Confidential Business Information AMENDMENTS TO 49 CFR PART 512	***Docket No. NHTSA-02-12150***

PETITION FOR RECONSIDERATION OF RULES CATEGORICALLY EXEMPTING EARLY WARNING INFORMATION FROM DISCLOSURE

The organizations listed below hereby petition the National Highway Traffic Safety Administration ("NHTSA") to reconsider rules promulgated on July 28, 2003. In particular, petitioners request that the agency vacate Appendix C of the rules, which purports to make categorical determinations that warranty claim information, field reports, consumer complaints, and certain production numbers are exempt from disclosure under Exemption 4 of the Freedom of Information Act ("FOIA"). See 68 Fed. Reg. 44209-232. Manufacturers are required to submit this data under the early warning reporting requirements that Congress enacted in response to the Ford-Firestone tire scandal. See 49 U.S.C. § 30166(m); 49 C.F.R. Part 579.

For the reasons discussed below, we believe that NHTSA's decision to make categorical determinations by regulation is inconsistent with FOIA's mandate that agency records be disclosed in the absence of detailed, specific evidence that disclosure of any part of the record would result in the harms identified in one of the statute's exemptions. Adherence to FOIA's mandate for disclosure is particularly important with respect to the early warning data because of its safety implications and the need to make the agency more accountable. Congress directed NHTSA to establish an early warning reporting program in response to evidence that the hazards associated with Firestone tires could have been uncovered much earlier if the agency had properly reviewed data that was held by the industry and data in NHTSA's own possession. See Statement by the President on the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act, Nov. 1, 2000; Docket No. NHTSA-02-12150-#53, Letter of the Hon. Henry A. Waxman, Feb. 26, 2003, p. 1. Investigations of the performance of the Office of Defect Investigations have shown that better use of early warning information can save lives and reduce injuries.[1]

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[1] See Office of the Inspector General, Review of the Office of Defects Investigation, National Highway Traffic Safety Administration, Report No. MH-2002-071, at 13-17 (Jan. 3, 2002).

However, the value of the early warning information is diminished if information that manufacturers provide to the agency is kept from the public. Public disclosure of information about potential defects enhances the information available to the agency by encouraging reports from consumers who might otherwise fail to report. Public disclosure can also save lives and reduce injuries by making consumers aware of hazards. Perhaps most importantly, experience shows that even when NHTSA has had information that should prompt defect investigations, it has sometimes failed to act, or responded ineffectively. Id. Public disclosure will improve public accountability and provide a check on agency errors and inaction. In contrast, the categorical secrecy contemplated by Appendix C will conceal potential defects from the public and thwart public scrutiny of the agency's actions.

I. THE REGULATIONS SHOULD BE RECONSIDERED BECAUSE SIGNIFICANT CHANGES ADOPTED IN THE FINAL RULES WERE NOT REFLECTED IN THE NOTICE OF PROPOSED RULEMAKING.

Reconsideration is particularly appropriate with respect to the Appendix C rules because the agency's Notice of Proposed Rulemaking did not propose the categorical exemptions for early warning information found in the final rule, or even identify these exemptions as an option that the agency was considering. To the contrary, the Notice of Proposed Rulemaking stated that the agency was *not* proposing to add any additional class determinations to the Part 512 regulations. 67 Fed. Reg. 21198, 21199-200 (2002). Moreover, the Notice stated that, based on both case law and NHTSA's experience with the information typically submitted in rulemakings and defect investigations, the agency was proposing to adopt a regulatory presumption that disclosure of information concerning consumer complaints and warranty claims would not cause competitive injury if released. Id. at 211200, 21206.

The Notice of Proposed Rulemaking also did not indicate that NHTSA might create categorical exemptions based on impairment of the government's ability to obtain information. See id. at 21200 (soliciting comment only on whether agency should make presumptive determinations on competitive harm to the submitter). In addition, the Notice of Proposed Rulemaking did not give any warning that NHTSA was considering changing the language of its regulations on class determinations to remove the term "presumptively" and adopt regulations that state that the Chief Counsel "has determined" that disclosure of classes of information will cause competitive harm or impair the government's ability to obtain information. Compare 67 Fed. Reg. at 21206 (proposed Appendix B) with 68 Fed. Reg. at 44232 (final rule) and 67 Fed. Reg. 21204-05 (proposed § 512.16) with 68 Fed. Reg. 44230-31 (final § 512.16).

