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Comments by Public Citizen Regarding the Notice of Proposed Rulemaking for Confidential Business Information

Public Citizen is pleased to offer these comments on the National Highway and Traffic Safety Administration's (NHTSA's) Notice of Proposed Rulemaking, which proposes to create class determinations, based on Exemption 4 of the Freedom of Information Act (FOIA), to treat certain categories of early warning information as confidential.

For reasons to be discussed in these comments, Public Citizen requests that NHTSA abandon its proposal to make class determinations for confidential treatment of EWR data, as is discussed in Appendix C of the proposed rule. NHTSA's attempt to do so is in direct conflict with congressional intent, as laid out in the Transportation, Recall, Enhancement, Accountability and Documentation (TREAD) Act, enacted in the wake of the Ford/Firestone scandal. *See* TREAD Act, Pub. L. No. 106-414, 114 Stat. 1800 (Nov. 1, 2000). The NPRM's rationale for choosing certain information for exemption is flawed, because FOIA gives NHTSA no authority to make these class determined exemptions.

Public access to early warning data is of paramount importance. NHTSA's proposed intention to keep these data from the public is reprehensible. Following the Ford Firestone tragedy in 2000, Congress instructed NHTSA through the TREAD Act to establish an early warning reporting program. The envisioned program was meant to guarantee that NHTSA would be properly informed about potential vehicle defects. And, of equal importance, the early warning reporting program was designed to give the public unfettered access to this information as the House floor debate in Congress made clear.

Only through public access to early warning information will the public— which bears the risk of death and injury from defective vehicles— be adequately informed about the vehicles it chooses to drive. Furthermore, public access will encourage citizens to

report information to NHTSA about these potential defects which will help the agency do its job with real world data, and public disclosure will hold NHTSA accountable in the event that the agency fails to take action on a vehicle or equipment safety hazard, as it tragically did in the Ford/Firestone disaster.

As a federal agency, NHTSA has the statutory responsibility to protect the public's safety. Needlessly withholding key pieces of early warning data is in conflict with this important responsibility, and in conflict with the agency's own policies, since NHTSA routinely releases these data as part of its final reports on safety defect investigations. We strongly urge NHTSA to explore the issues discussed in these comments and to rethink its rationale for proposing to exempt this vital data from public disclosure. Public access to early warning data is essential for the early warning program's success.

I. Congress Demanded Early Warning Because NHTSA's Secrecy and Ineptitude Cost Lives.

The TREAD Act's history makes it clear that Congress intended for the public to have access to early warning data. Automotive manufacturers have a long and well-documented history of hiding safety defects in their products from the government and the public. NHTSA, in turn, is well known for its slow response to automotive safety defects because of its failure to gather and properly use vehicle safety data. These major failings of the automotive industry and NHTSA coalesced in the Ford/Firestone tragedy, causing hundreds of fatalities and injuries.

When Congress became acutely aware of the severity of the situation, it passed the TREAD Act, which required auto manufacturers to turn over information about potential safety defects to NHTSA and required NHTSA to improve its vigilance. Before the TREAD Act, manufacturers reported to NHTSA only when they had already decided to conduct a recall, which is when they said they "learned" of a safety defect, in the words of the organic NHTSA statute. Through public disclosure of the early warning data, Congress empowered the public to be warned about potential hazards and to act on behalf of its own safety by monitoring both NHTSA and auto manufacturers. Congress recognized that only through public disclosure of early warning data would ordinary citizens be able to hold manufacturers and NHTSA accountable.

The Ford/Firestone tragedy could have been prevented if an early warning program had been in place at that time. As early as 1996, Ford and Firestone were receiving a large number of complaints about a serious safety defect in Firestone's 15-inch ATX, ATX II, and Wilderness tire models, and a number of lawsuits detailing the problem had been filed. These tires were designed specifically for Ford Explorers. By 1997, Ford was receiving similar complaints regarding tires sold abroad. In response to complaints about tire defects abroad, Ford and Firestone launched a series of recalls in Thailand, the Middle East, Venezuela, and Malaysia, but they failed to launch similar recalls in the United States or to disclose the problem to NHTSA or their customers.

