

with a summary of the information that the CPSC intends to release if the summary would enable one to readily ascertain the identity of that manufacturer. *Id.* The manufacturer is also afforded an opportunity to comment on the CPSC's summary. *Id.*

Similarly, some of the statutory provisions regarding the disclosure of information the Federal Aviation Administration (FAA) receives involve very specific instances or types of information. For example, in *Public Citizen v. FAA*, 988 F.2d 186 (D.C. Cir. 1993), the court determined that information concerning air transportation security could be withheld under the agency's Air Security Improvement Act of 1990. Under the provisions of that Act, the court determined that "Congress's intent was to broaden the FAA's power to withhold sensitive information" held by the agency. *Id.* at 195 (emphasis in original).

Indeed, the extent of protection afforded to submitters of information under federal programs varies.²³ For example, while the Food and Drug Administration (FDA) must adhere to a statutory scheme that governs the public disclosure of information (21 U.S.C. 360j), the D.C. Circuit noted that a lower court's reading of the FDA statute as an Exemption 3 provision was "contradicted by the language of Section 360j(h), its legislative history, and its interrelation with other provisions of the Medical Device Amendments." *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1284 (D.C. Cir. 1983). Under the FDA's statutory provisions, the agency must release a summary of information relating to the safety of medical devices. The court noted that the statutory provision's "legislative history repudiates the proposition that Section 360j(h) specifically prohibits the disclosure of health and safety data that do not qualify for protection under Exemption 4 to the FOIA or [Trade Secrets Act]." *Id.* at 1285.

The Tenth Circuit Court of Appeals considered whether another provision of the FDA statute, 21 U.S.C. 331(j), qualifies as an Exemption 3 statute. See *Anderson v. HHS*, 907 F.2d 936, 950 (D.C. Cir. 1990). Section 331(j) provides that any information acquired under the

FDA's various information-collection statutes must not be disclosed if the information "concern[s] any method or process which as a trade secret is entitled to protection." *Id.* While the court indicated that Section 331(j) qualified as an Exemption 3 statute, it held that the scope of the statute is not broader than Exemption 4 and "cannot provide any independent justification for nondisclosure." *Id.*

The colloquy between Congressmen Markey and Tauzin suggests no intent to create a statutory scheme like that governing the disclosure of information from the CPSC or other provisions prohibiting disclosure. Rather, the limited legislative history of Section 30166(m)(4)(C), and the reference to Section 30167(b) in that provision, shows that Congress intended the agency to determine the confidentiality of the early warning reporting information in accordance with its long standing practice of considering whether the data constitutes confidential business information. Congress is presumed to be aware of agency practice when promulgating statutes and, therefore, is presumed to have been aware of NHTSA's practice of analyzing confidentiality claims pursuant to Exemption 4 of the FOIA. See e.g., *U.S. v. Wilson*, 290 F.3d 347, 356 (D.C. Cir. 2002) ("Congress is presumed to preserve, not abrogate, the background understandings against which it legislates").²⁴

VIII. Appendix B—Confidential Business Information Case Law Analysis

In assessing whether Exemption 4 applies to required submissions the Government must examine whether the disclosure is likely to impair the Government's ability to obtain necessary information in the future or is likely to cause substantial competitive harm to the submitter. Substantial competitive harm can arise when the information has significant commercial value to competitors, such as: from revealing fundamental data (such as price, cost or other proprietary business structure); from revealing information that would otherwise require investment, through reverse engineering or other means, to obtain; or from revealing business strategies by making information that

otherwise would be unobtainable available to competitors.

The *National Parks* test also recognizes that the Government requires the submission of certain information because it is needed to serve an important government function. In describing this aspect of Exemption 4, the court in *National Parks* noted that:

The "financial information" exemption recognizes the need of government policymakers to have access to commercial and financial data. Unless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials and the ability of the Government to make intelligent, well-informed decisions will be impaired. *Id.* at 767.

The DC Circuit nonetheless decided that the information at issue—financial information of concessionaires in national parks—did not qualify as confidential under the impairment prong because it was required by government regulation and therefore the government's ability to obtain it in the future would not be impaired by its disclosure. The court remanded the case to the district court for a determination of whether the data would cause competitive harm if released.

That the *National Parks* test was intended in part to ensure the proper functioning of government business was further made clear in *Washington Post Co. v. HHS*, 865 F.2d 320 (D.C. Cir. 1989). In remanding the case for the development of a more complete record, the court emphasized that it had no intention of undermining the impairment prong of *National Parks*. Instead, the *Washington Post* court prognosticated that the impairment prong would tend to focus on protecting the reliability of data, rather than the availability of data. *Id.* at 328. Thus, the court reiterated the fundamental concept that the receipt of valid information on which the government can rely in performing its programmatic functions is a critical component of considering Exemption 4 claims.

The DC Circuit once again considered its policy of encouraging the submission of information to the government in *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992) (en banc). In *Critical Mass*, the court distinguished between information the government compels and that which is voluntarily submitted to help further governmental functions, such as rulemakings. The court held that information voluntarily submitted to the government should be treated as confidential under Exemption 4 as long as the submitter can show that it is not customarily released to the public. *Id.* at

²³ We note that the U.S. District Court for the District of Columbia has rejected the notion that the Vehicle Safety Act generally provides Exemption 3 protection for information the agency requires be submitted. *Ditlow v. Volpe*, 362 F. Supp. 1321, 1324 (D.D.C. 1973) (specifically rejecting application of Exemption 3 to the Motor Vehicle Safety Act), *rev'd on other grounds*, *Ditlow v. Brinegar*, 494 F.2d 1073 (D.C. Cir. 1974).

²⁴ The Alliance suggests that Exemption 7 may also be applicable. Exemption 7 protects records from disclosure relating to law enforcement purposes when disclosure could reasonably be expected to interfere with the enforcement proceedings. NHTSA has historically not invoked Exemption 7 to withhold information received from manufacturers during the course of defect investigations. See *CNA v. Donovan*, 830 F.2d 1132, 1139 (D.C. Cir. 1987).