclosure of these numbers would competitively harm EWR submitters in part because of perceived problems by potential customers.

Several entities acknowledged the limited releases of warranty information submitted by the manufacturers during investigations by NHTSA's ODI. The Alliance stated that the release of this limited information on specific models in a limited number of model years in investigations conducted by NHTSA does not support the release of the comprehensive compendium of information in EWR submissions. A limited release 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 quarterly EWR submissions. Unlike EWR data, the release of data from investigations does not permit industry-wide comparisons of the quality or durability of all significant components across entire product lines and they are not a compendium of quality and customer satisfaction information developed over time. Thus, the Alliance concluded that the confidentiality of EWR warranty information should be maintained.

GM added that the limited disclosure of warranty information in other contexts, such as during defect investigations, typically involves a limited number of makes, models, and

model years of vehicles and are limited to a narrow group of warranty codes. GM concluded that the effects of disclosing all EWR warranty data, are, therefore, much different from the effects accompanying the disclosure of the more limited warranty data the agency currently discloses.

Similarly, Nissan distinguished the EWR warranty claims data from those provided during ODI investigations, noting that the latter have limited competitive value compared to EWR warranty data because they do not offer the same market-oriented base of information as the comprehensive collection of trend data provided under the EWR rule.

By contrast, non-industry commenters argued in favor of disclosing all EWR warranty data. Quality Control and Public Citizen argued that the disclosure of this information would permit the public to make educated decisions regarding products. Quality Control stated that the EWR warranty data should be disclosed because they would be useful to the public in spotting potential defect issues. Public Citizen stated that the EWR rule requires no unnecessary details about manufacturer business operations or future plans. Quality Control and Public Citizen did not provide any facts disputing the competitive value of the data or the harms of disclosure explained by the industry commenters.

The literature also refers to the value of warranty claims data. At its core, warranty data are commercially valuable because of the myriad ways they can be used. *See* Tom Gelinas, *We Got You Covered*, Fleet Equipment, July 1, 2005, at 36 (noting ArvinMeritor's use of warranty data to perform many tasks, such as in the company's OnTrac Call Center's early warning system reports, which are used to help engineers "determine corrective actions on new or emerging product problems") and Huaqing Wu, *Early Detection of Reliability Problems Using Information from Warranty Databases*, TECHNOMETRICS, May 31, 2002, at 120 (explaining the value of using warranty data "to detect potentially serious field reliability problems").

After carefully considering the comments and other information of record, NHTSA has determined that the release of EWR warranty claims numbers on light vehicles, medium-heavy vehicles and buses, motorcycles, and trailers, and EWR warranty adjustment data on tires is likely to cause substantial harm to the competitive positions of the manufacturers that submit the data.

The EWR warranty data are a comprehensive compendium of warranty claims paid by manufacturers, for a broad range of products, generally by make, model year, going back for years and updated quarterly. They address numerous components and systems of vehicles and equipment and for certain vehicles include rollovers and fires. *See, e.g.*, 49 CFR 579.21(b)(2); 49 CFR 579.22(b)(2). The comprehensive nature of the compendiums of EWR data on warranty data is enhanced by their continuing content, which is updated by quarterly reports, and by their standardized reporting format. In general, these data reflect a repair or the replacement of an item. They can be used for industry-wide comparisons on these numerous systems and components. The amount of EWR warranty data is substantial. For the first 15 quarters of EWR data, an average of 65 light vehicle manufacturers per quarter reported 204 million warranty claims; an average of 87 medium—heavy and bus vehicle manufacturers per quarter reported nearly 11 million warranty claims; an average of 18 motorcycle manufacturers per quarter reported over 1.1 million warranty claims; an average of 285 trailer manufacturers per quarter reported 1.6 million warranty claims and an average of 27 tire manufacturers per quarter reported over 1.6 million warranty adjustment claims.

These warranty data are not publicly available. Automobile, system, component and equipment manufacturers closely guard their warranty data. The compendiums of EWR warranty data submitted by manufacturers could not be replicated at all or at least not easily at any price.

The EWR warranty data are a valuable indicator of the field experience of parts and systems in vehicles and tires.<sup>57</sup> The warranty data indicate the reliability and durability of various systems and components.

EWR warranty data are a valuable source of information about the quality of the range of products, system-by-system, over time sold by a manufacturer or its supplier. Warranty information is useful in assessing performance, reliability and durability issues. These data can be used to select an optimal design and production process.

Warranty claims help to identify potential problems early in the life of a vehicle. By analyzing such data, a

<sup>57</sup> While this discussion applies to child restraints, they are covered under the aggregated submission of consumer complaints and warranty claims.

company is able to update components, incorporate new technologies and achieve cost savings. Warranty data assist manufacturers in implementing production adjustments or service actions to ensure that products are operating as intended and meeting consumer expectations. Such information in the hands of competitors would enable them to assess the in-use performance of components, identify issues and avoid mistakes.

If EWR warranty data were released, competitors would likely review the data to evaluate a particular product, technology or process. The EWR data have great bearing on the selection of a design or production process. The data are particularly valuable on future design decisions. While the manufacturer submitting the data would have borne expenses associated with the introduction of the product and the collection of the data, competitors would benefit from reduced development costs, including costs of testing and analysis. Competitors would also face a risk of performance issues in the field that is lower than would otherwise be attainable. Wholesale disclosure of EWR warranty data eliminates the expense and risk of obtaining this information through field testing and trial and error. Using this information, competitors could base decisions to pursue certain technologies to a substantial degree on their reviewing a submitter's EWR warranty information. The competitor would gain a real world evaluation free of the risk or the effort and associated cost of a real world evaluation. Thus, the public availability of detailed, comprehensive warranty data for each model and model year across numerous components and systems will provide significant market intelligence to competitors. In short, the release of the EWR warranty data would enable one company to use the experience of another. The loss of confidential information would force the OEM that submitted the EWR data to subsidize other OEMs, reducing their costs at the submitter's expense and undercutting its competitive advantage. This would impair the competitive position of the manufacturer that submitted the EWR data.

The EWR data have a substantial bearing on purchasing decisions. EWR warranty information is useful in making decisions about purchases and the prices to be paid. Comparative component warranty, reliability, and durability experiences strongly influence component sourcing and pricing decisions. Since vehicle manufacturers increasingly purchase entire systems (*i.e.*, all components used

to perform a specific function such as steering, suspension, heating and cooling, occupant restraints, or seats) from suppliers, the disclosure of these data would provide vehicle manufacturing competitors with the warranty claims experience of systems made by various potential suppliers that would give these competitors valuable information at the expense of the EWR data submitter. Similarly, tire manufacturers have acquired complete tires from producers in China. An important question is the relative quality of the suppliers' products in the field. Some will be more reliable and the subject of fewer warranty claims. Providing that field experience to other vehicle manufacturers gives them a free ride at the expense of the submitting manufacturer. EWR warranty data would provide significant intelligence to a manufacturer making a decision as to which supplier to choose and what price to pay. Competitors could also learn for instance that the aggregate number of warranty claims in a category rose with a change of suppliers.

Competitors would use the EWR data to follow warranty trends, which would provide a window into those competitors' costs and cost structure. Because the EWR warranty claims represent costs incurred by manufacturers, counts of warranty claims provide an index of a manufacturer's costs. Knowing whether costs for various systems are relatively high is useful and important information, because controlling costs is critical to the success of a business.

The fact that an owner returned to a dealer for service, further, is indicative of customer satisfaction, or the lack thereof. As one commenter put it, the EWR information is a reservoir of information about customer satisfaction and on the company's efforts to satisfy customers.

Warranty claims data would be valuable to competitors that produce, supply or sell aftermarket parts. Aftermarket parts are replacement parts for vehicles that have been sold to first purchasers. After the warranty on a vehicle expires, owners often have the vehicle repaired at shops other than dealerships. While franchised dealers generally must use service parts sold to them by vehicle manufacturers, independent repair shops have the option of using OEM parts or aftermarket parts made by independent manufacturers.

Vehicle manufacturers, often through parts sales by their dealers, compete with independent component manufacturers for sales of aftermarket parts used in repairs. Independent

aftermarket parts manufacturers could use vehicle manufacturer warranty data in targeting their marketing effort when vehicles come off warranty. The independents could use the EWR warranty data to make decisions on what parts to produce, in what quantities and at what price. They could use the data in planning marketing strategies, preparing bids for new business and estimating the likely costs and pricing positions of vehicle manufacturers, with whom they compete for sales in the aftermarket. The warranty claim experience at the component level would be very useful to them, to the direct expense and detriment of the vehicle manufacturers' competitive positions.

The warranty data also provide insight into a company's warranty practices, particularly good will repairs after a warranty expires.

The EWR data would be especially valuable to new entrants. Several manufacturers are currently considering entering or reentering the U.S. market. These potential new entrants would be likely to benefit competitively from the substantial amount of information contained in EWR data by reviewing the warranty history of vehicle manufacturers currently in the U.S. market. These data would provide these potential entrants with valuable insight into the likely warranty costs and issues they would face if they decide to enter the U.S. market.

Quality Control and Public Citizen provided no facts disputing the competitive value of the data or the harms of disclosure raised by the industry commenters.<sup>58</sup>

The release of EWR warranty claims and warranty adjustment claims information submitted by manufacturers would have competitive consequences, as recognized in *Worthington Compressors*, 662 F.2d at 51–52. The large volumes of EWR warranty data are valuable and likely would be used by competitors. For the reasons discussed above, the release of this information would be to the significant benefit of the competitors of the submitters and to the significant detriment of the competitive position of the manufacturers that submitted the information.<sup>59</sup>

<sup>58</sup> NHTSA disagrees with the analogy that they attempt to draw to the release of warranty data in ODI investigations of problems in particular vehicles. See the discussion above regarding the different impacts of the release of consumer complaint data in ODI investigations and EWR consumer complaint data. The same applies to EWR warranty data.