Consequently, the Notice of Proposed Rulemaking did not give the public fair warning that NHTSA was contemplating the class determinations adopted in the final rule, and the public has not had the opportunity to comment on the legality or wisdom of these changes. Such public scrutiny is particularly appropriate in this context because FOIA contemplates that evidence offered to support a claim that records are exempt from disclosure will be subject to adversarial testing. See Vaughn v. Rosen, 484 F.2d 820, 826-28 (D.C. Cir. 1973). However, NHTSA has promulgated the regulations in Appendix C without subjecting its contentions or the evidence cited to support these regulations to adversarial scrutiny. At the very least, NHTSA should vacate the portion of the final rules concerning class determinations and publish a request for public comment on whether such regulations should be adopted.

II. THE AGENCY DOES NOT HAVE AUTHORITY TO ADOPT REGULATIONS THAT EXEMPT INFORMATION FROM THE FOIA.

NHTSA should reconsider and abandon the categorical exemptions set forth in Appendix C because it does not have authority to issue legislative regulations that exempt information from disclosure under the FOIA. "An agency's 'power to promulgate legislative regulations is limited to the authority delegated' to it by Congress." Amalgamated Transit Union v. Skinner, 894 F.2d 1362, 1368 (D.C. Cir. 1990) (quoting Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988)). Agency rules that are not "rooted in a grant of such power by the Congress and subject to limitations which that body imposes" are not valid. Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979); see also Michigan v. EPA, 268 F. 3d 1075, 1081-1082 (D.C. Cir. 2001); U.S. ex rel. O'Keefe v. McDonnell Douglas Corp. 132 F.3d 1252, 1254 (8th Cir. 1998) (en banc).

NHTSA does not have the power to issue binding regulations that exempt an entire category of materials from disclosure under the FOIA because Congress has never delegated such power to federal agencies. The FOIA contemplates that agencies will promulgate procedural rules addressing the time, place, and manner for making requests and applicable fees. See 5 U.S.C. § 552(a)(3)(A), (a)(4)(A)(I). However, nothing in the statute authorizes agencies to issue substantive regulations concerning the scope of the Act or, more specifically, to promulgate regulations that create categories of exempt records. Congress did not give agencies the authority to issue such legislative regulations because FOIA is designed to combat agency secrecy and agencies "are not necessarily neutral interpreters insofar as FOIA compels release of information the agency might be reluctant to disclose." Association of Retired Railroad Workers, Inc. v. United States Railroad Retirement Board., 830 F.2d 331, 334 (D.C. Cir. 1987). The courts have primary responsibility for interpreting the scope of FOIA's exemptions, and principles of

deference that apply in other contexts in which Congress has delegated responsibility for implementing a statute to a specific agency do not apply under the FOIA. See id. at 333-34; Tax Analysts v. Internal Revenue Service, 117 F.3d 607, 613 (D.C. Cir. 1997). Consequently, although NHTSA has substantive law-making authority under other statutes, Congress has not delegated such authority under the FOIA and NHTSA's legislative regulations concerning the scope of the FOIA are invalid.

Indeed, where Congress has decided to exempt an entire category of records from disclosure so that submitters do not need to show that the requirements of FOIA's Exemption 4 are satisfied, it has enacted special statutes that define the categories of information that are exempt. See, e.g., Critical Infrastructure Information Act of 2002, 6 U.S.C. 131-134; Consumer Product Safety Act, 15 U.S.C. § 2055(b)(5); Federal Trade Commission Improvement Act, 15 U.S.C. § 57b-2. NHTSA's rules are invalid because they attempt to create by regulation categorical exemptions that can only be authorized by statute.