At this time, NHTSA was not collecting early warning data, and it simply ignored information sent to the agency about the problem in July 1998 by the State Farm Insurance Company on 21 separate cases in which documented tire failure was responsible for Ford Explorer crashes. NHTSA also received information on an additional 10 tire failure incidents in 1998 and 35 in 1999 from State Farm Insurance Company. In 1999 as well, NHTSA collected reports on 29 fatalities through its Fatal Accident Reporting System (FARS). Despite having this information readily available, NHTSA inexcusably failed to act.

In 2000, a Houston, Texas television station, KHOU, uncovered problems associated with the Firestone tires as a result of a number of lawsuits filed in Texas, and its disclosure gained national attention. Only then, in response to increasing public outrage, did NHTSA finally open an investigation, leading to the decision by Ford and Firestone to eventually recall the defective tires. As this case exemplifies, public access to information about vehicle safety hazards can play an extremely powerful role in motivating NHTSA to take necessary action. If the public had been able to access this data earlier, through the early warning program, NHTSA would have felt pressure to act sooner and the auto manufacturers would have had an incentive to avoid public disgrace by acting quickly to recall the defective tires.

II. The TREAD Act's Legislative History Makes It Clear that Congress Intended for the Public to Have Access to the Early Warning Data.

During the congressional Ford/Firestone investigation and during the discussions which led to the TREAD Act, key legislators were deeply concerned that the TREAD Act's early warning system could be manipulated in order to avoid disclosure of early warning data. These legislators sought out legal advice from NHTSA and were reassured that NHTSA would not change its disclosure policies or in any way undercut the public purpose of TREAD. These legislators, along with Public Citizen and other safety advocates, anticipated that the auto industry would push NHTSA to keep this important data from the public.

When the TREAD Act was being negotiated by legislators, several concerns were raised about the disclosure provision in the proposed bill, *see* H.R. 5164 § 30166 (m)(4)(C), predicting that the industry would attempt to use the proposed new language to undercut Congress's intention that early warning data would be available to the public. At that time, no one predicted that NHTSA would propose sweeping exemptions from FOIA, under Exemption 4 status, as it has in this NPRM. Lawmakers were nonetheless concerned that the agency could be swayed by industry pressure and undercut the purpose of the TREAD Act. As this proposed rule shows, lawmakers' fears were well founded.

In response to a pointed inquiry via telephone prior to the TREAD Act's passage by the staff of Rep. Henry Waxman (D-CA), one of the authors of the bill, NHTSA's Office of Chief Counsel responded that the section in question would not alter the agency's disclosure obligations under the law. According to conversations with Public

Citizen President Joan Claybrook, and the staffs of Rep. Waxman and Rep. Edward Markey (D-MA), also a member of the committee enacting TREAD, each lawmaker made a decision not to push for a specific change in the provision in reliance on that communication from the Chief Counsel's office. In short, the lawmakers trusted that NHTSA would honor the intention of Congress and uphold the purpose of the TREAD Act.¹

In order to assure that this interpretation of the pending law was a consensus opinion with the committee and that the committee chairman agreed, Rep. Markey conducted a colloquy on the subject with Rep. Billy Tauzin (R-LA) on the floor of the House during debate on the bill. In that colloquy, Rep. Tauzin affirmed Rep. Markey's statement that the "special disclosure provision for new early stage information is not intended to protect [information] from disclosure that is currently disclosed under existing law." *See* 146 Cong. Rec. H9629 (Oct. 10, 2000). In addition, when signing H.R. 5164 on November 1, 2000, the president stated that he was directing NHTSA "to implement the information disclosure requirements of the [TREAD] Act in a manner that assures maximum public availability of information."

