

- C. Specific Types of Information to be Provided Under the Early Warning Regulation
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 - 2. Claims and Notices Involving Death, Personal Injury and Property Damage
 - 3. Information Regarding Warranty Claims
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- VII. Appendix A: FOIA Exemption 3 and the TREAD Act Disclosure Provision
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- IX. Regulatory Analyses and Notices
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 - J. Data Quality Act
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I. Background

On April 30, 2002, NHTSA published a Notice of Proposed Rulemaking (NPRM) to amend 49 CFR part 512, Confidential Business Information (part 512). The proposal was intended to make the regulation clearer and easier to follow, particularly for organizations or individuals who do not submit materials to the agency on a regular or frequent basis, and to update specific sections of the regulation to reflect developments in the law. The agency proposed to reorganize the provisions of part 512 and to use a question and answer format, designed to guide the reader through the procedural steps of making a claim for confidential treatment of business information. The NPRM also addressed a variety of procedural matters relating to such claims.

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

II. Comments Received

The comment period closed on July 1, 2002. The agency received timely comments from various sectors of the

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

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

III. Overview of the Comments

Most of the comments supported the NPRM's approach to make Part 512 easier to read and to update the substantive description of what constitutes confidential business information to conform to developments in the law. Many commenters expressed concern over the number of copies the agency was considering requiring to be

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

filed, the agency's request that certain submitters redact personal identifiers, and various other aspects of the proposal. Objections were also raised to the concept of establishing categories of information presumed not to cause substantial competitive harm if disclosed.

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

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

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

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