III. THE CATEGORICAL DETERMINATIONS FOR EARLY WARNING DATA ARE NOT SUPPORTED BY CATEGORICAL EVIDENCE.

Even if NHTSA had the legal authority to issue regulations determining prospectively that entire categories of information are exempt from disclosure under the FOIA, such rules would require conclusive and broad evidence that does not exist for the classes of information covered by Appendix C. The regulations state that NHTSA's Chief Counsel "has determined" that disclosure of early warning reports and data relating to warranty claims, field reports, and consumer complaints "will cause substantial competitive harm and will impair the government's ability to obtain this information in the future." 68 Fed. Reg. 44232, Appendix C (a). With respect to production numbers, the regulations state that, with the exception of production numbers for light vehicles, the Chief Counsel has already determined that disclosure of such numbers that must be reported as early warning data "will cause substantial competitive harm." Id. (b).

These determinations for records that have not yet been submitted to the agency could only be justified if the agency had a factual basis for conclusively finding that all the reports and data that will be submitted under these categories will satisfy each of the elements necessary to establish an Exemption 4 claim under the FOIA and that non-exempt and exempt information could not be reasonably segregated. The evidence does not remotely support such a prospective determination for the early warning information covered by the Appendix C regulations.

The Appendix C regulations are also not supported by a history of case-by-case determinations that early warning data categorically satisfy the requirements of Exemption 4. There are no prior judicial decisions holding that this information is categorically exempt. There is not a series of opinions in which courts have repeatedly concluded that the requirements of Exemption 4 were satisfied for information in these categories. Nor is there a history of prior administrative decisions that have repeatedly concluded that submitters of information in these categories were able to satisfy Exemption 4's requirements. To the contrary, NHTSA has generally disclosed information in these categories in the context of defect investigations, and the industry has not contested that practice. See 67 Fed. Reg. 21200; 68 Fed. Reg. 44219; 66 Fed. Reg. 66190, 66214 (2001) ("Historically, these types of information generally have not been considered by the agency to be entitled to confidential treatment, unless the disclosure of the information would reveal other proprietary business information"). Where manufacturers have submitted requests for confidential treatment, NHTSA has frequently rejected those claims as unfounded or deficient.[2] This historical experience shows that a categorical determination that information should be withheld is unjustified.

Moreover, because the early warning data has not yet been submitted, claims that disclosure of this data will risk harms not presented by similar information that NHTSA has released in the past are necessarily speculative. Agency speculation that records might contain information that satisfies the requirements of a FOIA exemption is not sufficient to establish a basis for withholding individual records, much less withholding broad categories of information. See Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 870 (D.C. Cir. 1980).

An agency may not properly withhold information under the FOIA based on the *absence* of contrary information; it must have an affirmative basis for concluding that all the conditions for applying an exemption are satisfied. See Public Citizen Health Research Group v. FDA, 185 F.3d 898, 904-05 (D.C. Cir. 1999); Niagara Mohawk Power Corp. v. Department of Energy, 169 F.3d 16, 18 (D.C. Cir. 1999). The categorical rules that NHTSA has adopted do not have such support. For example, the categorical rule for production numbers covers all early warning production number reports for child restraint systems, tires, and all vehicles other than light vehicles. This rule is not supported by comprehensive information on confidentiality practices of all the businesses that will be the beneficiaries of this determination, and there is no examination of the competitive value of such information in the various industries covered by the regulation. Instead, the

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[2] See, e.g., Attachment 2, Ford Request for Confidential Treatment and NHTSA Confidentiality Determination/PE00-020/NSA-12tad (Nov. 2, 2000).

categorical rule was adopted after receiving comments by a few businesses that stated that their production numbers are not generally available. See 68 Fed. Reg. at 44221.

Similarly, although NHTSA has acknowledged that the nature, quality, and quantity of field reports vary significantly from company to company, id. at 44223, the categorical rule contains a determination that early warning reports and data relating to field reports uniformly qualify for withholding under Exemption 4. Judicial decisions under Exemption 4 indicate that whether an investigative report qualifies under this Exemption is heavily dependent on case-specific details. See 139 ALR Fed. 225 § 22 (1997) (summarizing cases on Exemption 4 claims for investigations and audits); Critical Mass Energy Project v. Nuclear Regulatory Commission, 830 F.2d 278, 283 (D.C. Cir. 1987) (Critical Mass I) (more detailed facts necessary to evaluate agency's claim that agency's ability to obtain information from industry reports would be impaired by disclosure). The categorical determination set forth in Appendix C is untenable in light of these decisions, the breadth of the categories, and the evidence before the agency.[3]