Prior to receiving these interpretations and assurances, on October 19, 2000, Public Citizen sent a letter to the U.S. Transportation Secretary warning that the industry would very likely attempt to bootstrap a secrecy requirement onto the pending bill. The worst-case scenario, the letter suggested, was for the agency to succumb to the inevitable industry demand by making early warning data secret in utter defiance of Congressional intent. Accordingly, we urged the agency to preempt this possibility and honor the intent of the statute by defining the agency's obligations under the statute "*through regulation.*" Public Citizen was particularly concerned about undue industry influence over the agency's interpretation of the law after the bill's passage.

Following passage of the TREAD Act and in an apparent response to this letter, the agency issued an interpretive legal memorandum regarding the impact of the new disclosure provision upon the agency's obligations under TREAD and FOIA. In light of the legislative record, the president's statement upon signing the bill, and the legal meaning of the statute, John Womack, Senior Assistant Chief Counsel, officially reviewed the TREAD Act and concluded, from a legal perspective, that the disclosure provisions "will have no effect on the disclosure of documents received by NHTSA."

Clearly, the TREAD Act's legislative history shows that this current NPRM is a complete departure from congressional intent, and a departure from the promises and assurances made by NHTSA prior to the bill's passing.

¹ *See* Comments of Public Citizen Regarding 49 CFR Part 512 Confidential Business Information 67 Federal Register, April 30, 2002

III. NHTSA's Previous Attempt in 2003 to Keep Early Warning Data Secret Was Rejected by a Federal Court.

Following the passage of the TREAD Act, NHTSA began the rulemaking process to establish early warning reporting requirements. NHTSA's final rule on the early warning database required companies that manufacture at least 500 vehicles, including light vehicles, medium-heavy vehicles and buses, motorcycles, or trailers to report early warning information to NHTSA. *See* 49 C.F.R. § 579.1-.29. The reported information includes production numbers, *id.* § § 579.21(a), 579.22(a), 579.23(a), 579.24(a), reports on incidents of death or injury in the United States alleged to have involved safety defects (and specifying whether each incident was a fire or rollover and which component system was involved), *id.* § § 579.21(b)(1)-(2), 579.23(b)(1)-(2), 579.24(b)(1)-(2), and copies of field reports that implicate a potential safety defect in a coded system, *id.* § § 579.21(d), 579.22(d), 579.23(d), 579.24(d). This information was required to be reported from the current year and previous nine years.

NHTSA also required child restraint manufacturers to report the same information, but only for the current year and previous four years. *Id.* § 579.25. Manufacturers of tires are required to report data for the previous four years on deaths, injuries, warranty claims, and production numbers. *Id.* § 579.26. Common green tires must also be submitted, *id.* § 579.26(d), but tire manufacturers are not required to submit data on field reports and consumer complaints. Finally, manufacturers that produce fewer than 500 vehicles, manufacturers of original equipment, and manufacturers that produce replacement equipment other than child restraints or tires need only report on deaths. *Id.* § 579.27.

The agency's ANPRM on early warning contained a brief section on the disclosure provision under TREAD, in which the agency insisted, "[W]e believe that section 30166(m)(4)(C) will have almost no impact...Historically, NHTSA has not invoked Section 30167(b) in deciding to release information to the public." Although the early warning rule expanded the universe of information available to NHTSA, principles governing its disclosure would have been similar to those applying to information already collected in the course of defect investigations, which is routinely disclosed by NHTSA:

The primary differences between pre-TREAD and post-TREAD Act reporting are likely to be in the mechanisms for reporting and amount of information reported. Before the TREAD Act, other than material submitted pursuant to 49 CFR 573.8, information in NHTSA's possession relating to a possible defect that was not the subject of an ongoing investigation was primarily in the form of consumer complaints. Under the TREAD Act, information will also be generated through periodic reports to NHTSA of information that a manufacturer might not otherwise have disclosed unless specifically asked by NHTSA to provide it. However, most of this information is likely to be similar to the types of information that NHTSA regularly obtained during its investigation pursuant to information request or special orders.

The agency's NPRM on early warning also unequivocally supported the public disclosure of early warning information. Although the agency stated that "TREAD does not affect the right of a manufacturer to request confidential treatment for information that it submits to NHTSA," the agency went on to review the categories of information that would likely be submitted under the agency's final rule and found additional reasons not to keep the information from the public:

Historically, these types of information generally have not been considered by the agency to be entitled to confidential treatment, unless the disclosure of the information would reveal other proprietary business information, such as confidential production figures, product plans, designs, specifications, or costs. Light vehicle production information is generally not confidential, unlike production data on child restraint systems and tires.