<sup>59</sup> As an alternative basis for confidentiality, the disclosure the comprehensive compendiums of EWR warranty information would likely result in

### Impairment

In addition to proposing to hold EWR warranty claims data confidential on grounds of competitive harm from their release, the NPRM proposed to hold these data confidential under the impairment prong of FOIA Exemption 4. As reflected in that notice, manufacturers have considerable latitude in establishing the scopes and durations of their warranties. They have largely unfettered discretion in providing good will repairs outside of warranties, which are counted under the EWR rule as warranty claims. It is beneficial to NHTSA if a manufacturer has broad warranty coverage. More input channels increase the robustness of the available data. Warranties have historically provided feedback on product performance that can be valuable to NHTSA in identifying problems, including potential defects that may point to the presence (or absence) of a safety problem. The agency seeks to ensure that it receives as much information as possible to identify possible defect trends.

As noted above, under the early warning reporting provisions of the Safety Act, NHTSA requires manufacturers of certain motor vehicles and motor vehicle equipment to provide reports on only the warranty claims that they pay, which are dependent in part on the scope of warranty coverage. See 49 U.S.C. 30166(m)(4)(B). NHTSA does not exercise control over the warranty coverage provided by manufacturers. In view of the fact that the quantity and comprehensiveness of the EWR

warranty data depend in substantial part on the willingness of manufacturers to provide warranty coverage, NHTSA does not want to take steps that discourage extensive warranties, including good will.

Both industry and non-industry commenters addressed the agency's proposal. Industry commenters stated that a class determination for warranty claims was justified on the basis that disclosure would impair the agency's ability to obtain this information in the future. These commenters noted that in light of the limitations in 49 U.S.C. 30166(m)(4)(B), manufacturers could adjust their warranty programs, which would affect the amount of data NHTSA receives.

The Alliance explained that there is wide variation in manufacturers' programs. As to warranties, disclosure could cause manufacturers to reduce coverage. Manufacturers who offer longer or more generous warranty programs may curtail those programs, since generous warranty programs can generate a greater number of warranty claims and hence may cause a manufacturer's products to appear to be less reliable, even if they are not. As a result, the government's ability to obtain necessary information in the future will be impaired.

TMA stated that the release of warranty claims data will likely lead to the strict application of manufacturer warranty programs that would deny good will and customer accommodation claims falling outside of their terms. Also, because manufacturers offer warranty programs that vary in length and scope, Utility asserted that manufacturers with longer and broader warranty programs will inevitably have more information in their possession. If the data were disclosed, manufacturers with generous warranty programs will have an incentive to curtail their programs in length and scope thereby decreasing the volume of information submitted to NHTSA. This would impair NHTSA's ability to obtain such information in the future.

Blue Bird observed that the agency can reasonably anticipate that the quality and specificity of this information will be reduced if it is disclosed. It asserted that manufacturers would take measures to minimize their respective exposures.

AIAM asserted that the quality of the EWR information, including warranty claims information, provided to NHTSA would suffer in part because of the generation of additional claims accompanying the publicity of warranty data received and disclosed by the agency. These additional claims, AIAM

asserted, would distort the quality of EWR warranty data NHTSA collects.

TIA argued that if EWR warranty information is not protected, companies will produce the bare minimum required. Protecting this information, it asserted, would ensure that the agency receives robust amounts of data.<sup>60</sup>

Public Citizen disputed the statements that if warranty data were disclosed manufacturers would alter their warranty and good will policies in order to report fewer claims. It asserted that manufacturers are under market pressures to offer good services and competitive warranties. In its view, the proposition that warranty practices would be altered was speculative and insufficient justification. It stated that the practice would only apply to potentially unsafe products.

In the discussion that follows, we will address the impairment that likely would result from the disclosure of EWR warranty data. As discussed above in the context of consumer complaints, Public Citizen believes that under the impairment prong of *National Parks*, the confidentiality of information is determined by a balancing test. While we do not accept Public Citizen's view of Exemption 4, in the alternative we will address a rough balance between the importance of the information and the extent of the impairment against the public interest in disclosure.

Warranty claims data have been and are a critical aspect of the data the agency considers to identify trends involving particular equipment and systems or components in a particular make, model and model year of a product. For this reason, in the EWR rule, NHTSA included warranty claims and adjustments in the reporting requirements. 67 FR at 45852–53. In fact, to obtain as much data as possible, the agency defined warranty claims to include not only warranty programs, but also extended warranties and good will. *Id.*; see also 49 CFR 579.4 (definition of warranty claim). Warranty information is a valuable and useful pointer to areas that, after appropriate inquiry, may lead to defect investigations and ultimately to the remedy of safety defects. 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,

consumer misuse. In *Worthington Compressors*, 662 F.2d at 53 n.43, the court permitted the consideration of consumer misuse of commercial information that is otherwise unavailable. The disclosure of the EWR information would be misleading to consumers and unfair to the submitting manufacturers. Consumers would attempt to make comparisons of the performance of one model to another across multiple model years, on a quarterly basis, which is problematic. The underlying foundations for the data are not the same. Different manufacturers have different warranty coverage, in terms of scope of coverage. Some have longer and more extensive coverage than others. The net result would be unfair and unsubstantiated and misleading comparisons. These comparisons would adversely affect the competitive positions of manufacturers in a way that would be unfair.

Public Citizen has asserted that this analysis amounts to an unwarranted product disparagement theory, and contends that the harm occurring from the disclosure of these data amounts to adverse public reaction, which is not a cognizable harm under Exemption 4. The agency disagrees with this attempt to recharacterize the harm. Since the EWR data are competitively sensitive for a valid reason under Exemption 4, other potential consequences such as adverse public reaction, do not dictate that we treat the information as non-confidential. *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 341 (D.C. Cir. 1989).

<sup>60</sup> TIA also noted that smaller tire dealers, in response to the disclosure of the number of claims honored, will be inclined not to make any adjustments.

thus assisting in the prompt identification of potential defects.

The disclosure of EWR warranty claims and adjustments would be likely to significantly reduce manufacturers' willingness to provide expansive warranty coverage or to apply warranty policies in a more generous and less restrictive way. Longer warranties, extended warranties, good will, 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.

Manufacturers have discretion in providing warranty coverage. For example, for marketing purposes, manufacturers may choose to make available to their customers warranties of longer duration and broader coverage (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. Hyundai, for example, provides what it calls America's Best Warranty: 10 years/100,000 miles powertrain protection and 5 years/60,000 limited miles warranty covering nearly every new vehicle component. Toyota provides a 5 years/60,000 miles powertrain warranty and a 3 years/36,000 miles warranty covering all components other than normal wear and maintenance items. General Motors' limited warranty generally is for 3 years/36,000 miles, but its powertrain protection is for up to 5 years/100,000 miles, although some makes and models have different warranties. Ford's warranty generally is for 3 years/36,000 miles. Chrysler has a lifetime (for as long as you own your vehicle) limited powertrain warranty on some models. Extended warranties may be purchased for varying time periods. Some are not transferable. Thus, not only do warranties differ by manufacturer, they also differ based on the targeted market (e.g. luxury v. non-luxury), on system components and on the purchaser.

Similarly, companies can choose strictly to adhere to their warranty policy limits 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. The disclosure of early warning warranty data is likely to

reduce good will and customer accommodation since such efforts will increase the number of warranty claims.<sup>61</sup> Manufacturers would do this because if these data were made public, they 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 warranty claims and adjustment information is likely to limit manufacturers' offerings in extensive and extended warranties and good will. While the release of the information would not eliminate manufacturers' warranty programs, the disclosure of EWR warranty information likely would lead substantially to the contraction of current warranty policies. Less warranty data would be reported to NHTSA. This would result in substantially less robust data bases provided to NHTSA to screen for signs of early field problems. NHTSA's ability to identify potential safety defect trends would be impaired. Such a result would affect the agency's ability to carry out the early warning program.<sup>62</sup> Non-industry commenters provided no information countering the comments in the record pointing to the likelihood of this risk. In sum, the disclosure of EWR warranty claims, including warranty adjustment information, would be likely to impair NHTSA's ability to obtain necessary information in the future.

Such a response by manufacturers would also adversely impact consumers, who would be less likely to benefit from more generous warranty and good will policies as manufacturers impose restrictions in how they honor these policies. A class determination of confidentiality avoids these consequences.

On the other hand, the public would not receive significant, if any, safety benefits from the release of EWR warranty information. The non-industry commenters raised a safety argument. But they did not provide facts to support the argument. The EWR warranty data are not safety data. The

vast majority of the data are not indicative of a safety defect trend. Thus, to the extent that a balancing is required, non-release of the warranty data would have very little impact on the public. It is outweighed by the benefit to the EWR program.

#### 4. Field Reports

Field reports are communications from a manufacturer's representative or dealer about a malfunction or performance problem. See 49 CFR 579.4. The EWR rule requires larger volume manufacturers of light vehicles, medium-heavy vehicles and buses, motorcycles and trailers, and all manufacturers of child restraints to submit the number of field reports that they have received broken out, for each make and model, by specific component categories (e.g., steering, brakes), and for certain reporting sectors, fire and rollover—all of which are binned by code. See 49 CFR 579.21(c), 579.22(c), 579.23(c), 579.24(c), 579.25(c). Above and beyond the reports of the binned numbers of field reports, these manufacturers must also provide copies of field reports other than dealer field reports and product evaluation field reports. *Id.*

The early warning field report data include field reports that are not safety-related and those that may involve safety-related defects. As noted above, when NHTSA published the EWR rule, the agency expressly contemplated that the manufacturers would report a large volume of data and that the agency would then screen it for possible defects. NHTSA's experience with EWR data has shown that the vast bulk of EWR field report information has not been indicative of defect trends.

In the NPRM, the agency proposed to make a class determination that field report information in EWR data would not be released to the public. 71 FR at 63744. The agency based this proposed class determination on both the competitive harm and impairment prongs of *National Parks*. We first address the likely competitive harm from the release of EWR field report information, then we discuss the impairment to the agency's ability to obtain as complete field report information that would follow the release of the information.

#### Competitive Harm

Numerous parties have provided information to NHTSA on the question whether the disclosure of EWR field report information would be likely to cause the submitting manufacturer to suffer competitive harm. This includes comments from the motor vehicle and

<sup>61</sup> 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.

