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Comments of Public Citizen Regarding
49 CFR Part 512
Confidential Business Information
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Introduction

Public Citizen is pleased to offer these comments to the National Highway Traffic Safety Administration's (NHTSA's) Notice of Proposed Rulemaking (NPRM) amending the agency's rules governing confidential business information under 49 CFR Part 512. The importance of the proper resolution of issues raised under this rulemaking cannot be underestimated, as the rules will, in large part, govern the public's access to important types of information submitted to the agency by automotive manufacturers.

The terms of the rule will also have an indelible impact upon the agency's exercise of its authority to collect and disclose to the public "early warning information" under the Transportation, Recall Enhancement, Accountability and Documentation (TREAD) Act, enacted in the wake of the Ford/Firestone disaster. Because this latter issue has proven to be highly controversial and is of paramount public significance, we address the general implications of this rulemaking for the agency's early warning rule first.[1] Next, we grapple with the changes proposed in the rule, and finally, we provide responses to the assault by the Alliance of Automobile Manufacturers upon the disclosure of early warning information.

I. The TREAD Act's Legislative History Makes Clear the Public Purpose of the Law

The agency made it exceedingly clear in the Advanced Notice of Proposed Rulemaking (ANPRM) and NPRM for its now-final rule on early warning that disclosure of information collected under that authority would be in keeping with the agency's current rules under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and Part 512. However, the agency's more recent proposal to amend Part 512 has had the unfortunate side effect of opening a forum for automotive manufacturers to attempt to seal this critical information in a veil of secrecy. A quick review of the docket on the Part 512 rulemaking reveals that the automotive industry is attempting to use this

[1] Although the docket for this rulemaking closed July 1, 2002, NHTSA specifically indicated that it would accept and consider, as possible, late-submitted comments in view of the pending rule regarding early warning.

rulemaking to run roughshod over the agency's previous articulations of its disclosure policy on early warning documents, in an endeavor to over-ride the clear intent of Congress in passing the early warning law.

The TREAD Act, which requires the agency to collect early warning safety defect information, was the result of a massive effort by Congress to make the automotive industry publicly accountable for its decisions not to recall dangerous and defective vehicles and equipment by mandating the disclosure of potential safety defects to both the agency and public. The law followed upon shocking media and Congressional revelations of secret company memoranda and actions, including communications to dealers in foreign companies and of foreign recalls that should have been communicated to regulators. The public availability of information in that case would have saved lives and prevented a catastrophic loss of faith in both the industry in general and the reputation of Ford and Firestone specifically. It would be a profound and devastating evisceration of the law passed by Congress to solve this problem of industry cover-up to seal up early warning records, as the manufacturers now are, outrageously, pressuring the agency to do.

We did, however, anticipate that the industry would attempt to manipulate the agency's interpretation of the new law in order to preserve its cloak-and-dagger tricks and its private, profit-based calculations on remedies for defects. When the TREAD Act was being negotiated by legislators, we raised several concerns 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 the scope of authority clearly granted by Congress. We protested the possible misuse of the statute vigorously to the Congress and to the agency.

Key legislators also perceived the valid reasons for our alarm and sought advice from legal experts at NHTSA that the disclosure provision in TREAD did not in fact change NHTSA's policies or undercut the public purpose of TREAD. In response to a pointed inquiry via telephone prior to its passage by 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, Rep. Waxman and Rep. Edward Markey (D-MA), also a member of the committee reviewing TREAD, each made a decision not to push for a change in the provision in reliance on that communication from the Chief Counsel's office.

In order to assure that this interpretation of the pending law was a consensus opinion with the committee and was one held by its Chairman, Rep. Markey also 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."

The disclosure provision, Section 30166(m)(4)(C), as passed, states that:

> None of the information collected pursuant to the final rule promulgated under paragraph (1) [the early warning rule] shall be disclosed pursuant to section 30167(b) unless the Secretary determines the disclosure of such information will assist in carrying out sections 3011(b) and 30118 through 30122 of this title.