The agency continued, stating that, "[a]ccordingly, the agency does not expect to receive many requests for confidential treatment for submissions under the early warning requirements of the TREAD Act."

Prior to the final rule regarding early warning reporting requirements, NHTSA announced a separate rulemaking on the confidentiality of early warning data, on April 30, 2002. As was discussed previously, Congress had already sought to establish that early warning data must be released to the public, so it was assumed by interested parties that NHTSA would follow congressional intent with this rulemaking.

In NHTSA's NPRM on Confidential Business Information (CBI), the agency proposed to codify its long-standing presumption that three classes of early warning data—consumer complaints, property damage, and warranty claims—did not qualify for FOIA's CBI exemption. *See* Notice of Proposed Rulemaking, 67 Fed. Reg. 21,198, 21,199-200 ("NPRM") (discussing proposed amendments to 49 C.F.R. Part 512 ("Part 512")). In the NPRM, NHTSA proposed to notify submitters that confidentiality requests for such information were rarely granted, thereby accelerating the processing of those requests. *Id.* at 21,200.

Regardless of the limited nature of the agency's proposals in the NPRM, auto manufacturers sought to use it as an opportunity to urge NHTSA to exempt all early warning data from disclosure under FOIA exemption 3.

Public Citizen and other advocacy groups were concerned with the manufacturers' efforts to sway NHTSA. On October 17, 2002, Public Citizen met with NHTSA representatives. Public Citizen submitted comments on the NPRM to address these concerns.

When NHTSA published the final rule on confidential business information in July 2003, the resulting rule came as a shock. NHTSA fully rejected the argument that the TREAD Act exempts early warning data from FOIA, yet adopted almost every request made by the auto industry by another means—Exemption 4. Furthermore, the

new rule went even further than just meeting the auto industry's requests: it proposed to bar the disclosure of almost all production numbers, warranty claims data, field reports, and consumer complaints under FOIA Exemption 4. In short, NHTSA issued a final rule completely different from its proposed rule, surprising most consumer groups involved in the process. Even more galling, NHTSA issued the final rule with no advance supplemental notice that these tremendous changes would be made, giving concerned citizens and safety advocates no opportunity to properly comment on them.

NHTSA's 2003 final CBI rule could not have been predicted by Congress, concerned citizens, or consumer advocacy groups. It abandoned NHTSA's normal practice of releasing this information through defect investigations and defied Congress's request that the data be made public. Instead, NHTSA's final 2003 CBI rule privileged manufacturers' secrecy while ignoring any concern for the public's safety and the public's right to information.

Outraged by NHTSA's sudden, unexpected, and unannounced position change, consumer advocates took action. A group of consumer advocates petitioned for reconsideration of the confidentiality rule in July 2003. Public Citizen eventually filed a complaint with the U.S. District Court for the District of Columbia challenging the legality of NHTSA's new rule for confidential business information.

Public Citizen challenged the new rule for four key reasons. First, Public Citizen argued that NHTSA lacked authority to promulgate the rules. Second, even if NHTSA had authority to do so, it failed to provide adequate notice and time to comment. Third, even if notice and an opportunity to comment had been provided, the rule was invalid because it misinterpreted FOIA and considered inappropriate factors. Finally, Public Citizen argued that NHTSA's rule fell short of meeting FOIA's heavy evidentiary burden to prove that each piece of exempted information subject to the rule was exempt from FOIA disclosure.

Public Citizen Inc. v. Mineta was decided in March 2006. The court ruled in favor of Public Citizen, concluding that NHTSA had failed to provide adequate notice or an opportunity to comment. *See Public Citizen v. Mineta*, 427 F. Supp. 2d 7 (Mar. 31, 2006). The court held that NHTSA's complete reversal of position on the public availability of early warning data was an unprecedented "switcheroo." *Id.* at 17.