<sup>62</sup> Limited disclosure of a manufacturer's warranty claims data in an investigation does not negate the competitive value of the data or the likely impact that wholesale (rather than piecemeal) disclosure would have on submitters.

equipment industry and non-industry commenters.

Commenters from various sectors of the automotive and automotive equipment industry addressed the competitive value and use of field report data. As noted above, there is competition in the auto industry. Manufacturers compete vigorously for sales. They compete in areas that include quality and consumer satisfaction, and expend substantial amounts of research money on quality and consumer satisfaction in the market for sales.

As noted in comments, the EWR information is a comprehensive compendium of field reports. Manufacturers have submitted a significant volume of field report data and copies of field reports to NHTSA under the EWR program. They cover numerous systems and components, as well as fires and rollovers for many reporting industry sectors (e.g., 18 for light vehicles and 22 for medium heavy vehicles). They cover makes and models going back a number of years and are updated quarterly. As noted by the Alliance, their value is enhanced by their continuing content, which permits a model-to-model comparison on the numerous systems and components in EWR reports. The release of EWR field report information would permit wholesale industry-wide comparisons of the quality or durability of all significant systems or components on models chosen for comparison. The data are not publicly available.

The Alliance pointed out that the EWR field report data are a comprehensive collection of information on the field experience of a manufacturer's vehicles on a make/model/model-year and component/system basis, pertaining to quality and customer satisfaction. The information is treated as proprietary.<sup>63</sup>

<sup>63</sup> The Alliance addressed the competitive consequences of disclosing EWR field reports as part of its comments on the disclosure of EWR data on consumer complaints, warranty claims and field reports. The Alliance emphasized that the comprehensive nature of these submissions—covering all makes and models over a multi-year timeframe that is updated quarterly—makes them a valuable compendium of quality and consumer satisfaction information that could not be replicated easily at any price and could be used by competitors. The Alliance added that the EWR data provide valuable insights into a given manufacturer's business practices and decisionmaking.

Citing *Worthington Compressors*, the Alliance pointed out that the release of information collected at considerable cost by an entity that submitted information to the Government could easily have competitive consequences. The submitters expend considerable sums to gather large volumes of EWR data and the release of it would be contrary to the competitive interests of entities that submit the

The Alliance observed that although the volume of field report information submitted is smaller than the volume of warranty claims, the information in the copies of field reports contains a great deal of detail. The field reports reveal the protocols used to identify, evaluate and remedy performance issues and would, in many cases, provide a detailed roadmap for performance issues with particular components and subsystems. The release of the information would allow competitors to improve on components and systems experiencing these performance issues, without incurring the full costs of doing so. This would cause competitive injury.

AIAM, as discussed above, stated that the competitive value of the EWR data results from the totality and comprehensive nature of the information, which gives it value. The information would enable one company to use the experience of another to select optimal product design, production process and pricing strategies, while avoiding the cost and risk that otherwise would be encountered through trial and error.

Similarly, Nissan explained that field reports serve as a useful means through which technical staff in the field can communicate with those who design, engineer, and manufacture the product. Through field reports, the company can discover and address issues, identify supplier successes or failures, and obtain useful information in developing future products. As with consumer complaints, field reports identify areas where field experience is showing an issue warranting further investigation.

TMA addressed field report information as part of its comments on the range of EWR information. TMA pointed out that the release of the information would provide competitors valuable information to evaluate the performance, reliability and durability of various components without the expense and risk associated with product development that would normally occur with field-testing efforts, while shortening the amount of time competitors need to market competing products, to the competitive disadvantage of the submitting manufacturer.<sup>64</sup>

information. The financial benefit resulting from this effort flows to those who obtain the data without significant cost or effort and use the data for their own purposes is contrary to the competitive interests of the manufacturers who submit the EWR information.

<sup>64</sup> TMA stated that the EWR data that medium-heavy vehicle manufacturers report are comprehensive; they involve 22 vehicle systems as well as fires and rollovers. This compendium of

Utilimaster explained that field reports contain performance, maintenance or durability issues. Blue Bird stated that EWR field report information has a very high level of competitive sensitivity. It expressed concern about competitor usage of it to the detriment of its competitive position.

Utility explained that field reports contain valuable "in-use" information about a manufacturer's product. The reports are used to identify and correct potential performance problems, with the intent of improving overall field performance. In the hands of competitors, it asserted, this information would enable them to avoid similar issues in their own products and eliminate the need to invest in research and development in improving their own products. This would result in a significant competitive advantage. Competitors could also incorporate field report information into their marketing strategies.

Harley-Davidson addressed its field reports as part of its fully developed contact system with its dealer network that enables it to do what is right and obtain a competitive advantage over its competitors. As a result, Harley-Davidson urged that this information not be released as a matter of course. The Motorcycle Industry Council similarly urged the agency not to disclose EWR field report information.

Equipment suppliers supported the vehicle manufacturers' statements. MEMA/OESA stated that field reports are often an invaluable source of information for companies in their efforts to improve product quality and performance. WABCO also expressed concern over the competitive impacts of

field report and other EWR data, laid out model-by-model and system-by-system has significant competitive value. There are numerous ways in which competitors could use these data to their competitive advantage. TMA characterized the data as a data bank of quality control information that competitors can use to evaluate the performance, reliability and durability of various components without the expense and risk associated with product development that would normally occur with field-testing and "trial and error" efforts, while shortening the amount of time competitors need to market competing products. TMA cited an example on the benefits of field testing that a competitor would receive. Also, a competitor could use the reporting manufacturer's field experience, good or bad, while avoiding the costs, effort and risks that the reporting manufacturer has incurred.

TMA stated that the disclosure of EWR field report data would provide competitors with valuable and previously unavailable insight into the field experience and performance of a submitter's entire product line and individual systems and components. TMA stated that competitors could use this information to assess the in-use performance of parts and systems. It would be used in purchasing, pricing, and sourcing decisions, all of which would have competitive impacts.

disclosure. It explained that field reports can be used by skilled and experienced engineers to spot trends in product reliability and trigger follow-up actions.

Industry commenters raised other concerns related to EWR field report disclosure. Although field report information can be useful in quickly finding possible problems, not all of this information is safety-related. As a result, the information primarily serves independent business purposes and merited protection from competitors.

The Alliance, TMA and others stated that the release of EWR field report data would result in misuse, as they had stated with respect to consumer complaints and warranty data. More particularly, they raised concerns that the disclosure of EWR field report data would lead to erroneous conclusions that would cause submitters competitive harm. Manufacturers and consumers could misuse it to draw unfair and unsubstantiated and misleading comparisons regarding competitors' products. *See* discussion above under consumer complaints.

The Alliance and others added that the release of limited field report information regarding particular concerns on specific models in a limited number of model years in investigations by NHTSA's Office of Defects Investigations does not support the release of the comprehensive compendium of information in EWR submissions. A limited release is much different from a competitive standpoint than the automatic release of the continually collected, full compendium of EWR information across virtually all makes and models, as is represented by the quarterly EWR submissions.

In contrast to industry commenters, the three non-industry groups advocated that field report data be released by the agency. In its comments, Public Citizen recognized that manufacturers place importance on field reports for staying informed about their products' performance and dealers' handling of problems. It added that, as with consumer complaints, field reports offer vital real world information for a company. Like industry groups, its comments addressed consumer complaints, warranty data and field reports together. As noted above, it contended that NHTSA did not explore the extent to which information is available publicly and it emphasized the value of the information to the public.<sup>65</sup>

It noted that field reports vary in nature and quality.

Quality Control cited the statement in the NPRM that competitors could use EWR field report information to help them avoid potential problems or improve their products without the need to invest in research, development or actual market experience. It did not dispute this but stated that if true, consumers would not necessarily suffer injuries or economic losses. It claimed, however, that this is the agency's safety mission. Accordingly, in its view, field reports should be disclosed.

AAJ asserted that the disclosure of EWR field report data is vital to the public interest. It stated that disclosing this information would allow the public to be fully informed of all potential issues affecting a particular vehicle or piece of equipment and could lead to necessary safety enhancements. The non-industry groups did not refute the numerous specific competitive consequences that would result from the release of field report data stated by industry commenters.

After carefully considering the comments and other information of record, NHTSA has determined that the release of EWR field report data and copies of field reports on light vehicles, medium-heavy vehicles and buses, motorcycles, trailers, and child restraint systems is likely to cause substantial harm to the competitive positions of the manufacturers that submit the information.

The EWR field report data amount to compendiums of comprehensive information on field reports, both in terms of numbers, binned by make, model, model year and specified system or component, and in terms of field reports themselves. These cover an extensive range of makes and models of motor vehicles, for the reporting period and going back to the previous 10 years. They address numerous components and systems of vehicles and equipment and for certain vehicles include

safety related and should be routinely disclosable because safety problems cannot provide a basis for finding substantial competitive injury. It added field reports vary in their quality and quantity, and should not be uniformly withheld. It also disputed that product disparagement is a basis for protection under Exemption 4. The group also stated that the agency has historically determined that this type of information is not covered by Exemption 4. Field reports are not prepared for defect investigations. They are prepared for business purposes as recognized in the EWR definition of field report and in industry comments. The statement that they routinely disclose safety problems is an unsupported assertion that is not correct. While they vary, they all meet the definition of field report and are commercially valuable to competitors. The allegations on product disparagement are addressed elsewhere.

rollovers and fires. The comprehensive nature of the compendiums of EWR data on field reports is enhanced by their continuing content, which is updated by quarterly reports, and by their standardized reporting format. They can be used to compare numerous aspects of vehicles and equipment across industry sectors. The amount of field report information is substantial. For the first 15 quarters of EWR data, an average of 65 light vehicle manufacturers per quarter reported nearly 7.6 million field reports and submitted over 580,000 field reports; an average of 87 medium-heavy vehicle and bus manufacturers per quarter reported over 385,000 field reports and submitted over 26,000 field reports; an average of 18 motorcycle manufacturers per quarter reported over 134,000 field reports and submitted over 26,000 field reports; an average of 285 trailer manufacturers per quarter reported over 22,000 field reports and submitted nearly 500 field reports; and an average of 20 child restraint manufacturers per quarter reported over 11,000 field reports and submitted over 7,500 field reports.