Prior to receiving these interpretations and assurances, on October 19, 2000, Public Citizen sent a letter to Secretary Slater 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 maintaining the secrecy of the early warning documents in utter defiance of Congressional intent, and we urged the agency to correct the situation and honor the intent of the statute by defining the agency's obligations under the statute "*through regulation*." We were worried, in other words, not primarily about the words of the statute, but about undue industry influence over its interpretation by the agency after the bill's passage.

Our statements about the possible meaning of the bill were concerned with its potential for legal manipulation by the industry, *i.e.*, what in the worst case it *could* mean, rather than any suggestion of what it *should* or actually *does* mean in agency practice. Nonetheless, this did not stop the Alliance, in its comments, from claiming that our words should now be used against the public's interest in disclosure. The fact that the industry must cite our direst and most frightening prediction in a stratagem to subvert the disclosure provisions shows just how desperate its lawyers must be to accumulate evidence supporting that position.

Following passage of the bill and in an apparent response to our letter raising the issue of a worst-case scenario, 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 provisions and concluded, from a legal perspective, that the section "will have no effect on the disclosure of documents received by NHTSA."

Mr. Womack went on to specifically deny the worst-case scenario suggested by the Public Citizen letter, comparing the old disclosure provision with the newer one from TREAD, and concluding that the reference within the TREAD provision to section 30167(b) so narrowed its application as to render it inconsequential:

> Upon comparing the two provisions, we conclude that the differences between them do not support the advocacy groups' claim. Ms. Claybrook's letter seems to

> suggest that the variation in language could be interpreted to prevent the disclosure of any early warning information submitted to the agency in the absence of a decision by the Secretary that disclosure of the information "will assist in carrying out" the purposes of the Act. However, the legislation clearly requires that such a decision be made prior to disclosure only when the disclosure is being made under section 30167(b), which by its terms is invoked only when the disclosure involves information that has been determined to be entitled to confidential treatment.[2] [Emphasis in original].

In short, Mr. Womack reasoning that Section 30267(b) is rarely, if ever, invoked and has little impact on the agency's current disclosures under FOIA. Section 30167(b) contains a presumption that business information already deemed appropriate for confidential treatment may nonetheless be disclosed if such disclosure is in keeping with other agency purposes. After analysis, Mr. Womack concluded that because the purpose of that section is so narrow, Section 30166(m)(4)(c), which is "in pursuant to" Section 30167(b), is similarly to be very narrowly applied.

Mr. Womack then quoted the President's statement concerning "maximum public availability of information" and stated that "[a]s a practical matter, we do not interpret Section 30166(m)(4)(C) as affecting the current policies and practices applicable to the disclosure of information to the public."

ii. Disclosure Provisions in Early Warning ANPRM and NPRM Further Support Agency Openness

II. Disclosure Provisions in Early Warning ANPRM and NPRM Further Support Agency Openness

The agency's ANPRM on early warning contained a brief section on the disclosure provision under TREAD, in which the agency noted that "we 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 be 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

[2] *See* Memorandum re: Disclosure of Information Under the TREAD Act from John Womack for Frank Seales, Jr., Chief Counsel to Rosalind A. Knapp, Acting General Counsel, Oct. 27, 2000. Attached as Appendix A.

> 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.

In our comments to the ANPRM, Public Citizen stated that the agency should address the issue of manufacturer and agency secrecy in the rulemaking, asking that "the agency's disclosure policy…be treated as a critical part of its obligation to honor the objectives of Congress and the President in making the TREAD Act a law." We wrote that:

> [T]he agency should set out the categories of documents that are clearly deemed to be routinely non-confidential, as well as the types of information that could, if justified by the submitter, receive confidentiality treatment by the agency, including a description of the instances in which this decision will be made based upon a document's contents. For example, the agency should determine that presumptively non-confidential information includes, at a minimum, consumer complaints, deaths, injuries, lawsuits, company testing related to the defect and warranty data in the aggregate. Regardless of the agency's categorizations, however, a company submitting information must still explicitly request and justify confidential treatment of any information, and the agency must separately evaluate each such claim.