IV. THE CATEGORICAL EXEMPTIONS ARE BASED ON ERRONEOUS CONSTRUCTIONS OF EXEMPTION 4.

The categorical determinations for warranty information, field reports, and consumer complaints are predicated on conclusions that disclosure of the early warning reports with this type of information would result in three types of harm: (A) "unwarranted product disparagement" arising from misleading cross-company comparisons of the data; (B) competitive injury arising from competitors using others' early warning data to assess the problems with, or value of, a component or system in a competitor's model without incurring the same costs; and (C) impairment of the quantity or quality of information available to the agency.[4] In relying on these harms, NHTSA has

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[3]Connelly, *Secrets and Smokescreens: A Legal and Economic Analysis of Government Disclosures of Business Data*, 1981 Wisc. L. Rev. 207, 235 (observing that assessment of competitive value "will have to be made on a case-by-case basis" because competitive value or propensity to produce competitive harm "is not susceptible to generalized definition.")

[4]The explanation of the final regulations also states that the field reports and consumer complaints may "reveal which aspects of a vehicle's performance . . . a manufacturer deems important in its commercial efforts," but does not elaborate. 68 Fed. Reg. at 44224, 44225. It is not clear what is meant by these statements, nor is it clear that this consideration played any substantial role in the agency's decision to adopt the

misconstrued the standards that govern Exemption 4 determinations. At the very least, NHTSA has articulated novel theories for withholding records that have not been the basis for prior judicial decisions under Exemption 4. NHTSA should reconsider and abandon the Appendix C regulations rather than categorically withhold the early warning data based on these flawed and aberrant theories.

A. Unwarranted Product Disparagement Arising from Misleading Cross-Company Comparisons.

NHTSA's explanation of its basis for the final regulations states that it believes that warranty claims information may "give rise to misleading comparisons," 68 Fed. Reg. 44222-23, competitors may use field reports to make similar misleading comparisons, id. at 44224, and consumer complaints may be used for "unwarranted product disparagement." Id. at 44225. For four reasons, NHTSA should reconsider its conclusion that the possibility that data will be used for such cross-company comparisons constitutes substantial competitive harm.

First, the agency's justification ignores well-established sources of data that are available to consumers seeking to make cross-company comparisons. See, e.g., Attachment 1, LIST OF PUBLICATIONS AND WEBSITES WITH COMPARATIVE INFORMATION FOR CONSUMERS.[6] Disclosure of the early warning reports could result in significant competitive harm in the manner that NHTSA imagines only if large numbers of consumers abandon the existing publications and websites that provide guidance on vehicle performance in favor of examining raw data in the early warning reports. The idea that consumers will disregard the books, magazines, and user-friendly databases with detailed analyzes that are designed specifically to assist consumers in favor of the unanalyzed spreadsheets submitted under the early warning rule is fanciful. Instead, the

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Appendix C regulations. In any event, the early warning reports will not categorically reveal what "a manufacturer deems important in its commercial efforts," nor will revealing such information categorically result in substantial competitive injury. Consequently, the determinations set forth in Appendix C cannot be justified based on these statements.

[6] See also CONSUMER REPORTS' USED CAR BUYING GUIDE; The Center for Auto Safety Public Database of Consumer Complaints at www.autosafety.org/fileacomplaint.php; Docket No. NHTSA-02-12150-#10, Comments of the Alliance of Automobile Manufacturers, Attachment A, p. 2 (22% of new vehicle buyers consulted consumer magazines).

consumers are likely to treat the early warning information as, at most, another source of information about vehicles that must be considered in context with other information compiled by experts to assist consumers in selecting vehicles, and professionals who analyze the data for consumers will recognize its limitations and evaluate it in context. There is no evidence that disclosure of the early warning reports will lead consumers to discard established resources for cross-company analysis and produce the competitive effect that NHTSA hypothesizes.