The manufacturers that submit field report information expend considerable sums to initiate and review field reports. The data are not publicly available and are highly proprietary. The data could not be replicated.

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. Because of the depth of coverage required by the EWR rule, the field report numbers reveal a manufacturer's experience across its entire product line with respect to particular components and systems. These reports reflect a company's pursuit of feedback on a particular aspect of a product and can involve technical investigations into a problem detected through warranty, consumer complaint or other information available to the company. The field reports themselves often contain a great deal of detail and even those of lesser quality are valuable as an integral part of the whole compendium and for their identification of concerns.

The disclosure of EWR field report information would provide competitors with valuable and previously unavailable insight into the field experience and performance, including at times reliability and durability, of individual systems and components in a submitter's entire product line. Field reports reveal aspects of the performance of components and materials that appear to be problematic. Competitors could use EWR field report

<sup>65</sup> Public Citizen's Litigation Group, like some industry commenters, had addressed field reports with other EWR data. In its view, field reports are materials prepared for a defect investigation and are

information in assessing systems and parts with apparent shortcomings and identifying technological and engineering improvements that might better satisfy customers. If the information were released, competitors would gain product and component performance information, both in terms of numbers and from information in copies of field reports, developed at the cost of the submitting manufacturer, that they could implement. Thus, competitors would benefit, while the submitting manufacturer bore the cost.

In addition, the EWR field report data are a compendium of quality information of a manufacturer's products, model-by-model, system-by-system. These data provide in-use information on technologies. Competitors can study and run lab tests on a competitor's products. But these efforts do not inform the competition of the quality of a product based on operation in the field.

Competitors would use this information to evaluate particular technologies, including both technologies that have penetrated considerably numerous segments and newly introduced technologies, at a risk and cost that is lower than otherwise attainable, because the competitor would not have to develop that information. Using this information, competitors could base decisions to a substantial degree on their reviewing a submitter's EWR field report information. The EWR field report information would enable one company to use the experience of another in the selection of a design. It could also be used in the selection of a production process. The release of the data would permit broad comparisons of the quality or durability of components on vehicle models chosen for comparison. It would enable the person reviewing the materials to substantially avoid similar issues that gave rise to the field report. While the manufacturer submitting the information would have expended substantial resources in deciding whether to install a particular technology and associated design and testing as well as follow-up, the competitor would gain a real world evaluation without the time, expense and risk associated with product development that would normally occur with field-testing.

The generation of a field report has an associated cost and the fact that a manufacturer has completed a field report on a particular issue indicates that a manufacturer has made an investment of resources to discover and understand that issue. The competitor could use the information while

avoiding the cost and risk that would otherwise be encountered. This would have competitive impacts.

Competitors can use the field report information to assist in their future purchasing (sourcing) decisions, including the technological approach, supplier and price. This information provides insights into whether a particular supplier has built durable and reliable systems and components.

Additionally, the EWR data provide valuable insights into a given manufacturer's business practices and decisionmaking, including, the methods used to collect field reports. Field reports, by their nature, reveal the process by which a manufacturer examines an issue of interest. Further, a field report comprises the protocols a manufacturer follows when examining a particular problem and helps identify whether a problem (safety or non-safety related) is present in its products. Such information is commercially valuable to competitors because it provides them with additional insight on how to improve their own processes in identifying potential problems.

EWR field report data are a valuable source of information related to customer satisfaction of vehicles. This data base provides information on perceived problems with the company's product, which gave rise to the field report. This is valuable to companies, which depend on satisfying customers. If the field report information were publicly available, competitors could and likely would use it to learn whether there is a market reaction to any new technology, supplier or product changes. The information would be valuable to competitors who may be considering deploying similar or competing technology. Competitors could rely on EWR information in making critical decision such as which technology or suppliers to use.<sup>66</sup>

Public Citizen recognized the value of the information. It did not, however, provide facts to refute comments by industry sources. AAJ and Quality Control recognized that other manufacturers can benefit from the

<sup>66</sup> Also, the EWR data are different from investigation data in scope and competitive impact. As discussed above, as for example in the context of consumer complaint data, data released in the course of agency investigations are limited. The release involves limited models and model years and specific alleged problems. EWR data amount to full compendiums, across makes, models and model years involving numerous systems. Thus the release of field report numbers in ODI investigations has no real bearing on release of EWR field report data. We note that NHTSA has withheld field reports obtained in investigations. See discussion above regarding the release of information obtained in investigations under consumer complaints.

disclosure of these reports by using them to mitigate similar problems they are encountering or by deferring or changing purchasing decisions of particular components or technology. They thought that the release of the data would benefit the public. However, they did not demonstrate how. Also, the benefit to the public is not a factor in assessing confidentiality under Exemption 4 of the FOIA.

The release of EWR field report data and the field reports submitted by manufacturers would have competitive consequences, as recognized in *Worthington Compressors*, 662 F.2d at 51–52. The volumes of EWR field report information are valuable and could be used by competitors. For the reasons discussed above, the release of it would be to the significant benefit of the competitors of the submitters and to the detriment of the competitive position of the manufacturers that submitted the information.<sup>67</sup>

#### Impairment

In addition to proposing to hold EWR field report information data confidential on grounds of competitive harm from their release, the NPRM proposed to hold this information confidential under the impairment prong of FOIA Exemption 4. As reflected in that notice, manufacturers may obtain and receive feedback on product performance in a variety of ways, and establish differing practices for field reports. The nature and level of effort expended by a company is

<sup>67</sup> As an alternative basis for confidentiality, the disclosure of the comprehensive compendiums of EWR field report information would likely result in consumer misuse. In *Worthington Compressors*, 662 F.2d at 53 n.43, the court permitted the consideration of consumer misuse of commercial information that is otherwise unavailable. The disclosure of the EWR information would be misleading to consumers and unfair to the submitting manufacturers. Consumers would attempt to make comparisons of the performance of one model to another across multiple model years, on a quarterly basis, which can not be done. The underlying foundations for the data are not the same. Different manufacturers have different approaches to field reports, in terms of procedures and numbers of field reports generated. The net result would be unfair and unsubstantiated and misleading comparisons. These comparisons would adversely affect the competitive positions of manufacturers in a way that was unfair.

Public Citizen has asserted that this analysis amounts to an unwarranted product disparagement theory, and contends that the harm occurring from the disclosure of these data amounts to adverse public reaction, which is not a cognizable harm under Exemption 4. The agency disagrees with this attempt to recharacterize the harm. Since the EWR data are competitively sensitive for a valid reason under Exemption 4, other potential consequences such as adverse public reaction, do not dictate that we treat the information as non-confidential. *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 341 (D.C. Cir. 1989).

discretionary. It is beneficial to NHTSA if a company expends considerable effort. More inputs increase the robustness of the available data. Field reports provide feedback on product performance that can be valuable to NHTSA in identifying problems, including potential defects that may point to the presence (or absence) of a safety problem. The reports themselves, which are submitted under the EWR program, contain valuable technical information. The agency seeks to ensure that it receives as much information as possible to identify possible defect trends.

As discussed above, under the early warning reporting provisions of the Safety Act, NHTSA 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. 49 U.S.C. 30166(m)(4)(B). In view of the fact that the quantity and comprehensiveness of the EWR field report data depend in substantial part on the willingness of manufacturers to collect this information, NHTSA does not want to take steps that discourage the collection efforts.

Both industry and non-industry commenters addressed the agency's proposal. Industry commenters stated that a class determination for field reports was justified on the basis that disclosure would impair the agency's ability to obtain this information in the future, citing 49 U.S.C. 30166(m)(4)(B). This limitation permitted submitters to expand or contract the scope of their programs generating field reports.

The Alliance explained that there is wide variation in manufacturers' programs that generate field reports. The Alliance stated that the potential for impairment is particularly significant in the context of field report information. By protecting field reports, NHTSA creates an incentive to encourage free text descriptions or other candid analysis in field reports. On the other hand, if the information were disclosed, NHTSA could reasonably anticipate that field reports would be less thorough or candid. As a result, the government's ability to obtain necessary information in the future will be impaired. The Alliance added that this would impact ODI defect investigations, which consider field reports.

AIAM stated that disclosure of this information would impair the agency's EWR program. It asserted that the quality of the information provided to NHTSA would suffer. The natural reaction of the individual who writes a field report would be to consider its appearance in the press or a contact by

an investigator. This would affect the thoroughness and candor of the reports.

TMA explained that field reports play an important role in the medium-heavy truck segment. Manufacturers receive frequent reports from field personnel, fleet owners and dealers regarding vehicle issues, both safety and non-safety. Field reports often contain the drafter's evaluations or assessments of a possible system, component or performance problem. TMA verified the flexibility that manufacturers have in preparation of field reports. It added that the routine dissemination of this information would lead to fewer and less reliable reports available to the agency in the future to identify promptly potential safety defects.

Blue Bird observed that the agency can reasonably anticipate that the quality and specificity of this information will be reduced if it is disclosed. It asserted that manufacturers would take measures to minimize their respective exposures to competitive harm.

Utility explained that manufacturers take the initiative to generate field reports in an effort to identify product defects and analyze possible defect trends. This information is generated and studied to improve product quality. But it could be used by plaintiffs to help file lawsuits against the submitting manufacturer. Utility asserted that manufacturers would react to this situation by generating fewer and less comprehensive field reports. This would hamper the agency's ability to obtain substantive field reports in the future.

Other commenters expressed similar concerns and recognized this impairment risk. Workhorse Custom Chassis explained that it relies extensively on reports from fleets to identify and correct problems but was concerned that the accuracy of those reports would be reduced if they are routinely disclosed. MEMA/OESA also asserted that the routine disclosure of field reports would impact the quality of these reports in future submissions.

On the other hand, Public Citizen disputed the assertion that if field report information were disclosed manufacturers would alter their field reporting practices. It asserted that manufacturers place importance on field reports for staying informed about the performance of their products and dealers' handling of problems. Field reports offer vital real-world information for a company. In its view, NHTSA had not undertaken an adequate investigation relating to manufacturers' field reports and had not made an

adequate showing of the impairment from disclosure of field reports.