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 noted that:

> 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." The agency also solicited comments under the auspices of that rulemaking regarding the redaction of personal information from submitted documents.

In our comments to the NPRM docket, we noted the agency's policy statements on disclosure with approval and predicted an attack by the industry in this approach, given its legendary historical secretiveness, particularly about potential safety defects:

We are also very pleased with the overall tone of the agency's articulation of the disclosure of early warning information, but we await the agency's implementation of the principles before making a final judgment. The agency's presumption of disclosure must remain intact throughout what is sure to be a sustained assault by the manufacturers to keep as much defect-related information secret as the agency will permit. The defect investigation provisions in the 1966 law were a reaction against the manufacturers' secret recalls in the years before the law was enacted.

III. NHTSA's Rulemaking on 49 CFR Part 512 Must Reflect the Value of Agency Openness

Without any notice in the early warning docket, and prior to issuing the final rule on early warning, on April 30, 2002, NHTSA published a notice in the federal register concerning the agency's *sua sponte* plans to amend the procedures that it uses to process confidentiality requests under 49 CFR Part 512. A majority of the changes proposed in the NPRM were organizational in nature and concerned the re-arranging of the sections to produce a more logical format. We address the key issues below.[3]

The agency proposed to require that any personal information contained in submissions, such as names, addresses and telephone numbers of consumers, be removed by the submitter from the redacted version submitted to the agency under these guidelines. The agency states: "This provision would help NHTSA protect the personal privacy of individuals, since the disclosure of this type of information could constitute a clearly unwarranted invasion of personal privacy."

We strenuously object to the current agency practice of providing a release check box on consumer complaint Vehicle Owner Questionnaire (VOQ) forms for consumers to allow their names to be shared with manufacturers, yet providing no similar opportunity for consumers to affirmatively release their contact information to members of the public and consumer groups. This double standard has no legal basis in the Privacy Act, as the government has suggested in meetings with representatives of Public Citizen, because an express waiver of privacy would solve any possible problem pertaining to release of this

[3] Other changes include the following: Changes in process (Subpart B): Submitters would now be required to include a general description of the information for which confidentiality is being claimed and indicate under which standard such claim is made; Each page claimed to be confidential would be numbered; Rather than two complete copies of complete information and one redacted being submitted to the Office of Chief Counsel (OCC), as well as a redacted one to the public docket, NHTSA now proposes to require that submitters turn in a single copy of just the information claimed as confidential (with the information in support of such claim) to the OCC, and both a complete and redacted version to the responsible office within NHTSA or the docket. Changes in legal standards for agency determinations (subpart D): NHTSA is proposing to update its regulations to reflect changes in case law wrought by *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992). Under that decision, information submitted voluntarily need not meet the *National Parks* test for showing "competitive harm." Instead, voluntarily submitted information will be protected if it is the kind of information that is customarily not released to the public by the submitter; NHTSA's proposal also includes a section to cover any new confidentiality standards established in future court decisions.

information. There is likewise no sound policy basis for NHTSA's failure to provide an opportunity for consumers to affirmatively consent to the public release of their identifying information, as most consumers, when writing to the agency, are interested in a public-spirited solution to their problem or safety defect, and would prefer to publicize the issue as much as possible.

Similarly, identifying information that is part of a public record, such as a news article, and is submitted to NHTSA as a part of the early warning information collection program, should not be permitted to be redacted, and NHTSA's final guidelines for the redaction of information should clarify this point.

IV. Class Determinations Are An Invaluable Tool for Effective Use of the Early Warning Reporting System

The NPRM stated that the agency would also continue to issue class determinations, under which NHTSA decides that a class of information is presumed to cause competitive harm if released, or that a class of information is presumptively and routinely disclosable as not risking competitive harm. Class determinations are intended to codify the agency's existing practice and eliminate duplicative requests for secrecy. NHTSA already list three classes for categorical non-disclosure that are a part of present agency practice, which include: 1) blueprints and engineering drawings (under certain circumstances); 2) future specific model plans; and 3) future vehicle or equipment production or sales figures (in some cases, for limited periods of time).