Second, insofar as NHTSA's conclusion is based on the premise that substantial competitive harm will result because competitors will use their rivals' information to make "misleading comparisons" and engage in "unwarranted product disparagement," these considerations are not a proper ground for withholding information under Exemption 4. Federal and state laws prohibit unfair and misleading advertising and marketing practices. There is no reason to believe that disclosure of the early warning reports will somehow induce dealers and manufacturers to disregard these laws and use the early warning data to engage in misleading product disparagement that would not otherwise occur and that such misconduct will be so widespread and successful that it will result in significant competitive harm.

Third, NHTSA's theory that the possibility that information may be misinterpreted by the public is sufficient to establish a substantial competitive harm under Exemption 4 appears to be unprecedented. Nothing in the legislative history suggest that when Congress created the exemption for confidential business or financial information it intended to give agencies the authority to withhold information because the public might misunderstand the information. See National Parks and Conservation Association v. Morton, 498 F. 2d 765 (D.C. Cir. 1974). Virtually all of the commercial and financial information submitted to the government can be misinterpreted, but the possibility of mischaracterization has never been identified as a justification for keeping information secret under the FOIA.[7] Nothing precludes NHTSA from including a disclaimer to warn

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[7] The explanation accompanying the final regulation suggests that NHTSA believes that Worthingon Compressors v. Costle, 662 F.2d 45, 52 n.43 (D.C. Cir. 1981), supports the conclusion that the possibility that mischaracterization of information from a submitter might cause substantial competitive harm is a legitimate basis for withholding information under Exemption 4. 68 Fed. Reg. at 44220 & n.13. Worthington Compressors contains no statement that potential mischaracterization constitutes competitive harm, and did not approve withholding information on this ground. Moreover, in the twenty-two years since Worthington Compressors was decided, the courts have not interpreted the decision as holding that possible misinterpretation of a

against misinterpretation, and those who have competing interpretations of the data can always present their views to the public. Government is generally not permitted to ban the dissemination of truthful information. See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, (1996). More specifically, FOIA does not provide license for agencies to withhold commercial information from the public on the theory that the agency alone can be trusted to interpret it properly.[8]

Finally, insofar as the competitive consequences of disclosing warranty, field report, and consumer complaint information is not the result of "unwarranted" disparagement, but *warranted* questions about the safety and quality of the product, this "harm" is not a basis for withholding information under Exemption 4. Not all injury to competitive position is a "competitive harm" in the context of the FOIA. See Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1287 n.16 (D.C. Cir. 1983). Competitive injuries that are the result of "'customer or employee disgruntlement or from the embarrassing publicity attendant upon public revelations concerning, for example, . . . violations of civil rights, environmental or safety laws'" do not qualify as competitive harms for the purpose of Exemption 4. Id. (quoting Connelly, *Secrets and Smokescreens: A Legal and Economic Analysis of Government Disclosures of Business Data*, 1981 WIS.L.REV. 207, 235-236); accord CNA Financial Corp. v. Donovan, 830 F.2d 1132, 1154 (D.C. Cir. 1987); Public Citizen Health Research Group v. FDA, 964 F. Supp. 413, 415 & n.2 (D.D.C. 1997). The FOIA and laws that protect trade secrets and confidential business information are concerned with preventing *unfair* use of information that unjustly enriches competitors. Although information that shows that a product on the market may be unsafe or inferior may harm a business's reputation and the sales of the product, such information does not give an unfair competitive advantage to rivals.[9]

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submitter's materials is a legitimate basis for withholding information under Exemption 4.

[8] For example, comments by Cooper Tire & Rubber Company in this docket urge NHTSA to withhold the early warning information from the public to prevent consumer groups from analyzing the data on the theory that such groups will engage in "well meaning but technically unsophisticated" analysis of the data. Cooper Tire & Rubber Company comments at 9-10. Withholding business information on the premise that only business and the government are capable of understanding the significance and limitations of the data is wholly inconsistent with FOIA's mandate that records be disclosed to allow public scrutiny.