In the discussion that follows, we will address the impairment that would result from the disclosure of EWR field report data. As discussed above in the context of consumer complaints and warranty claims, Public Citizen believes that under the impairment prong of *National Parks*, the confidentiality of information is determined by a balancing test. While we do not accept Public Citizen's view of Exemption 4, in the alternative, we will address a rough balance between the importance of the information and the extent of the impairment against the public interest in disclosure.

Under the EWR reporting program, manufacturers report the numbers of field reports, separately, by model and model year, and by system and component, to NHTSA. They also provide field reports, except dealer field reports and product evaluation field reports. The significance of field reports is indicated in part by the EWR definition of field report. Under the definition, an alleged failure, malfunction, lack of durability or other performance problem has been identified in a written communication to the manufacturer from one of its employees, representatives, dealers, or a fleet. 49 CFR 579.4(c). Both before and after the promulgation of the EWR rule, ODI has reviewed numerous field reports over the years and has often found them to be technically rich. See 67 FR at 45856.

The magnitude of the numbers of field reports is important to NHTSA because our screening will look for trends based in part on relatively high numbers. These trends may result in inquiries to the manufacturers. In addition, field reports themselves generally contain information that provides insights.

As with other EWR data (complaint and warranty claims data), the agency cannot compel the creation of field reports. Their continued creation depends on whether a manufacturer chooses to create them. In light of the value of the reports and the discretion that manufacturers have in not generating them or in including less detail and fewer insights in them, the agency does not want to do anything to discourage manufacturers from preparing accurate and comprehensive field reports about apparent problems with their products. Nor do we want to detract from the candor and specificity with which field reports are written.

As noted in the comments, if these reports were disclosed, manufacturers likely would decide to generate fewer and less informative (less candid) field

reports. Manufacturers would be reluctant to have negative information appear in documents that are subject to routine disclosure. As a consequence, less information would be 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 defect trends. Thus, the availability of less information would be inconsistent with our goals.

As made clear throughout the comments, disclosure of field reports would be likely to discourage candor on the part of field personnel and could adversely affect corporate policies and practices with respect to their preparation. One association was concerned about appearances of the documents in the media. This would have a chilling effect on candor. 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.

The field reports themselves are very important to the government. The numbers of reports are indicative of potential problems in numerous systems and components. Many of the reports provide text that is not conveyed by the numerical reports. The views of manufacturers' engineers and technicians in reports are often helpful to us. If they were disclosed, manufacturers would react by decreasing both the number of reports generated and the level of detail contained in these reports. Without them, we often would not gain a full understanding of the issues, at least not without a steep and time-consuming learning curve. The agency would be faced with attempting to conduct analyses with considerably less information from manufacturers. NHTSA's ability to identify potential safety defect trends would be impaired. Such a result would affect the agency's ability to carry out the early warning program.<sup>68</sup> In sum, the disclosure of the

field information would be likely to impair NHTSA's ability to obtain necessary information in the future.

We recognize that some of the field reports would be of interest to some members of the public. But the public would not receive significant, if any, safety benefits from the release of EWR field report information. The non-industry commenters raised a safety argument. But they did not provide facts to support the argument. The EWR field report data are not safety data. The vast majority of the data are not indicative of a defect trend. And, standing alone, the EWR field report numbers simply indicate that there was a reported problem, by system or component. Thus, to the extent that a balancing is required, non-release of the data would have very little impact on the public. It is outweighed by the benefit to the EWR program. On balance, we are in a better position to address potential defects with as robust a set of field reports as possible, which benefit the public at large.

#### 5. Common Green Tire Identifiers

The EWR rule requires reporting tire manufacturers to provide a list of common green tire data, including all relevant tire lines, tire type codes, stock keeping unit (SKU) number, brand names and brand name owners. 49 CFR 579.26(d). "Common greens" are tires "that are produced to the same internal specifications but that have, or may have, different external characteristics and may be sold under different tire, line names." 49 CFR 579.4(c). A green tire is an assembly of the components of a tire formed in a machine. The green tire is placed in a mold where the tire is given its final shape, including the tread pattern and information on the sidewall such as the tire brand, size and tire identification number. In the mold, the tire is cured; it is exposed to high pressure and heat (i.e., vulcanization). Tires made from a common green tire have the same fundamental construction and composition. Based on the mold, the finished tires may and often do have different outward appearances, such as different treads and markings to differentiate them from one other and, importantly, the tires receive different brand names. Tire manufacturers use the term "common green" to describe a family of tires that are produced from the same "before cure" specification but are cured in different molds. The practice of using "common greens" allows maximization of economies of scale in manufacturing tires. The

submitters. Moreover, NHTSA has granted confidentiality to the field reports themselves.

common green tire information submitted by individual manufacturers reveals which tire lines share the same internal structural and rubber compound specifications and the relationships between manufacturers and private brand name owners (e.g., tires with names commonly owned by large tire retailers).

In the NPRM, NHTSA proposed to make a class determination that tire manufacturers' submissions of EWR common green data would not be released to the public. 71 FR at 63744 and 63749. This was based on the competitive harm prong of FOIA Exemption 4, as interpreted in *National Parks*.

Several submissions from RMA and a submission from Cooper Tire described the nature of the common green EWR data and explained the manner in which competitors can use the data and the competitive consequences of their disclosure. RMA stated that the information on common green tires in EWR data is not available to the public and can not be derived from any public source. It explained that the disclosure of this information would cause substantial competitive harm since it would allow competitors to know with exact certainty which tires have the same specifications even though many are sold under different tire brand names. Manufacturers would have insight into their competitors' marketing strategies, business plans, pricing data, and future product plans. RMA added that substantial competitive harm would result to the manufacturer from disclosing the specific business relationships between tire manufacturers and private tire brand name owners.

Cooper Tire's comments, which RMA re-submitted, included a study that detailed the nature of common green data. The study asserted that common green lists are confidential. The study indicated that tire manufacturers are required under the EWR rule to produce information on more than 24,000 tire lines. This information includes not only each green tire group produced, but each tire line originating from each green tire group. The study explained that green tires serve as the platform for the production of all tire lines and each individual tire SKU. It stated that the release of green tire groups and the identification of the green tire source for each finished tire would provide a complete and comprehensive road map to a tire manufacturer's production and marketing strategy. The study likened the release of this information as equivalent to the release of a tire manufacturer's business plan.

<sup>68</sup> Limited disclosure of field report numbers during agency investigations does not negate the value of the data or the likely impact that wholesale (rather than piecemeal) disclosure would have on

RMA also noted that it has been NHTSA's practice to grant requests for confidentiality for common green information. RMA provided copies of relatively recent letters that responded to particular requests from tire manufacturers covering categories of information that granted confidential treatment to common green information submitted to the agency.

Apart from RMA and Cooper Tire, only Quality Control specifically addressed common green tires. Quality Control opposed confidential treatment for common green tires. But it did not contradict the tire industry's repeated statements regarding the use of common green tires in the tire industry, the unavailability of information on common green tires to the public sector, the competitive value of common green tires or the competitive harm that would result from releasing the information. Instead, Quality Control asserted that a consideration of how to treat common green tire information should include an evaluation of its usefulness to researchers and the general public of this information in the avoidance of deaths, injuries, and economic losses.

NHTSA has fully considered the comments and has reached the following conclusions. Green tires serve as the basic envelope of tire production. Common green tire lists identify the tires that share the same internal specifications and construction characteristics. Tire manufacturers treat their lists of common green tires as proprietary and competitively sensitive information. The EWR common green information is not publicly available and broadly applies across manufacturers' tire lines.

The release of common green tire information would identify the tires made from the range of common greens. The disclosure of this information would allow competitors to know which tires have the same specifications and construction. The release of green tire groups and the identification of the green tire source for each finished tire would provide a complete and comprehensive road map to a tire manufacturer's production strategy. It would inform competitors of a tire manufacturer's basic economies of scale in tire production. Precise insights from another manufacturer's approach would enable a competitor to adjust its own production to more effectively compete against a competitor's particular tire line.

Competitors would know which tires, sold under different tire brand names, are basically the same. The release of information linking green tires and finished tires, often of different labels,

would inform competitors of a tire manufacturer's marketing approach. Manufacturers would, thus, have insight into their competitor's business plans and, with additions to and deletions from common green lists reported each quarter, future product plans. This information on tires that are basically the same can be used selectively by a manufacturer to compete against a particular tire line of another manufacturer and can harm the company that submitted EWR information by revealing less expensive but similarly constructed alternatives to more expensive tire lines. The release of common green information would also disclose the specific business relationships between tire manufacturers and private tire brand name owners. The foregoing demonstrates that the release of EWR common green tire information is likely to cause substantial harm to the competitive positions of the tire manufacturers that submit EWR information.

As noted above, Quality Control's comments did not contradict the tire industry's statements. Quality Control suggested the further consideration of an evaluation of the usefulness of the information for safety and economic reasons, but it did not provide any information in these regards. Nor did it demonstrate the relevance of such considerations under FOIA Exemption 4. As discussed above, Exemption 4 does not involve a balancing of competitive harm to the party that provided the information to an agency against possible societal interests such as research or provision of information to the public. Accordingly, we are adopting a class determination on EWR information on common green tires.

#### *D. Class Determination Based on FOIA Exemption 6*

The EWR rule requires larger vehicle manufacturers to submit the number of reports alleging that deaths or injuries occurred. These reports must contain the vehicle identification number (VIN) of the vehicle(s) allegedly involved in these incidents. See 49 CFR 579.21(b)(2), 579.22(b)(2), 579.23(b)(2), 579.24(b)(2). The agency's October 2006 NPRM proposed creating a limited class determination that would redact the last six characters of VINs from EWR death and injury reports, based on Exemption 6 of the FOIA. 71 FR at 63745 and 63749.

Each VIN consists of 17 characters. In general, the first eight of these characters denote the manufacturer and attributes of the vehicle including the make and type of vehicle (e.g., the

relevant line, series, body, type, model year, engine type and weight rating). The ninth digit is a check digit. In the last eight characters, the first two represent the vehicle model year and plant of production, and the last six are the number sequentially assigned by the manufacturer in the production process. See 49 CFR 565.6 (detailing elements of the VIN code), SAE Standards J218 (passenger car identification terminology) and J272 (vehicle identification number systems).

