

information or has referred to particular types of matters to be withheld. The RMA asserted that the reference in the disclosure provision to the rulemaking required by Section 30166(m)(1) is sufficient to bring the statute within the purview of Exemption 3. According to the RMA, the analysis prepared by the agency in the October 27, 2000 memorandum would render the statutory provision meaningless and violate a central tenet of statutory construction.

The RMA, as well as individual tire makers and many other manufacturers, further argued that the information required by the early warning reporting regulation would lead to substantial competitive harm if disclosed. In addition, they suggest that disclosure would lead to less candor from field personnel, resulting in less reliable information, and would discourage marketing efforts that lead to more complete and useful data.

The Alliance suggested that the provision assumes the confidentiality of the early warning reporting data because information cannot be disclosed under section 30167(b) unless it is otherwise confidential. The Alliance asserted that the information may be found to be confidential under either Exemption 4 or Exemption 7 of the FOIA. The Alliance submitted affidavit evidence to support its claim that disclosure of the early warning reporting information would lead to substantial competitive harm within the automotive industry. General Motors also submitted comments explaining how, in its view, substantial competitive harm is likely to result if the data were disclosed.

The TREAD Act mandated that NHTSA collect and maintain information in a manner not previously followed by the agency. Historically, the agency has received information relating specifically to a particular alleged defect or noncompliance, including engineering drawings, warranty claim information, customer complaints, field reports and lawsuit information. Manufacturers submitting information in response to the agency's information requests frequently seek confidential treatment for portions of the information submitted. The agency reviews those requests in accordance with Exemption 4 of the FOIA.

The early warning reporting regulation requires regular periodic submissions of data that relate not simply to alleged problems, but to all of a manufacturer's products. These submissions are not necessarily indicative of any problem needing investigation. We do not believe that the language of Section 30166(m)(4)(C), and

the colloquy accompanying its enactment (*See* Appendix A), expresses a Congressional mandate to treat all early warning reporting information confidentially. Instead, we believe that Congress expected the agency to review the confidentiality of early warning reporting information under Exemption 4 of the FOIA, but to apply Section 30167(b) in a more restrictive manner to that data than to other information received by the agency.<sup>9</sup>

As many of the commenters pointed out, Section 30167(b) applies only after we have determined that information is entitled to confidential treatment. The provision permits the disclosure of confidential information whenever the Secretary, in his discretion, believes that the information can be useful in carrying out the agency's defect identification and remediation function. In contrast, the TREAD Act's disclosure provision does not permit the disclosure of confidential early warning reporting information unless the Secretary specifically finds that disclosure is necessary to carry out the agency's responsibility to identify potential safety-related defects. Thus, the basis for justifying disclosure of the early warning reporting information is significantly more stringent than that for all other material submitted to the agency and found entitled to confidential treatment under the FOIA.

Both Public Citizen and the Alliance construed the TREAD Act provision in a manner consistent with our analysis. Public Citizen stated that the provision "inverts existing law, as the current presumption of 49 U.S.C. § 30167(b) is to favor disclosure over and above the disclosure requirements of the Freedom of Information Act (FOIA)."<sup>10</sup> The

<sup>9</sup> We must give meaning to all words and phrases of a statute, and therefore we must give meaning to the reference in Section 30166(m)(4)(C) to the preexisting Section 30167(b). *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction that a statute ought, upon the whole, to be construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant'") and *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'") We must also ensure that our construction of the statute does not render the TREAD Act provision meaningless or duplicative of existing law. *See, e.g., Dunn v. Commodity Futures Trading Commission*, 519 U.S. 465, 472 (1997) ("Our reading of the exemption is therefore also consonant with the doctrine that legislative enactments should not be construed to render their provisions mere surplusage").

<sup>10</sup> In its comments, Public Citizen expressed its view that the provision is not an Exemption 3 statute, stating that "while the TREAD Act provision may reverse a presumption available for certain information under Section 30167(b), the language of the statute falls far short of creating a withholding statute or exemption from FOIA." (Emphasis in original.)

Alliance similarly argued that Congress enacted the TREAD Act aware that the Vehicle Safety Act contained a provision generally favoring disclosure of information, even if it is otherwise confidential, when deemed necessary to assist in carrying out the agency's defect remediation function. According to the Alliance, Congress intended to neutralize that presumption and to disfavor disclosure of the early warning information:

[U]nder longstanding NHTSA practice, *nonconfidential* information related to potential defects or noncompliances under investigation by the agency is routinely available in the agency's public reference reading room, without need for a Secretarial "determination" under § 30167(b), even though NHTSA could lawfully invoke FOIA Exemption Seven (relating to law enforcement investigations) to protect this information. Thus, as a practical matter, information in NHTSA's possession is *not even considered for release* under § 30167(b) of the Safety Act, **unless and until that information is already entitled to confidential treatment** under one of the Freedom of Information Act exemptions. (Emphases in original.)

As set forth in the October 27, 2000 memo, the agency disagrees with the assertion presented by the RMA and other business interests that the TREAD Act provision categorically prohibits the disclosure of any early warning reporting information pursuant to Exemption 3 of the FOIA. Our analysis of the arguments in favor of the application of FOIA Exemption 3, and our reasons for rejecting those arguments are amplified in Appendix A to this Final Rule. In sum, we believe the TREAD Act provision intended the Secretary initially to determine which information is entitled to confidential treatment as confidential business information, and, if so and only then, to consider whether disclosure is nonetheless necessary for the agency to fulfill its responsibilities to detect and enforce the laws governing the recall of vehicles and equipment containing safety related defects.

## 2. The Early Warning Reporting Information and FOIA Exemption 4

Consistent with the October 27, 2000 memo, we have determined that the confidentiality of the early warning reporting information should be construed under Exemption 4 of the FOIA. Exemption 4 protects information from disclosure that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4). Information is confidential if its disclosure is likely "(1) to impair the Government's ability to obtain necessary