This new CBI NPRM, issued on October 31, 2006, is NHTSA's response to the court's March 2006 decision. And, as we expected, NHTSA has proposed a rule almost identical to the 2003 final rule rejected by the courts. Public Citizen's position remains unchanged from the argument presented to the court in *Public Citizen Inc. v. Mineta*. Furthermore, despite the court's decision that NHTSA has the authority to issue categorical exemptions, we absolutely dispute this holding and maintain that FOIA grants NHTSA no such authority. Even assuming *arguendo* that NHTSA has the authority to create categorical exemptions, the agency has not presented sufficient justification for doing so.

IV. NHTSA Lacks Authority to Issue Arbitrary Secrecy Privileges for Classes of Early Warning Data.

As stated in our argument to the court in *Public Citizen Inc. v. Mineta*, “FOIA does not grant administrative agencies substantive rulemaking authority. Rather, it grants them authority only to establish fee schedules and compliance procedures, *see* 5 U.S.C. § 552(a)(3)(A), (a)(4)(I), and expressly *forbids* them from creating new FOIA exemptions. *See* 5 U.S.C. § 552(d).” In the TREAD Act, Congress did not grant NHTSA authority to issue any new substantive FOIA rules, so NHTSA therefore has no power to create these exemptions.

Although we recognize that the court disagreed on this point in the decision for *Public Citizen Inc. v. Mineta*, we believe this ruling was in error. In its opinion, the court explains its decision by stating that “the promulgation of categorical rules was necessary to allow the agency to administer the EWR program effectively.” 427 F. Supp. 2d at 13. FOIA, however, does not allow agencies to avoid FOIA compliance simply because they find their FOIA obligations burdensome.

We are sympathetic to NHTSA’s concern about dealing with the vast amount of information the early warning program demands; however, this burden cannot be used as an excuse to circumvent Congress’s intent that this information be released to the public.

Moreover, in the court’s later decision to dismiss a cross-claim by the Rubber Manufacturers Association, the court held that the TREAD Act specifically did not give NHTSA authority to exempt information from public disclosure under FOIA Exemption 3. *See Public Citizen v. Mineta*, 444 F. Supp. 2d 12 (July 31, 2006). Instead, the court concluded, the TREAD Act emphasized public disclosure:

While Section 30166(m) specifically pertains to EWR data collected by the Department of Transportation, the disclosure provision in that section, § 30166(m)(4)(C), describes the process for the disclosure of EWR data that the Secretary *shall* disclose to the public. . . [Under 49 U.S.C. § 30167(b), if] the Secretary decides that disclosure will assist in carrying any one of [several] enumerated sections of Chapter 301, then the Secretary must disclose the relevant EWR data. Section 30166(m)(4)(C) reemphasizes the fact that the EWR data collected that relates to defect or noncompliance that the Secretary finds will assist in the carrying out of the other sections of Chapter 301 *shall* be disclosed.

Id. at 17-18 (citations omitted). By issuing these blanket exemptions from public disclosure, NHTSA is effectively flouting Congress’s decision that public disclosure is essential to create accountability for NHTSA, accountability that NHTSA proved in the Ford-Firestone tragedy it needs to do its job of identifying and remedying safety hazards.

V. NHTSA Attempts to Justify Its Arbitrary and Capricious Proposal with Baseless Supposition and Logically Incoherent Arguments.

A. NHTSA Inappropriately Attempts to Defend its Exemptions by Arguing that the Public Will Not Find the Information Valuable.

As discussed above, NHTSA is not authorized under FOIA to issue categorical exemptions; however, even if NHTSA had this authority, its proposed rule would be invalid because it considers inappropriate factors for confidentiality treatment under FOIA Exemption 4. For example, the NPRM makes the ludicrous assertion that an exemption can be based on the concern that consumers will be confused by the data or find it of little value.