VINs can readily be used to track down personal information on an individual who owns, or at one point owned, a particular vehicle. Such information can include not only the name and address of an individual but other information as well.

Exemption 6 of the FOIA addresses the withholding of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" to the subject of those files. 5 U.S.C. 552(b)(6). Several entities have addressed the privacy implications of release of the full VIN.

Both NHTSA and the Alliance documented their efforts in using VINs to obtain personal information on individuals.<sup>69</sup> When coupled with a fatality—or injury—producing incident, VINs can be used to identify the owner of the vehicle. The Alliance explained that VINs can be used to track down information on individuals. Specifically, it stated that it is relatively easy to determine the name, address, social security number, home telephone number and other personal identification information from a VIN. Because of the relative ease in obtaining this information from a VIN, the Alliance urged the agency to consider protecting VIN information contained in EWR submissions involving fatalities or injuries. The Alliance supported the Agency's proposal, with an analysis that addressed the elements for withholding information from disclosure under Exemption 6. After pointing out that both the Alliance and NHTSA had been able to employ widely available

<sup>69</sup> See NHTSA Docket 2002–12150, Item Nos. 58 (Alliance's discussion of obtaining Social Security Numbers using VINs) and 64 (websites enabling users to locate personal information using VINs). The agency examined a widely available legal database—WESTLAW—and several websites that offered to provide personal information on individuals using the VIN of a vehicle for a nominal fee. Using WESTLAW, the agency could determine the name, address, date of birth, and lien information of the vehicle owner using the full VIN. In view of this easy identification, the disclosure of full VIN information would jeopardize the personal privacy of individuals involved in EWR reports of fatalities and injuries arising from motor vehicle crashes.

databases to access personal information about the owner of a vehicle using a VIN, the Alliance asserted that the information met the threshold requirement of personal and similar files—information that applies to a particular individual. Next, it explained that the disclosure of this information would constitute a clearly unwarranted invasion of personal privacy. Finally, the Alliance offered a balance of the privacy interests at stake with the public interest in disclosure. Under an Exemption 6 case it cited, the public interest is limited to shedding light on the government's activities. And, disclosing the last 6 digits of the VIN would not advance that interest. Based on its analysis, the Alliance recommended that the last 6 digits of VINs in EWR death and injury reports not be disclosed. TMA supported the exemption.

Public Citizen stated that it respected NHTSA's intent to protect individual citizen's personal privacy. However, it contended that exempting the VIN is unnecessary and advocated that NHTSA abandon its proposal. Public Citizen noted that VINs are visible to the public on the vehicle's dashboard and are publicly available through police reports. Public Citizen contended that the last six figures of a VIN serve the important role of allowing members of the public to see if their personal records have made it into the early warning data base and would aid the public in seeing if multiple records are in reference to the same individual vehicle or different vehicles of the same make.

Under Exemption 6, the information must fall within the category of "personal \* \* \* and similar files." The EWR information on deaths and injuries is submitted by manufacturers electronically into an electronic file in the agency's ARTEMIS database. The VIN information can easily be used with readily available databases to identify the owners of the vehicles in crashes that resulted in deaths or injuries, as alleged in claims or notices to the manufacturer. There was no dispute in the comments that the threshold requirement of personal and similar files was met and NHTSA finds that it has.

If the threshold requirement is met, the focus of the inquiry turns to whether the disclosure of the records "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). This requires a balancing of the public's right to disclosure against the individual's right to privacy. The first step is an assessment of the privacy interests, if any, that would be

threatened by the disclosure. In *Center for Auto Safety v. NHTSA*, 809 F. Supp. 148 (D.D.C. 1993), the court recognized the privacy interests in the names and addresses on consumer complaints received by NHTSA. The court noted that some of the complaints may refer to injuries of a personal and upsetting nature. It is possible that persons involved in such incidents would resent unsolicited intrusions into their experiences. *Id.* at 149. The same or similar interests exist here, as the EWR data at issue involves incidents that resulted in an injury or fatality. For example, it is foreseeable that the persons who could readily be identified from VINs or surviving family members would be contacted by attorneys and consultants, seeking involvement in legal activities related to the incident or information for a potentially related matter. Public Citizen did not address the interests of the individuals, who have been in an incident and had a relationship with a person who died in an incident or who was injured in an incident. We conclude that disclosure of the complete VINs in death and injury reports at issue would result in a substantial threat to individuals' personal privacy interest.

The second step is an assessment of the public interest in disclosure. Under Exemption 6, the concept of public interest is limited to shedding light on the government's performance of its statutory duties. *United States Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989); *National Ass'n of Retired Federal Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989); cf., *DOD v. FLRA*, 510 U.S. 487, 497 (1994). With the limited redaction of part of the VIN under this rulemaking, the public would be able to review EWR information on claims for fatalities and injuries, including identification of the make, model and model year of the vehicle and the component or system implicated in the claim. This information apprises the public of significant information. Disclosing additional VIN information, with the sequential number unique to the vehicle, that would enable someone to identify the owner of the vehicle and other personal information would not, however, further serve the public interest. If disclosed, it would not answer the question of "what the government is up to." *Reporters Comm.*, 489 U.S. at 773 (1989).

Public Citizen contended that the last six figures of a VIN serve the important role of allowing members of the public to see if the incident in which they were involved is in the early warning

database and would aid the public in seeing if multiple records are in reference to the same individual vehicle or different vehicles of the same make. This does not squarely address the question of what the government is up to. In any event, an interested person could review EWR data to see the date the make, model and model year of the vehicle, the first part of the VIN, the incident date, the numbers of deaths and injuries, the State where the incident occurred and the vehicle system or component that allegedly contributed to the incident. *See, e.g.*, 49 CFR 579.21(b)(2). In the first 15 quarters of comprehensive EWR reporting, there have been 23,647 reports of deaths and injuries in vehicles based on claims and notices. That amounts to 1576 per quarter, or about 30 per State per quarter on the average. In view of the level of detail in EWR reporting, it is highly likely that if a reported incident matched the one that the person was involved in, it was reported by the manufacturer.<sup>70</sup> Similarly, multiple records are unlikely given the review of data by manufacturers before submission. Neither does the need to verify whether multiple records are duplicative outweigh these interests, particularly when other information related to those incidents would likely be disclosed, such as the time, date, and place of the incident. Individuals have a privacy interest when it comes to their involvement in a traumatic incident and it is not the province of outside parties to be the decision-maker in this regard. In any event, while of questionable relevance under Exemption 6, we note that redaction of the last six characters provides sufficient information for interested parties to determine a vehicle's identity down to its engine type and plant of production using the first 11 characters of the VIN. Using this information, the public can still ascertain whether a particular type of vehicle may be involved in a potential vehicle safety issue.<sup>71</sup>

<sup>70</sup> As a practical matter, individuals seeking this type of information on their own cases are free to file a Privacy Act request with the agency to confirm the inclusion of their cases in the EWR database.

<sup>71</sup> Public Citizen also stated that the VIN is visible on the dashboard and that police reports are publicly available. However, it did not explain the likelihood of the public finding a vehicle, particularly if it is involved in a fatality and may have been sent to a salvage yard. Public Citizen has also not addressed the fact that in numerous states police reports are not generally available. *See, e.g.* Cal. Veh. Code section 20012 (placing limits on who may obtain accident reports); Mont. Code section 61-7-114 (restricting access to accident reports); and Ore. Veh. Code § 802.220 (limiting disclosure of accident reports).

The final step in an Exemption 6 analysis is weighing the competing privacy and public interests against one another. See *Ripskis v. HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984). In the case of the EWR VIN information, there is a strong privacy interest in not being contacted about a death or personal injury, which often involves personal distress. On the other hand, the public interest, in terms of information that reveals what the government is up to is at most, minimal. Thus, on balance, NHTSA has concluded that the privacy interests far outweigh the public interest. The balance is similar to that in *Center for Auto Safety* because there is no ascertainable public interest of sufficient significance or certainty to outweigh that right. 809 F. Supp. at 150.<sup>72</sup> The disclosure of the full VIN would constitute a clearly unwarranted invasion of personal privacy. As a result, the balancing required by Exemption 6 cuts in favor of protecting the privacy interests of those individuals over the interests that others may have in learning their identities. NHTSA is, therefore, according confidentiality to the last six digits of VINs under FOIA Exemption 6 using a class determination that is set out separately from the other EWR-based class determinations.

NHTSA is adopting a new class determination in 49 CFR Part 512 Appendix D that applies only to those VINs that are provided in EWR submissions and does not apply as a rule of general application to the agency's treatment of VINs in other instances.

#### IV. Exemption 3

The Rubber Manufacturers Association (RMA) has historically maintained that NHTSA is precluded by statute from releasing all EWR data, subject to a limited exception. RMA has relied on a disclosure provision of the TREAD Act, 49 U.S.C. 30166(m)(4)(C), which provides:

Disclosure.—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.<sup>73</sup>

<sup>72</sup> See generally *Horowitz v. Peace Corps*, 428 F.3d 271, 278–79 (D.C. Cir. 2005) (discussing balancing required under Exemption 6 and indicating that “seemingly innocuous information” can be subject to the Exemption’s protection).

<sup>73</sup> Sections 30117(b) and 30118 through 30121 involve the statutory remedy and recall requirements under the Safety Act.

RMA has asserted that this provision is a FOIA Exemption 3 statute and therefore, NHTSA is precluded from releasing the data.

RMA’s views were rejected by the U.S. District Court for the District of Columbia in *Public Citizen v. Mineta*, 444 F.Supp.2d 12, 16–18 (2006). In the October 2006 NPRM, we noted that the judgment in that case is on appeal to the U.S. Court of Appeals for the District of Columbia Circuit (No. 06–5304). 71 FR at 63745. We stated that should the Court of Appeals reverse the District Court, the agency may proceed to issue a final rule exempting EWR data from disclosure in a manner consistent with the D.C. Circuit’s decision or terminate the EWR Appendix C portion of this rulemaking as unnecessary.