After reviewing the early warning submission requirements, NHTSA proposes that the following categories of early warning information should be presumed not to cause competitive harm: 1) consumer complaints and related documents; 2) and reports and data regarding damage and warranty claims. The agency asks for comments as to whether reports on deaths or injuries or copies of field reports should be presumptively disclosable. The agency also proposed to establish a class determination that the results of testing by the manufacturers related to safety standards compliance is presumptively disclosable. The agency asked for comment on whether any of the class determinations should be added, removed or modified.

We deem the routine disclosure of information in these categories to be eminently reasonable, because the data to be disclosed in many of the categories are summary data by make and model. Of course, collection of company documents is doubtless also within the scope of authority granted by the early warning law. Reports on deaths and injuries and copies of field reports should be routinely disclosable, as they are in materials prepared for a defect investigation.

The categorical disclosure of documents and data obtained under the early warning system is essential for the proper functioning of the early warning rule, as we have consistently suggested in our comments to the early warning docket. The rule must work to warn consumers and the agency of developing safety defects, but will not be capable of so doing if crucial data are withheld from expedient publication. In order to

minimize unnecessary delay and to discourage manufacturers from distracting the agency with spurious claims for the confidential treatment of documents, NHTSA should articulate as many categories for presumptive disclosure as are pertinent to the timely and efficient disclosure of safety-related information.

V. Amendments to Part 512 Should Not Affect Disclosure of Early Warning Documents

Without additional explanation or context, NHTSA's NPRM on Part 512 quoted the TREAD provision, "early warning information collected pursuant to regulations issued under 49 USC § 30166(m), if claimed confidential or determined to be entitled to confidential treatment, shall not be disclosed under 49 USC § 30167(b) unless the Administrator determines that the disclosure will assist in carrying out Sections 30117(b) and Sections 30118 [through] 30121."

Regardless of the substantial record in support of the public disclosure of early warning data and documents, automakers have seized the opportunity provided by this separate rulemaking on Part 512 to assert that information submitted to NHTSA under the auspices of the early warning rule should be kept secret from the public. *See* Comments of the Alliance of Automobile Manufacturers to Confidential Business Information NPRM, June 1, 2002, August 27, 2002. In formulating its attack, the automotive industry goes so far as to suggest that its own submissions to the database are dubious or suspect, *see id.* at 2 (citing the "unconfirmed reports" that will comprise the database), and argues that disclosing information on the safety defects in their products will cause competitive harm. This outrageous position must not be given any credence by the agency, despite the clear threat of litigation contained in the Alliance comments, as it has no basis in law.

The key statutory relationships, listed according to the likely order of events pertaining to submissions, are as follows:

1) Information submitted to NHTSA as early warning submissions;
2) Some of that information redacted and submitted for evaluation under FOIA/Part 512 to be retained as confidential business information;
3) Agency deems some information appropriately kept confidential under FOIA and Part 512;
4) Information qualified to be retained as confidential business information is presumed to be nonetheless disclosable under Section 30167(b) if its disclosure would assist the Secretary in carrying out Section 30117(b) or Sections 30118 through 30121, in addition to whatever disclosure is available under FOIA;
5) Under Section 30166(m)(4)(c), the same information that is disclosable in Step 4, if it is early warning information, shall not be disclosed *unless* its disclosure would assist the Secretary in carrying out Section 30117(b) or Section 30118 through 30121.

As this reflects, the category of information that would be at all affected by the existence of Section 30166(m)(4)(c) is miniscule. That fact has not prevented the Alliance from suggesting, however, that this molehill is a mountain.

In at least one important sense, the Alliance wants to have it both ways: In its letter to Dr. Runge of August 26, 2002, regarding the NPRM on Confidential Business Information, it stated "The most natural reading of the reason for Congress' enactment of § 30166(m)(4)(C) is that it intended to neutralize the presumption in favor of disclosure contained in pre-existing §30167(b), with respect to the early warning submissions, and to subject them, instead, solely to the traditional considerations under FOIA of their confidentiality, which requires consideration of whether release of the information would cause substantial competitive harm to the submitter."