FOIA's purpose is to ensure that, with limited exceptions, government information is disclosed to the public so that ordinary citizens are empowered to monitor decisions by their government. NHTSA's argument that the public should be denied access to information whenever a government agency believes that only itself and industry groups will understand the information or find the information useful ignores the purpose and intent of FOIA. The purpose of FOIA is to allow the public, not administrative agencies, to determine if information is of public value. Additionally, as was demonstrated in the Ford/Firestone tragedy, important safety information that NHTSA ignored was viewed as highly important by a private news agency and subsequently the general public. Had the Texas news agency and the public had access to the Ford/Firestone data sooner, life-saving recalls may have been demanded more promptly.

The early warning program's purpose is to give consumers the power to make their own decisions about the vehicles they choose to drive. It is consumers who put their lives and the lives of their families at risk when they drive a dangerous and defective vehicle. In light of these serious risks, Congress sought to give consumers timely safety information through the early warning system. For NHTSA to pretend that these are not legitimate concerns and that some early warning data would not be "useful" to consumers is an insult to the public.

B. The NPRM Fails to Provide Adequate Evidence that Each Piece of Information It Intends to Exempt from Disclosure Meets FOIA's Requirements.

NHTSA's NPRM on Confidential Business Information fails to establish sufficient evidence to support its reasons for exempting early warning data from public disclosure. Instead, NHTSA chooses to support its exemption choices through speculation rather than fact. Under FOIA, it is NHTSA's responsibility to provide substantive evidentiary proof that a FOIA exemption applies; it cannot just engage in speculative generalizations, as it does in this NPRM.

For example, NHTSA has failed to show that making data regarding consumer complaints, field reports, and warranty claims publicly available would hinder its ability to collect this information in the future. NHTSA argues that by disclosing this information, manufacturers may alter their business practices in order to limit the amount of information they collect and turn over to NHTSA through the Early Warning program. This vague assumption, on NHTSA's part, is insufficient to warrant nondisclosure of this information.

A review of past cases shows that if NHTSA decides to use this argument in its final rule, it must include a detailed investigation into the way that manufacturers collect this information, and whether the compilers of this information would go so far as to change their business practices to avoid disclosure. *See Pacific Architects & Engineers Inc. v. Renegotiation Board*, 505 F.2d 383, 385 (D.C. Cir. 1974); *Critical Mass Energy Project v. NRC*, 931 F.2d 939, 946-47 (D.C. Cir. 1991), *vacated on other grounds*, 975 F.2d 871 (D.C. Cir. 1992) (en banc). Furthermore, NHTSA must show the extent to which disclosures would impair their ability to collect this information in the future. *See Washington Post Co. v. HHS*, 690 F.2d 252, 269 (D.C. Cir. 1982). Finally, in order to render this information exempt, NHTSA must prove that its ability to collect it will be "significantly" impaired. *See Critical Mass Energy Project v. NRC*, 830 F.2d 278, 286; *Pacific Architects*, 505 F.2d at 385. In this NPRM, NHTSA fails to address any of these issues.

Moreover, NHTSA's attempt to rationalize its proposal by making exemptions on the grounds of potential collection impairment completely neglects to explore any factors that could counterbalance industry's efforts to avoid disclosure.

In the NPRM, NHTSA states that "the commercial value of complaint data is well-recognized," and the NPRM further explains that "complaint data are a valuable data source used by companies to help them identify areas of concern, including product performance, to consumers and provide guidance on where to allocate their limited resources." Public Citizen agrees with NHTSA on these points. Consumer feedback is vital for companies striving to maintain a profitable business. In light of the extreme value this data holds for companies, NHTSA fails to explain why manufacturers would cease to collect it simply because they are required to turn over merely a count of these complaints to the public. By NHTSA's own admission, the actual consumer complaint is far too valuable for a company to stop collecting it. Moreover, NHTSA offers no explanation for how manufacturers could even avoid receiving consumer complaints, since consumers are not going to stop complaining about problems with the products they buy.

