

Consequently, such disclosure could impair the effective and efficient implementation of the agency's early warning process.

Manufacturers argued that release of consumer complaint information is likely to cause substantial competitive harm because it will be used by competing manufacturers and potentially others in the public to make cross-company comparisons. If misinterpreted, the information may result in unwarranted product disparagement, leading to substantial competitive harm. As many of the comments pointed out, consumer complaints reveal the raw, unverified perceptions of vehicle owners. They neither reflect a repair that was conducted (which is revealed by warranty claims) nor an evaluation of an event by a manufacturer's employee or dealer (which is often the source of field reports). Furthermore, the consumer complaint information is not subject to any controls or analytic rigor that we believe are imbedded into the development of public acceptance surveys.

Competitors with access to complaint data would obtain, to a certain extent, information revealing which product features, components and systems have met with consumer acceptance (and which have not) and what perceived problems may be associated with particular components and systems. The information may also reveal which aspects of a vehicle's performance (whether potentially safety related or not) a manufacturer deems important in its commercial efforts. Thus, the public disclosure of complaint data is likely to cause substantial competitive harm.

Because we have determined that the disclosure of the consumer complaint data required by the early warning reporting rule will likely impair the ability of the agency to obtain comprehensive consumer complaint information in the future and is likely to cause substantial competitive harm, we have decided to create a class determination covering these data.

VII. Appendix A—FOIA Exemption 3 and the TREAD Act Disclosure Provision

Exemption 3 of the Freedom of Information Act prevents the disclosure of information provided to the government when Congress evidences a clear intent through a statutory scheme that prohibits disclosure. The RMA argued that Congress referred specifically to all of the information submitted under the regulations issued to implement Section 30166(m)(1), and therefore all such information must be

withheld from disclosure under Exemption 3.

Exemption 3 is designed to incorporate into the FOIA exemptions other statutes that, on their face, clearly exempt information from FOIA's disclosure requirements. *See, e.g., Reporters Comm'n for Freedom of the Press v. Department of Justice*, 816 F.2d 730, 735 (D.C. Cir.), *modified on other grounds*, 831 F.2d 1124 (D.C. Cir. 1987), *rev'd on other grounds*, 489 U.S. 749 (1989) (providing that "a statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure"), and *Irons & Sears v. Dann*, 606 F.2d 1215, 1220 (D.C. Cir. 1979) (stating that "[o]nly explicit nondisclosure statutes that evidence a congressional determination that certain materials ought to be kept in confidence will be sufficient to qualify under the exemption."). An Exemption 3 statute must either make clear that the agency has no discretion on whether to disclose the information or must clearly circumscribe the determination by setting forth particular criteria or specifically identifying the information to be withheld from disclosure. The RMA claims that the TREAD Act's disclosure provision does the latter.

We disagree. Had Section 30166(m)(4)(C) stated only that "none of the information collected pursuant to the final rule promulgated under paragraph (1) shall be disclosed," then the provision would have provided unambiguous direction to the agency and clearly identified the information to be withheld. But that is not what the disclosure provision states. Instead, the provision makes reference to Section 30167(b) and states that "[n]one 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." By making reference to preexisting Section 30167(b), the provision suggests that Congress intended the Secretary to determine initially which of the early warning reporting information is entitled to confidential treatment as confidential business information, and, if so and only then, would consider whether disclosure was nonetheless necessary for the agency to fulfill its responsibilities.

The colloquy between Congressmen Markey and Tauzin during the TREAD Act hearings suggests that Congress intended the agency to consider the confidentiality of the early warning

reporting information by applying the same legal standards otherwise applicable to information the agency requires to be submitted:

Mr. MARKEY: First, under the section entitled "early warning requirements," we provide for the reporting of new information to NHTSA generally at an earlier stage than the stage when an actual recall takes place based on the finding of a defect. To protect the confidentiality of this new early stage information, the bill provides in Section 2(b) in the subsection titled "disclosure" that such information shall be treated as confidential unless the Secretary makes a finding that its disclosure would assist in ensuring public safety, but with respect to information that NHTSA currently requires be disclosed to the public *it is my understanding of the committee's intention that we not provide manufacturers with the ability to hide from public disclosure information which under current law must be disclosed. Would the gentleman from Louisiana (Mr. Tauzin) agree that this special disclosure provision for new early stage information is not intended to protect from disclosure [information] that is currently disclosed under existing law such as information about actual defects or recalls?*

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Mr. TAUZIN: Mr. Speaker, the gentleman is correct.²²

The RMA and other commenters, however, pointed to other statutory schemes in which Congress' intent to ensure the confidentiality of submitted information was made clear. The AIAM, citing the practices of several State and Federal agencies, noted that these "regulatory agencies receive product quality-related information from regulated parties for compliance evaluation purposes" and have "consistently follow[ed] policies of withholding such information from public disclosure." AIAM admitted, however, that the statutory provisions for these agencies "differ from those affecting NHTSA" and "do not * * * provide controlling legal authority for NHTSA's handling of the early warning report information."

For example, the Supreme Court has held that the statute governing the activities of the Consumer Product Safety Commission (CPSC) contains a provision constituting an Exemption 3 statute. *CPSC v. GTE Sylvania*, 447 U.S. 102 (1980). The Court noted that Section 6(b) of the Consumer Product Safety Act, 15 U.S.C. 2055, sets forth specific procedures that CPSC must follow prior to the release of information to the public. *Id.* at 105. Under that provision, the CPSC must ensure the accuracy of the information it plans to release, notify the manufacturer and provide it

²² 146 Cong. Rec. H9629 (daily ed. Oct. 10, 2000) (emphasis added).