[9] See Docket No. 02-12150-#12, Comments of General Motors Corporation, June 28, 2002, p. 3 (acknowledging that "legitimate competitive disadvantage brought to the

B. Competitor's Use of Early Warning Information To Avoid Development Costs.

NHTSA's explanation of the final regulations also states that disclosure may result in competitive harm because warranty information, field reports, and consumer complaints may reveal to other manufacturers which components and systems have "met with consumer acceptance" or show which components and systems have potential safety or other problems. 68 Fed. Reg. at 44222, 44223-24, 44225. NHTSA theorizes that this would result in competitive injury because a rival could use this information to decide whether to purchase similar components for its vehicles, the price to pay for the components, and whether to use the same supplier. Id. at 44222.

This theory does not provide a legitimate basis for a categorical determination that covers *all* early warning reports, including reports that identify potential defects, because reports that identify safety problems with vehicles on the market cannot provide a basis for finding substantial competitive injury, and NHTSA has historically determined that such information is not covered by Exemption 4. In the event that the early warning reports reveal safety-related problems with a vehicle, a system, a component, or equipment coming from a particular supplier, a submitter could not properly object that NHTSA should withhold this information to protect its reputation or ability to continue to sell the equipment. As discussed above, the harm resulting from such disclosures is not considered a competitive harm under Exemption 4, and revealing that safety problems are associated with a particular vehicle or component does not result in an unfair advantage to competitors. Indeed, NHTSA's history of disclosing warranty information, consumer complaints and similar records collected during defect investigations demonstrates that NHTSA has recognized that the possibility that such disclosures may influence competition by undermining a vehicle's reputation for safe performance does not provide a justification for withhold this information from the public.

The competitive injury that NHTSA hypothesizes also cannot support a categorical determination because it assumes a convergence of events that, at best, will arise only in rare and special cases. The early warning regulation provides for manufacturers to reveal the counts of consumer complaints, warranty claims, and field reports associated with various systems. See, e.g., 49 C.F.R. § 579.21(c). Because such counts do not reveal any details about the content of the consumer complaints, warranty claims, or field reports,

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consumers' attention by truthful, substantiated comparative claims in advertising is not the type of competitive harm that is considered in the context of Exemption 4.")

these counts will provide significant information about component performance only in the most extreme cases. Such extreme cases cannot provide a basis for categorically withholding all early warning reports.

Moreover, even if an early warning report contained counts that revealed exceptionally good or bad performance associated with a particular component, it would not follow that disclosure of the report would result in significant competitive injury under Exemption 4. The performance issues reflected in the early warning reports may already be public knowledge because of a defect investigation, press reports, a supplier's or manufacturer's own disclosures, or other sources of information. It is also necessary to demonstrate that the component or system at issue relates to an area in which there is actual competition within the industry and that competitors could not obtain the information through other methods at a reasonable cost. See Greenberg v. Food and Drug Administration, 803 F.2d 1213, 1217-18 (D.C. Cir. 1986); Niagara Mohawk, 169 F.3d at 19. In addition, the submitter "can suffer competitive harm only if the information has commercial value to competitors." Worthington Compressors, 662 F.2d at 51. If the information relates to components that are uniquely suited to a particular vehicle, a determination that disclosure would result in substantial competitive injury could not be justified. Similarly, the early warning reports concern the performance of components and systems in vehicles going back ten years. If the system or component at issue is not compatible with the vehicles that manufacturers are designing for future production, or has been displaced by newer technologies, disclosure of the early warning reports could not provide a significant competitive advantage to competitors in the way NHTSA hypothesizes. In short, it seems unlikely that the scenario described in the explanation of the final rule will ever occur, but if it does occur, the elements necessary to establish substantial competitive injury will be satisfied only in specific, isolated instances, not as a categorical matter.

C. Impairment of the Quantity or Quality of Information Available to the Agency.

For the following reasons, NHTSA should reconsider its conclusion that disclosure of warranty, field report, and consumer complaint reports "will impair the Government's ability to obtain necessary information in the future." 68 Fed. Reg. 44232, Appendix C (a).

