

from July 1, 2000 through June 30, 2003.<sup>4</sup>

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

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

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

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

Congress recognized that additional types of information may be useful to the agency in carrying out its mission to identify safety related defects. In Section 30166(m)(3)(B), Congress gave the agency the authority to mandate the submission of "other data" in addition to the information described above "to the extent that such information may assist in the identification of defects related to motor vehicle safety in motor vehicles and motor vehicle equipment in the United States." Pursuant to that

authority, NHTSA's early warning reporting rule requires the submission of information relating, among others, to warranty claims, field reports and consumer complaints.

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

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

#### *1. The TREAD Act and the FOIA Exemptions*

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

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

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

<sup>6</sup> Public Citizen's letter appears in the docket as an attachment to the comments submitted by the RMA.

totally secret, probably indefinitely. (Emphasis in original)<sup>7</sup>

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

Ms. Claybrook's letter seems to suggest that the variation in language could be interpreted to prevent the disclosure of any early warning information submitted to the agency in the absence of a decision by the Secretary that disclosure of the information "will assist in carrying out" the purposes of the Act. However, the legislation clearly requires that such a decision be made prior to disclosure only when the disclosure is being made under section 30167(b), which by its terms is invoked only when the disclosure involves information that has been determined to be entitled to confidential treatment.

Moreover, section 30167(b) provides specifically that "A requirement to disclose information under this subsection is in addition to the requirements of [the FOIA]." Accordingly, neither section 30167(b) nor paragraph (4)(C) would affect the agency's initial decision regarding whether information submitted to the agency is entitled to confidential treatment. Such decisions will continue to be made in accordance with Exemption 4 of [the FOIA], the Trade Secrets Act and the agency's regulations concerning the treatment of confidential business information, 49 CFR part 512.<sup>8</sup>

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

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

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

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

<sup>4</sup> The early warning regulation contains definitions and explanations that provide further context to these requirements and that are not repeated here.