We did not seek comment on the Exemption 3 issue. RMA provided comments nonetheless. Apart from scope issues, the agency rejects RMA’s views. As our rationale, we incorporate by reference the Brief for the Federal Appellee in the pending appeal in *Public Citizen v. Peters* (No. 06–5304) (filed July 6, 2007).

#### V. Other EWR Data

The data elements of the EWR rule were established in July of 2002. The 2003 CBI rule that was remanded by the district court did not resolve the confidentiality of EWR information on deaths and injuries, which is based on claims and notices, or the confidentiality of property damage claims. Those matters were left to individual manufacturers to pursue through individual requests for confidentiality should the manufacturers choose to pursue them. The October 2006 NPRM did not propose to include information on deaths or personal injury, or property damage claims (collectively claims data) as part of our Exemption 4-based class determinations. We stated that these items involve a collection of information, many pieces of which are publicly available in court documents and newspaper articles.<sup>74</sup>

RMA submitted comments. RMA’s comments are outside the scope of the

<sup>74</sup> See, e.g., <http://www.pbs.org/wgbh/pages/frontline/shows/rollover/etc/synopsis.html> (noting the number of deaths attributed to failing Firestone tires mounted on Ford Explorer vehicles), [http://www.charlestonbusiness.com/pub/12\\_12/briefs/6704-1.html](http://www.charlestonbusiness.com/pub/12_12/briefs/6704-1.html) (reporting on lawsuit arising from an alleged failure of a Yokohama tire), [http://www.cbc.ca/fifth/main\\_tire.html](http://www.cbc.ca/fifth/main_tire.html) (noting the number of deaths related to alleged failures involving Goodyear tires compiled by CBC News), and <http://www.cbc.ca/consumers/market/files/cars/dangeroustires/index2.html> (covering tire design problems and mentioning a multi-million dollar award against Dunlop).

NPRM. Should RMA or its members seek a rule on this issue, they should file an administrative petition for rulemaking. See 49 CFR Part 552. To be clear, NHTSA is not deciding in this notice that EWR claims data is or is not confidential. Insofar as a manufacturer desires confidential treatment for EWR claims data, it should submit a request for confidentiality for those data to NHTSA in accordance with 49 CFR Part 512.<sup>75</sup>

#### VI. Identification of Confidential Business Information Located in Electronic Files

The NPRM proposed amendments to the agency’s regulations for requesting confidentiality for certain information submitted to the agency on electronic media. See 71 FR at 63736. In practice, NHTSA’s Confidential Business Information regulations have been applied most often to the submissions of information in the context of enforcement and rulemaking actions and to other submissions required under the agency’s regulations, as well as to voluntary submissions. NHTSA proposed to add new requirements for identifying confidential information submitted in electronic form. In the last few years, increasingly, the information that is the subject of a request for confidentiality has been submitted on CDs and DVDs, rather than on paper. Under the existing regulations, the submitter is required to mark each page of a paper submission containing information claimed to be confidential with the word “CONFIDENTIAL”. 49 CFR 512.6. In addition, brackets are to be used to designate information claimed to be confidential where the entire page is not claimed to be confidential. *Id.* Under the proposed rule, electronic submissions would be marked with sequential page numbers or identifiers, confidential materials within these submissions would be marked with brackets, individual pages

<sup>75</sup> The manufacturer that requests confidential treatment should address whether the information regarding these categories is already available through publicly accessible court documents. See, e.g., *Lambert v. Goodyear Tire & Rubber Co.*, Case No. 1:03–CV–00382 (W.D. Mich.) (June 11, 2003) (death case), *Bayanay v. Continental Tire*, Case No. 6:02–CV–00205 (E.D. Okla.) (April 22, 2002) (death case), and *Swank v. Bridgestone Firestone*, Case No. 1:01–CV–00982 (M.D. Ala. 2001) (property damage and injury case). The manufacturer should also address the obvious legal problem of granting confidentiality for information that is already publicly available. See *Niagara Mohawk Power Corp. v. Dep’t of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1999). In any event, in light of the availability of this information and its questionable utility by competitors, the manufacturer likely will have a substantial burden in showing that disclosure of this collected information would result in substantial competitive harm.

would be marked as confidential as needed, 71 FR at 63746, and files that cannot be marked internally would be named to ensure that NHTSA can properly identify material that is claimed as confidential. *Id.* We noted that pagination requirements are not unusual and consistent with the rules governing Federal court filings. See 71 FR at 63746 (citing requirements of the Federal Rules of Appellate Procedure).

The agency's proposed amendment to section 512.6, which would replace section 512.6(b)(3), read as follows:

(c) Submissions in electronic format.

(1) Persons submitting information under this Part may submit the information in electronic format. Except for early warning reporting data submitted to the agency under 49 CFR 579, the information 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 word "CONFIDENTIAL".

(2) Pages and materials claimed to be confidential must be designated as provided in § 512.6(b)(1)–(2). Files and materials that cannot be marked internally, such as video clips or executable files, shall be renamed prior to submission so the characters "CONF" or the word "CONFIDENTIAL" appear in the file name.

(3) Each page within an electronic file that is submitted for confidential treatment must be individually numbered in the order presented with a sequential numeric or alpha-numeric system that separately identifies each page contained in that submission.

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

The Alliance and AIAM submitted comments addressing the proposed changes to Section 512.6. Both commenters largely agree with the proposed changes. AIAM observed that the proposal is workable as is and did not foresee any problems with the changes. The Alliance raised questions about the practicability, feasibility, and desirability of the proposed requirement that electronic pages be marked "confidential" and that brackets be inserted around information claimed as confidential. The Alliance voiced similar concerns about the proposed requirement that pages in electronic submissions be marked with page numbers or other sequential identifiers.

The Alliance asserted that the contents of some electronic submissions cannot be marked with brackets, be stamped as confidential or otherwise be numbered or marked with sequential identifiers. According to the Alliance, files such as video clips or executable files do not have individual pages, cannot be altered, and, therefore, cannot

be marked. Other files, such as spreadsheet or database files, do not have page breaks or do not have the capacity to "bracket" information. As NHTSA often requests spreadsheet or database files in their "native" format, the Alliance noted that complying with such requests precludes marking these files unless the submitter converts the files to another format. In the Alliance's view, the agency's analogy in its proposal to the Federal Rules of Appellate Procedure, which require that all submissions to the court be paginated, is inapt because court documents are still submitted on paper.

According to the Alliance, its member companies and NHTSA both wish to ensure that confidential data are properly identified when submitted, that NHTSA can properly review and segregate confidential data, and that the burdens placed on those submitting the data are reasonable. Given these goals, the Alliance notes that a variety of means could produce the same result as NHTSA's proposal.

The Alliance urged the agency to be both flexible and pragmatic when considering the requirements of the final rule. If files or data cannot be marked with brackets or individual page notations, it suggested that submitters be allowed to designate materials for which confidentiality is sought in the request letter and, in this fashion, refer the agency to indices or placemarks that exist inside the file in their native format. Therefore, the Alliance stated that confidential portions of video files could be identified by the "running time" data embedded in the file.

Confidential data within a spreadsheet could be identified in a confidentiality request letter designating only those columns or rows for which confidential treatment is sought. Noting that the language proposed for Section 512.6(c)(3) appeared to contemplate that page numbers or sequential markings need only apply to those pages for which confidential treatment is sought, the Alliance suggested that submitters could provide NHTSA with sufficient information to identify confidential data by numbering or marking only those pages. An alternative reading—that all pages in an electronic submission requesting confidentiality must be marked—would, in its view, be unduly burdensome.

Consistent with these views, the Alliance suggested an alternative version of the agency's proposed regulatory text. These alternative versions modified both Section 512.6(c)(2)—which contains the agency's proposed requirements for brackets and marking individual

pages—and Section 512.6(c)(3)—setting forth NHTSA's proposed requirements for page numbering—by altering Section 512.6(c)(2) to address page numbering and Section 512.6(c)(3) to address brackets and page marking. In particular, the Alliance suggested the following language:

(c) Submissions in electronic format.

\* \* \* \* \*

(2) Electronic files with content that can be marked with page designations must be so marked so that any page can be located using the file name and page number. Files with content that has page designations shall be identified in the request for confidentiality by file name and page numbers or, at the option of the submitter, by sequence number. If files cannot be marked with page or sequence number designations, then the portions of the files that are claimed to be confidential shall be described by other means in the request for confidential treatment.

(3) Electronic files with content that can be marked must be marked "Confidential" at the top of each page. If only a portion of the content of a page is claimed to be confidential, the confidential portion shall be designated by brackets. If the confidential portion cannot be marked with brackets, it must be identified by another method, such as font change or symbols, whenever feasible. The submitter must use one method consistently for electronic files of the same type within the same submission and the method used 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 characters "Conf" or the word "Confidential" appear in the file name.

The Alliance's suggested language differs from the agency's proposal in several ways. Marking file content with either page numbers, brackets or the legend "Confidential" is required only when that content can be marked. Where the content cannot be marked, submitters may choose other means of identification, including changing existing attributes of the content, if these changes are clearly and consistently identified in the submitter's request for confidential treatment.

We are modifying our earlier proposal to address the issues raised by the Alliance and a governmental issue. The agency agrees that some materials do not have paper equivalents or are not, particularly when submitted in their original or "native" format, capable of being marked with brackets, page notations, page numbers or other sequential identifiers. We also concur in the Alliance's interpretation that our proposed Section 512.6(c)(3) would require numbering or sequential marking of only those pages or items for

which confidential treatment is sought. The Alliance's suggestions for page numbering or sequential marking provide for accurate identification of confidential information within electronic submissions.

However, in a number of respects, the revisions suggested by the Alliance lack sufficient specificity to ensure that confidential materials will be adequately identified in a consistent manner. The Alliance's suggested revision to proposed Section 512.6(c)(2) provides that content files that cannot be marked with page numbers or sequential marks be "described" by other means. However, the categories of materials that "cannot" be marked are not adequately defined by the Alliance's revision. Also, the "other means" suggested by the Alliance does not provide sufficient guidance to submitters. The agency also notes that when such other means are used, these other methods may only be ascertained through examination of the request for confidential treatment, which often becomes separated from the materials, and not by examination of the information alone.

