

information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.” *National Parks*, 498 F.2d at 770. See also *Center for Auto Safety v. National Highway Traffic Safety Administration (CAS v. NHTSA)*, 244 F.3d 144, 147–48 (D.C. Cir. 2001) (discussing application of Exemption 4 to mandatory submissions).¹¹

Business interests contended that the early warning reporting information is entitled to protection under both prongs. They argued that early warning submissions would provide insight into the field experience and performance of a submitter’s entire product line. Business enterprises were concerned that this information could then be analyzed by competitors to assess various factors, such as a submitter’s experience with a particular supplier, production cycles, and the reliability of that submitter’s products. Many of the commenters also pointed out that the disclosure of information may deter candor and discourage efforts to obtain reliable information from the field.

The RMA asserted that disclosure of early warning reporting information would harm individual competitors. The Alliance echoed these concerns and emphasized that the information would be valuable to competitors, particularly within the context of competition among its member companies, aftermarket parts manufacturers, potential new entrants, and franchised dealers. Many commenters pointed out that the early warning reporting information constitutes a unique and comprehensive compilation of information not otherwise available, and, while subject to misinterpretation by the public, is especially valuable to competitors.

The Alliance submitted affidavit evidence with its comments from an automotive marketing consultant to support its claim that the early warning reporting information relates to issues of importance to new car buyers, and therefore that the material is likely to be used (and potentially misused) in the competitive marketplace. The Alliance pointed out that the most significant factors cited by automobile consumers when choosing a vehicle relate to reliability, quality and dependability—all factors upon which the early warning

reporting information is likely to shed some light.

The Alliance and others expressed concern over the potential misuse of the early warning reporting information, either by competing companies or others who may draw conclusions from the data that, according to the Alliance and others, may be unwarranted. The Alliance stated that in addition to “[t]he unfairness of subjecting the submitting manufacturers to the competitive harm that would flow from the disclosure of [early warning information],” any comparison of this information by the public would not be valid because of the differences in warranty periods among manufacturers.

GM reiterated this concern. Workhorse similarly wrote that disclosure of early warning information would create “a serious risk that the public will be misled by disclosing such raw, unverified data” and lead to “consumer confusion and manufacturer harm.” The RMA, while arguing that the potential misuse should support a blanket prohibition from disclosure, also asserted that the early warning reporting information is commercially valuable, and that its value is directly related to the extent of its confidentiality.

The Alliance recognized and did not take issue with NHTSA’s current practice of releasing similar types of information submitted during specific defect investigations, but argued that this “does not justify the release of the comprehensive compilations of information” collected under the early warning reporting rule. The Alliance explained that “[a] limited release of information that is relevant to, and specific to, an individual defect investigation 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 complete ‘early warning’ submission each quarter.”

Because of the comprehensive nature of the early warning information, the Alliance argued that these submissions “should * * * be protected by a class determination presuming their confidentiality and * * * should not have to be accompanied by a traditional part 512 justification with each quarterly submission.” The Alliance added that NHTSA’s “long-standing practice of releasing information limited in terms of scope and timeframe related to consumer complaints, warranty claims, property damage claims, field reports, etc., when this information has been submitted in connection with an

individual, specific defect investigation does not defeat the presumptive confidentiality of the comprehensive collection of such information.”

AIAM asserted a similar argument in favor of protecting early warning information, claiming that its main point of contention “lies with a comprehensive disclosure of all, unscreened early warning information.” The AIAM added that “we recognize that, in appropriate instances, portions of the early warning information could still be disclosed to the public.” AIAM explained that such releases could occur “after NHTSA has processed and evaluated early warning information and decided to pursue an investigation about a particular vehicle/component.”

GM also distinguished between the disclosures that NHTSA currently makes during defect investigations and the disclosures that would occur if the class determinations the agency proposed for warranty information were made. The company explained that its responses to agency information requests “often include warranty data for a limited number of makes, models, and years.”

Public Citizen argued that most of the information to be submitted under the early warning reporting rule is summary in nature and not specific enough to qualify for confidential treatment. Public Citizen also contended that because information to be submitted is similar or identical to the type of information submitted as part of a defect investigation, it should be treated as it currently is in a defect investigation. Public Citizen noted that the agency had speculated early in the development of the early warning reporting regulation that it thought manufacturers may not seek confidential treatment of the early warning reporting information.

We believe that the information submitted in the course of a defect investigation is qualitatively and quantitatively different from the comprehensive compendium of pre-investigation information to be submitted under the early warning reporting rule, and further that the competitive harm caused by the disclosure of some of the early warning reporting data is substantial. While the early warning reporting information will generally not be as specific as the data submitted during a defect investigation into a defined and particular problem, each company must provide data with regard to each product it manufactures. The information relating to certain elements of reporting provides specific information that competitors are likely to find valuable and, at the same time,

¹¹ A different standard applies to information that is submitted voluntarily to a government agency. See *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992) (en banc). Since all the information provided under the early warning reporting regulation is “required,” *Critical Mass* does not apply.