Similarly, NHTSA's assertion that manufacturers may alter field reporting practices fails to take into account the importance manufacturers place on field reports for staying informed about their products' performance and dealers' handling of problems. As with consumer complaints, field reports offer vital real-world information for a company. Additionally, NHTSA offers no evidence in this proposed rule to show that disclosing the mere number of warranty claims a manufacturer honors will counteract a

manufacturer's market-driven pressure to offer good service and competitive warranties. NHTSA's fear that disclosure of this information "may" discourage honest warranty practices on the part of the manufacturer is pure speculation² and insufficient justification for a FOIA exemption.

C. NHTSA Fails to Properly Consider the Early Warning Data's Public Importance.

In addition to NHTSA's failure to show that other factors will not counterbalance any potential for impairment of its ability to collect data, NHTSA also completely fails to show that these issues outweigh the importance of disclosing this data to the public. NHTSA simply proclaims that the data "would be of limited value to the public." And, rather than thoughtfully balancing the importance of these two issues, NHTSA only states that "the importance of the information to the agency's ability to help it identify potential safety defects and the associated impairment outweigh the *smaller interest* in its public disclosure."

NHTSA's position on this issue is in direct conflict with FOIA's basic purpose, and the intent of Congress, as is laid out in the TREAD act. A guiding tenet of both FOIA and the TREAD Act's early warning system is to ensure that the public has the ability to monitor government institutions and to protect themselves by being informed of potential defects. In fact it is consumers who pay the ultimate price when their vehicles are defective. That interest completely outweighs any undocumented and unsubstantiated concerns by NHTSA about the effect of disclosure on business practices. The Ford/Firestone tragedy illustrates why the public has a vested interest in accessing this data. Congress intended for the public to use this data to monitor whether or not NHTSA is fulfilling its obligation to investigate significant safety issues. In its NPRM, NHTSA shamefully ignores this fact.

VI. The Proposed Rule Fails to Prove that Releasing Early Warning Data Would Cause Competitive Harm.

NHTSA's proposed rule fails to provide adequate support for its claim that the release of this information would cause significant competitive harm if made publicly available. NHTSA has based its proposal to withhold information on poorly contrived speculations, rather than solid evidence.

A. NHTSA Has Not Established a Sufficient Case for Competitive Harm.

NHTSA's argument that releasing this information will cause competitive harm is unacceptable and unsubstantiated. Building faulty and dangerous products causes

² NHTSA has utterly failed to provide any rationale for this concern, leaving essential questions unanswered. What is the factual basis for this concern? What similar examples can be shown where disclosure of mere numbers of claims undercut warranty practices? Since the disclosure would apply only to potentially unsafe products, why would that affect all warranties?

competitive harm, and producing vehicles and vehicle equipment that injure and kill consumers causes competitive harm. Frankly, by forcing manufacturers to release the early warning data, NHTSA will only encourage the production of better and safer products, which ultimately will benefit industry. Furthermore, under FOIA, in order to even justify exempting information, the agency must prove that the information is likely to cause competitive harm in every case, and NHTSA must demonstrate that all of the exempt data relates to areas of actual competition in the industry. Finally, the agency must show that this information is generally unavailable to competitors. *See Greenberg v. FDA*, 803 F. 2d 1213, 1217-18 (D.C. Cir. 1986); *Niagara Mohawk Power Corp. v. U.S. Department of Energy*, 169 F.3d 16 (D.C. Cir. 1999). NHTSA fails to document any of these matters.

Additionally, the NPRM also fails to explore the extent to which the information it intends to exempt is already available to industry groups through trade publications, industry research, reporting services, and other means. For example, the Automotive Industry Status Report already makes some of the proposed exempt information available to manufacturers for a reasonable fee. No mention of research in this area is made in the NPRM. If NHTSA wants to support its proposal to exempt information for reasons of competitive harm, it must prove that other industry groups currently have no access to this information. Industry groups can afford to purchase expensive trade publications and similar media, but the public, which would benefit from the early warning data, often has severely limited access to these avenues of information, if any access even exists.

B. Early Warning Data Is Often Too Vague to Be Competitively Useful, but Would Offer a Wealth of Important Safety Information for the Public.