First, agencies have found that it is difficult to demonstrate that Exemption 4 is satisfied by impairment of the government's ability to obtain information when, as here, the law requires that information be submitted. See Niagara Mohawk, 169 F.3d at 18

(where information is submitted under compulsion, impairment claim is "inherently weak"). Courts have repeatedly rejected Exemption 4 claims in these circumstances because the agency lacked the detailed evidence needed to show that the government's access to mandatory submissions would be impaired. For example, NHTSA's statements that disclosure of early warning reports might discourage efforts to collect the information, or inhibit candor, are similar to the justifications for withholding the safety reports at issue in Critical Mass I, 830 F.2d 278. In that case, the court rejected the agency's claim that impairment would occur because it was not supported by a "'detailed justification [of] the extent to which disclosure . . . will impair the government's ability to obtain necessary information [, supported by] specific factual or evidentiary material.'" Id. at 283 (quoting Pacific Architects & Engineers Inc. v. Renegotiation Board, 505 F.2d 383, 385 (D.C. Cir. 1974)); see also Niagara Mohawk, 169 F.3d at 19 (conclusory and generalized assertions are insufficient); Washington Post Co. v. Department of Health and Human Services, 690 F.2d 252, 269 (D.C. Cir. 1982) (agency conclusion rejected for lack of detailed evidence). The detailed justification required to support a claim of impairment includes a detailed inquiry into the manner in which the private submitter collects information, the manner in which it is circulated, and whether those who compile the information are sensitive to its disclosure. See Pacific Architects, 505 F.2d at 385; Critical Mass Energy Project v. Nuclear Regulatory Commission, 931 F.2d 939, 946-47 (D.C. Cir. 1991), vacated on other grounds, 975 F.2d 871 (D.C. Cir. 1992) (en banc), cert. denied, 507 U.S. 984 (1993) (Critical Mass II).[10]

Moreover, to sustain a determination that will support withholding information under Exemption 4, the evidence must address not only whether disclosure would result

[10] NHTSA's rationale for concluding that early warning information should be held in confidence also echoes arguments offered in support of a self-critical analysis privilege for internal reviews conducted by businesses. However, NHTSA has recognized that this privilege has "not found a firm foothold in Federal law." Attachment 2, NHTSA Confidentiality Determination in PE00-020/NSA-12tad at 2 (Nov. 2, 2000). Many courts have rejected this rationale for a privilege altogether, while others have imposed severe limitations on claims of privilege based on the theory that disclosure will chill the collection of useful information. See Lawson v. Fisher-Price, Inc., 191 F.R.D. 381, 384 (D.Vt. 1999) (citing cases). The early warning reports would not qualify for protection under such a privilege because courts have recognized that factual information should not be protected under such a privilege, and businesses should not be permitted to withhold routine internal corporate reviews of matters related to safety concerns. Dowling v. American Hawaii Cruises, Inc., 971 F.2d 423, 426 (9th Cir. 1992); Morgan v. Union Pacific R. Co., 182 F.R.D. 261, 266 (N.D.Ill. 1998).

in impairment, but also the extent of the impairment. Washington Post, 690 F.2d at 269 (remanding case for the district court to make findings on the extent to which the government's ability to obtain information would be impaired by disclosure). To justify withholding the information under Exemption 4, the impairment must be significant. See Critical Mass I, 830 F.2d at 286; Pacific Architects, 505 F.2d at 385. The categorical rules adopted by NHTSA cannot withstand scrutiny under the standards of proof set forth in Critical Mass I and Pacific Architects.

Second, statements that submitters of the information or the agency believe that the government's ability to obtain information will be impaired are inadequate to sustain an Exemption 4 claim. See Niagara Mohawk, 169 F.3d at 18; Critical Mass II, 931 F.2d at 947; Critical Mass I, 830 F.2d at 284 (agency assertion inadequate where it lacks "clear focus and solid factual support"); Washington Post Co., 690 F.2d at 269. The rules at issue here rest on the type of subjective, conclusory statements that courts have condemned as inadequate to sustain an Exemption 4 claim.