Yet in its comments, the Alliance proposes blanket exemptions from FOIA and grounds its suggestions in Congressional intent in drafting the TREAD Act. This is utterly without basis in law. 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. As the agency's rulemaking under Part 512 correctly suggests, the basic process to implement NHTSA's obligations under FOIA is totally separate from, and above, the agency's obligations under § 30167(b).

Yet the Alliance is attempting to use the TREAD Act as a device for importing wholesale alterations in the agency's implementation of its obligations under FOIA, and as an escape hatch for industry's own responsibility to make a particularized set of evidentiary showings under FOIA. There is simply no basis for such an expansion of the meaning of the narrowly tailored statute in that way.

Similarly, the mere existence of the TREAD Act provision should have no impact upon the agency's activities under FOIA in crafting class determinations that would enable the routine disclosure of categories of early warning information, because in order to trigger Section 30167(b), NHTSA must have already decided that Part 512 non-disclosure applies. As Mr. Womack explicitly noted, and as was explained further in the agency's ANPRM, little, if any, information has historically been disclosed "pursuant to section 30167(b);" rather, it has been disclosed under FOIA and regulations governing the agency's implementation of FOIA.

Furthermore, it is possible that the FOIA "savings clause" would apply to any disclosure decisions under the TREAD Act provision, as that section is "in pursuant to" Section 30167(b), which specifies that a "requirement to disclose information under this subsection is in addition to the requirements of section 552 of title 5 [FOIA] or that is required to be disclosed under section 30118(a) of this title." Blacks Law Dictionary (7th ed., 1999), provides two relevant definitions of "pursuant to" as "1. in compliance with; in accordance with; under 2. in carrying out." Under either meaning, the Secretary could act to fulfill to the mandates of Section (4)(C)(m) of TREAD only if he or she acted "pursuant to section 30167(b)," as TREAD prescribes. Yet acting "in compliance with"

or "in carrying out" section 30167(b) would mean acting in view of that section's FOIA savings clause.

In contrast, the interpretation by the Alliance would require that the agency "neutralize" one section in favor of the other. *See* Letter to Dr. Runge regarding NPRM on Confidential Business Information, August 26, 2002, at 2 (stating that Congress "intended to *neutralize* the presumption in favor of disclosure contained in pre-existing §30167(b)") (Emphasis added).

Even were a disclosure under Section 30167(b) to be invoked, it is very unclear what possible difference the change in presumptions could make in practical terms. Under TREAD, "no information *shall* be disclosed…*unless* the Secretary determines the disclosure will assist" in carrying out certain subsections, versus under the current law "the Secretary *shall* disclose information …related to a defect or noncompliance that the Secretary decides *will assist* in carrying out" the same subsections. In both cases, release of the information is conditioned upon the same determination by the Secretary that such disclosure will assist in carrying out the same sections of the law. Therefore, the change in apparent presumptions works little, if any, change in the underlying mechanics of the statute, erecting only an apparent distinction without actually bringing about a difference.

It is also worth noting that the TREAD Act provision is a far cry from a withholding statute, needed to trigger an exemption under FOIA's exemption three. *See American Jewish Congress v. Kreps*, 574 F.2d 624 (D.C. Cir. 1978) (holding that exemption three embraces only those statutes incorporating a Congressional mandate for confidentiality that is absolute and without exception, stating this intent clearly and leaving no discretion to head of agency for disclosure) . The TREAD Act provision merely reverses a presumption in a particular area of the agency's disclosure practice under Section 30167(b). It does not authorize the agency to withhold information, and it allows disclosure at the agency's head's discretion upon a particular showing. Nor is there any suggestion in TREAD that any other part of NHTSA's FOIA procedures should be affected. Had Congress intended to pass an exemption three statute, it knows how to do so, and did not choose to take that route in this case. Any argument that this provision amounts to a withholding statute is utter nonsense.