Finally, in this NPRM, no mention is made about the already ambiguous nature of the early warning data, which greatly hinders its competitive usefulness. The early warning data only requires manufacturers to submit counts of specific information relating to injuries, fatalities and property damage rather than any explicit details, and all of these data are reported to NHTSA through standardized spreadsheets.

For example, a manufacturer of child restraints reporting about warranty claims and consumer complaints is only required to submit total numbers of such claims and complaints for each specific make, model, product year, and component of the child restraint product which may have had a problem. If a fatality or injury occurs as a result of a child restraint system the manufacturer only needs to report on the make, model, product year, product identification numbers, date of the event, the state where the event occurred, the number of injuries or fatalities, and the product components responsible for the incident.

This required information is extremely basic and requires no unnecessary details about the manufacturers' business operations or future company plans. At the same time, however, this information serves a very important purpose to the public. These counts allow the public to see when a specific product is responsible for high counts of deaths or

injuries, which allows the public to make educated decisions about their child's safety and encourages the public to call for investigations when incidences of injuries and deaths appear high.

VII. The Proposed Rule's Class Determinations Are Irrational.

In addition to a failure to evaluate many key issues and a failure to find sufficient evidence, NHTSA often relies on poor logic to defend its proposal to exempt large portions of early warning data. NHTSA's rationale for exempting production numbers serves as an example.

NHTSA explains in the NPRM that it intends to exclude production numbers for, among other things, vehicles with a gross vehicle weight greater than 10,000 pounds, adding that it will not exclude the same information for "light vehicles" (10,000 pounds or less) because such information is already publicly available. *See* 71 Fed. Reg. at 63,742. Given that production numbers are available for these light vehicles, it seems reasonable to assume that the release of this information does not cause manufacturers competitive harm, and if it did, this harm would be well documented. In the NPRM, however, NHTSA makes no attempt to provide evidence that competitive harm has occurred for light vehicle manufacturers whose production numbers have been released, and NHTSA fails to show why this information's release will hurt only the manufacturers of vehicles and equipment other than light vehicles. In an insufficient attempt to support this proposed exemption, NHTSA lists a series of hypothetical scenarios in the NPRM where the release of production numbers *might* harm the manufacturers. These scenarios are not backed up by any evidence of actual events and fail to demonstrate *significant* competitive harm.

In NHTSA's proposal to exempt field reports, similar inconsistencies in the argument emerge. In the NPRM the agency admits that "the nature, quality and quantity of field reports vary." However, the agency fails to acknowledge that this variation could very well mean that some significant portion of the field reports would never result in competitive harm if disclosed. NHTSA's proposal to exempt all information gathered from field reports is evidence of the agency's refusal to accept the importance of public disclosure.

VIII. NHTSA Should Disclose a Vehicle's Entire VIN Number.

NHTSA's proposal to exempt the last six digits of a vehicle's VIN number should be abandoned in the final rule. VIN numbers are already publicly available through police reports, and a vehicle's VIN number is visible to the general public on a vehicle's dashboard. We respect NHTSA's intent to protect individual citizen's personal privacy; however, exempting a vehicle's VIN is unnecessary.

Furthermore, the last six characters of a vehicle's VIN number serve the important role of allowing members of the public to see if their personal records have

made it into the early warning database. Additionally, including the full VIN number would aid the public in seeing if multiple records are in reference to the same individual vehicle or different vehicles of the same make.

Conclusion

Following the Ford/Firestone tragedy, Congress acted to ensure that the public would not be left helpless from a lack of information about potential safety defects. The TREAD Act's early warning program was designed to empower consumers to hold the auto industry accountable for its products' safety, to monitor NHTSA's ability to take action when evidence shows that a product could pose a safety risk, and to take steps to protect themselves and their families. In order for the early warning program to work effectively, it is essential for the public to have unfettered access to these data.

NHTSA's mission is to prevent injuries and fatalities through improved highway and vehicle safety. By failing to make all early warning information available to the public, NHTSA is proving again that it puts the needs of industry above the needs of the public and its mission. We strongly urge NHTSA to reevaluate the deficiencies in its argument and to rethink its proposal to exempt these vital data from public disclosure.