Third, evaluating whether information can be withheld based on impairment "necessarily involves a rough balancing of the extent of impairment and the importance of the information against the public interest in disclosure." Washington Post, 690 F.2d at 269; accord Washington Post Co. v. HHS, 865 F.2d 320, 326-27 (D.C. Cir. 1989) (on remand, district court must balance if impairment is shown). These regulations do not reflect such balancing.[11]

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[11] NHTSA's explanation for the final rule suggests that it is persuaded by the opinion in Public Citizen Health Research Group v. Food & Drug Administration, 185 F.3d 898 (D.C. Cir. 1999), that consideration of the public interest is not necessary. 68 Fed. Reg. 44221, 44227. That decision, however, addressed claims of competitive injury and did not modify the same court's earlier observation that balancing *is* necessary when evaluating claims under the impairment prong of Exemption 4. Moreover, the court's discussion of public interest in that case suggests that the interest in disclosure should be considered insofar as the information relates to what the government "is up to." 185 F.3d at 904. Disclosure of the early warning information would serve that interest. Finally, even within the District of Columbia Circuit the statements in Public Citizen Health Research Group v. FDA do not represent a comprehensive analysis of this issue, as the question whether the public interest could outweigh competitive harms was not briefed and the opinion's statements on this issue were not necessary to the resolution of the appeal. See 185 F.3d at 907-909 (Garland, J., concurring in the result).

Disclosure of the early warning information will serve the public interest, including the agency's goal of preventing injuries caused by defective vehicles. Experience indicates that public disclosure can encourage others who have not reported their experience to NHTSA or manufacturers to come forward and provide additional reports that will enhance the data available to the agency.[12] Moreover, disclosure of this information may alert the public to potential defects even before a defect investigation is opened and thereby prevent injuries by permitting consumers to take remedial measures or discouraging the use of hazardous equipment. The goal of the early warning program is not simply to provide NHTSA with more data for its own sake, but to prevent deaths and injury. Consequently, the interest of the public, including the specific objectives of the early warning program, are not served by rules that would result in the agency concealing information that could reduce deaths and injuries from defective equipment.

Fourth, the categorical determinations do not address the fact that the quality and quantity of information covered by the Appendix C regulations is influenced by many factors. To justify withholding information under the impairment prong, an agency must show not only that it is plausible that disclosure would influence the quality and quantity of this information, but also that disclosure would result in a significant impairment despite other factors that influence whether and how businesses collect this information.

Disclosure of the limited information in the early warning reports is unlikely to have any significant influence in light of the other factors influencing the quality and quantity of this information. For example, company officials preparing field reports on potential defects have many incentives for maintaining the quality of their work. See, e.g., Chicago Tribune Co. v. Department of Health and Human Services, 1997 WL 1137641, 21 (N.D. Ill. 1997) (rejecting claim that disclosure will have a "chilling effect" on scientific reports); Dowling v. American Hawaii Cruises, Inc., 971 F.2d 423, 426 (9th Cir. 1992) ("Organizations have many incentives to conduct [safety] reviews that

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[12] Prior recall investigations and advisories, including the Firestone tire recalls and automatic transmission defects, show that publicity about reported problems helps to uncover additional complaints from consumers who had similar experiences. See Attachment 3, Statement of Clarence M. Ditlow III, Before the National Highway Traffic Safety Administration on Safety Defects in Ford Automatic Transmissions, August 21, 1980. Indeed, manufacturers have occasionally acknowledged that publicity encourages consumer reporting and have argued that the number of complaints concerning a problem that has received publicity will naturally be higher than complaints concerning other vehicles. See *Wall Street J.* April 14, 1988, p. 20 (Ford maintained that disproportionate reports of automatic transmission failures reflected effect of publicity).

outweigh the harm that might result from disclosure.") Competition over the duration and scope of product warranties places an incentive on manufacturers to maintain the quality of their warranty programs and to maintain or even extend the length of product warranties. See Attachment 4, Articles on Automotive Warranty Competition. Manufacturers' practices concerning consumer complaints will be influenced by their obligation to respond to such complaints under state laws and the fact that such complaints will be subject to discovery in liability litigation. NHTSA's categorical determination concerning the effect of disclosure of the early warning data is untenable because it does not take these factors into account.

CONCLUSION

The agency should reconsider its decision to adopt Appendix C of the Part 512 regulations and vacate the early warning reporting class determinations set forth in those rules.**Petitioners:**

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