There have been other questions pertaining to whether within governmental parlance the word confidential refers to confidential business information.

To address the foregoing issues, the final rule specifies that pagination or sequential marking is required, except when files are submitted in their "native" format and only to the extent that the native format does not contain, or allow for, any internal indices. For example, a video file does not readily lend itself to marking with page numbers. Such files do, however, contain indices in their native format in the form of individual frames within the file itself. Spreadsheets contain internal indices in the form of columns and individual rows. In both cases, existing indices within the files serve as a substitute for sequential numbering. The final rule requires that those submitters seeking confidentiality of files in their native format must state that the native format precludes sequential page marking and specify an alternate means of identifying specific confidential material within the file. If internal indices exist, the submitter must provide an explanation of how these internal indices are arranged and apply to data within the file. We are also adding a requirement that an electronic copy of the submitter's request for confidential treatment be provided on the media containing the confidential data to reduce the possibility that explanations of alternative marking

schemes become separated from the data.

We are also adopting the proposed requirement that electronic media may be submitted only in commonly used and available formats to address occasional problems the agency has encountered when attempting to review files prepared using uncommon software applications, such as proprietary databases. To address requests for confidentiality, we must be able to open the files and examine the data submitted. We received no comments addressing this issue. This requirement would be satisfied by the submission of data in widely used formats such as PDF, Word documents, and Excel spreadsheets.

As proposed, requests for confidential treatment for information submitted to the agency must provide the information claimed as confidential in a physical medium such as a CD-ROM. They may not be sent to the agency by e-mail. No comments were received addressing this issue either. There have been occasions where manufacturers have attempted to submit information claimed as confidential via e-mail. Not only was this action not allowed under the existing regulations, but tracking requests for confidential treatment submitted in this manner is very difficult and far more prone to error than a physical submission. Permitting submissions and accompanying requests for confidential treatment in this manner affects the agency's ability to provide timely responses to these requests and the Chief Counsel's office's ability to transmit the information to the relevant office within NHTSA. In addition, the Department of Transportation limits the overall amount of e-mail information that an individual may maintain, which presents problems, including storage issues. We also have encountered difficulties in receiving attachments to e-mails that contain very large amounts of information. To ensure NHTSA's ability to properly track and handle this information, we are requiring that the information be placed on appropriate physical media, such as CDs, when requesting confidential treatment.

Finally, a question has been raised whether the word confidential could result in confusion. NHTSA's longstanding view has been that the word confidential means confidential business information as used in the title of 49 CFR part 512 *Confidential Business Information* and that the focus is on information that is exempt from disclosure under FOIA. In another context, involving national security information, the word confidential has a

different meaning. To make clear that we are dealing with confidential business information, we are adjusting the proposed regulation to use the words confidential business information instead of confidential.

The foregoing changes are included in a new 49 CFR 512.6(c) that replaces 49 CFR 512.6(b)(3).

## VII. Updated Agency Contact Information

In June 2007, the agency's offices moved to a new location. The current version of 49 CFR part 512 does not yet reflect this change. In today's notice, the new mailing address has been substituted at 49 CFR part 512.7. The agency's change of address does not require notice. 5 U.S.C. 553(b).

## VIII. Data Quality Act Issues

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 number 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.

RMA asserted that the class determinations that we proposed failed to satisfy the Data Quality Act. It contended that the Data Quality Act provides an independent basis to prohibit the disclosure of the EWR data the agency determined is not within the purview of Exemption 4. The RMA believes that the agency's release of EWR data would reasonably suggest to the public that the agency agrees with the data and would be relied on by the public as official NHTSA information. The RMA asserted that the EWR information is subject to the Data Quality Act because it is factual data prepared by third parties, and in the RMA's opinion, not covered by any of the 12 exceptions contained in the DOT guidelines. The RMA also argued that the final rule does not meet the Data Quality Act's "utility" requirement and as written would not present manufacturers' data in an accurate, clear, complete and unbiased manner and in a proper context.

We disagree. Under today's rule, most of the categories of EWR data will not be disclosed to the public, except under 49 U.S.C. 30167 or court order. We note that the EWR information not addressed in today's rule—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. Also RMA's members may submit individual requests for confidentiality regarding these data. Accordingly, this rule does not implicate Data Quality Act concerns.

Moreover, even if EWR data were subject to the Data Quality Act, the early warning program is not subject to the requirements of the Data Quality Act because it falls within an express exemption. The OMB guidelines define the dissemination of information as agency initiated or sponsored distribution of information to the public, but does not include responses to requests for agency records under the Freedom of Information Act, the Privacy Act, the Federal Advisory Committee Act or other similar law. (67 FR 8460). Thus, the Data Quality Act does not apply to data that the agency is required to disclose under FOIA, which would be the case with the quarterly reported death, injury, and property damage claim numbers provided under EWR, but only to information that the agency discloses as part of an agency-initiated or sponsored dissemination of information.

Consistent with OMB's guidance, the Department of Transportation developed a set of guidelines on information dissemination, which includes an exception for "responses to requests under FOIA, Privacy Act, the Federal Advisory Committee Act or other similar laws."<sup>76</sup> The information not covered by a class determination of confidentiality, or otherwise protected by a FOIA exemption, must be released under FOIA.

The process established by Part 512 allows the agency to make available to the public information subject to FOIA by determining in advance which information is entitled to protection under a FOIA exemption. The FOIA provides the analytic foundation for the determination of which data will be publicly available and which will be protected from public disclosure. Accordingly, this information qualifies

under the FOIA exception created by the OMB guidelines.<sup>77</sup>

Finally, in *Public Citizen v. Mineta* (D.D.C. Civil No. 04–463), RMA dismissed its Data Quality Act claim regarding the CBI rule that ultimately was remanded.

#### IX. Privacy Act Statement

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 (65 FR 19477) or you may visit <http://dms.dot.gov>.

#### X. Regulatory Analyses and Notices

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

Executive Order 12866, "Regulatory Planning and Review" (58 FR 51735 (Oct. 4, 1993)), provides for making determinations whether a regulatory action is "significant" and therefore subject to review by the Office of Management and Budget (OMB) and to the requirements of the Executive Order. The Order defines a "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

<sup>77</sup> The FOIA mandates that the agency make broadly available information that has already been the subject of a FOIA request granted by the agency. An agency must make available for public inspection and copying "records \* \* \* which have been released to any person [under FOIA] and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records." 5 U.S.C. 552(a)(2)(D). In addition, under the Electronic-FOIA Amendment of 1996, the information, if created after November 1, 1996, must be made available in an electronic format to the public. 5 U.S.C. 552(a)(2)(E).

NHTSA has considered the impact of this rulemaking action under Executive Order 12866 and the Department of Transportation's regulatory policies and procedures (44 FR 11034 (Feb. 26, 1979)). This rulemaking action is not significant under E.O. 12866, "Regulatory Planning and Review" or the Department's regulatory policies and procedures. There are no new significant burdens on information submitters or related costs that would require the development of a full cost/benefit evaluation. As indicated in the preamble, this document would remedy a deficiency identified by a Federal court and does not raise any new legal or policy issues. This rule does not present novel policy issues. Instead, it resolves issues that have been addressed in the past, including in litigation.

##### 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 will not have a significant economic impact on a substantial number of small entities. This rule will impose no additional reporting obligations on small entities beyond those otherwise required by the Safety Act and the early warning reporting regulation. This rule addresses the agency's treatment of early warning reporting data and clarifies procedures for all submitters, including small entities, with regard to confidentiality. The rule protects certain categories of early warning reporting information from disclosure to ensure consistency in the treatment of information that is likely to cause substantial competitive harm to submitters if disclosed.

In addition, small entities, which generally submit items in hard copy format, are expected to and may continue to do so. Those wishing to submit information in electronic format would be able to do so using the procedures that we are clarifying in this proposal. Therefore, a regulatory flexibility analysis is not required for this action.

##### C. Executive Order 13132 (Federalism)

NHTSA has examined today's rule pursuant to Executive Order 13132 (64 FR 43255, August 10, 1999). This action will not have "federalism implications" because it will not have "substantial direct effects on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government," as specified in section 1 of the Executive Order.

<sup>76</sup> DOT's Information Dissemination Quality Guidelines, at 12 (Effective Oct. 1, 2002). The DOT guidelines are available for public inspection at <http://dms.dot.gov> (click on the "Data Quality" link and then "guidelines").

*D. 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 a 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.

*E. Executive Order 12988 (Civil Justice Reform)*

With respect to the review of the promulgation of a new regulation, section 3(b) of Executive Order 12988, "Civil Justice Reform" (61 FR 4729, February 7, 1996) requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. This document is consistent with that requirement.

NHTSA notes that there is no requirement that individuals submit a petition for reconsideration or pursue other administrative proceedings before they may file suit in court.

*F. 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.*). At the time that we submitted the prior requirements of Part 512, these requirements were approved through January 31, 2008. This rule does not revise the existing currently approved information collection under Part 512. Instead, the rule contains the same requirements as before and only clarifies procedures as to electronically-submitted items to the agency for which confidentiality is sought. It does not require electronic submissions.

*G. 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 action does not meet either of these criteria.

*H. 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 recordkeeping requirements.

■ In consideration of the foregoing, the National Highway Traffic Safety Administration amends 49 CFR Chapter V, Code of Federal Regulations, by amending Part 512 as set forth below.

■ 1. The authority for Part 512—Confidential Business Information continues to read as follows:

**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.

■ 2. Section 512.6 is amended by removing paragraph (b)(3) and adding a new paragraph (c) to read as follows:

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

\* \* \* \* \*

(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, identify 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.

■ 3. Section 512.7 is revised to read as follows:

**§ 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.

■ 4. Appendix C to Part 512 is revised to read as follows:

**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.

■ 5. Appendix D to part 512 is redesignated as Appendix E to Part 512 and a new Appendix D to Part 512 is added to read as follows:

**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).

■ 6. Newly redesignated Appendix E to Part 512 is revised to read as follows:

**Appendix E to Part 512—OMB Clearance**

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

Issued on: October 10, 2007.

**Nicole R. Nason,**

*Administrator.*

[FR Doc. E7–20368 Filed 10–18–07; 8:45 am]

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