At a bare minimum, there appears to be some disagreement about the meaning of the language in the statute, thereby providing a reason to refer to the legislative history of TREAD. However, looking to the lodestar of Congressional intent provides no succor for the Alliance. There is in fact no authority in the legislative history of the law or docket for the biased reading of the TREAD provision suggested by the Alliance.

In point of fact, the law was developed and passed so quickly by Congress, due in large part to its outrage over the industry's secrecy concerning the existence of a Ford/Firestone safety defect, and the Congressional hearings are rife with cross-examinations of agency officials and company executives demanding why the public was left in the dark so long about a hazardous defect. On this record, which includes both the colloquy between Rep.'s Tauzin and Markey and the President's statement upon signing

the bill, it is truly ludicrous to claim, as does the Alliance, that Congress intended for the agency and the industry to erect and maintain detailed, but secret, data regarding vehicle safety.

The Alliance also raises the issue of NHTSA's practice of "screening" information provided in the early stages of a defect investigation prior to its disclosure. However, it fails to explain why the class determinations mechanism proposed by NHTSA will not accomplish a similar goal. The Alliance furthermore neglects to highlight the fact that despite such screens, defect information gathered during the course of an investigation is routinely collected for public distribution, organized, and released to interested members of the public. The Ford/Firestone example is a case in point. Due to the diligence of NHTSA staffer Bob Young, tens of thousands of pages of company documents pertaining to the defects are available for purchase from the agency at some $50.00 per CD-ROM.

To the extent that such "screening" activity currently occurs without reference to FOIA and is accomplished without public notice of even the fact that it occurs, as indicated by the Alliance, the agency's activities may very well be extra-legal. Indeed, NHTSA's collaboration with industry to conceal information regarding developing defects from the public was a central part of the criticism leveled at the agency that produced the TREAD Act, and thus should not be cited as a practice to undercut implementation of corrective measures adopted by Congress. Canons of construction cited by the Alliance that presume Congress is aware of agency practice are inapplicable where Congress was acting to address problems created by those practices, whether or not Congress was informed of the true scope of the agency's habits and actions.

The Alliance also cites Attorney General Ashcroft's memorandum of October 12, 2001, as further evidence for its position. However, the Ashcroft memorandum addressed government activities under FOIA only. The Alliance is again bootstrapping, as its arguments do not concern agency practices under FOIA, but are primarily directed to actions under the TREAD Act and the appropriate determinations for disclosure under Section 30167(b). The Ashcroft statement is utterly irrelevant to the agency's interpretations of these statutes, and should not be aggrandized in an attempt to use it as a general admonition in the service of industry secrecy.

Insofar as that memo may affect a pertinent area, *i.e.*, the agency's disclosure of information under FOIA, the Attorney General also noted in his memorandum that "[t]he Department of Justice and this Administration are committed to full compliance with the Freedom of Information Act (FOIA). It is only through a well-informed citizenry that the leaders of our nation remain accountable to the government and the American people can be assured that neither fraud nor government waste is concealed." We concur with these sentiments and counsel the agency to fulfill its traditional obligations under FOIA with far greater attention to the speedy resolution of claims for confidentiality and the timely release of public documents.

VI. The Alliance's Assertions of Competitive Harm from Disclosure of Information Are Misguided and Irrelevant

The Alliance arguments concerning the "competitive harm" that could be wrought by release of early warning information are totally inapplicable to "presumptions" under the early warning rule or Section 30166. Instead, they are arguments that could potentially be marshaled to preserve the confidentiality of particular documents under FOIA, yet nothing in the early warning rule permits auto manufacturers to supersede the agency's normal procedures under FOIA. Indeed, the cases cited by the Alliance are off-point, if they are intended to guide the agency's determinations under the TREAD Act disclosure provision, as they are pertinent only to the release of information under exemptions in FOIA. *See, e.g., National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

In fact, there is no interpretation of the agency's practices under the TREAD Act or under Section 30167(b) that would allow the Alliance to draw such a conclusion; nor it is reasonable to suggest that the case law governing FOIA has any direct relevance to, or provides any justification for, a proposal for a blanket approach to early warning data *per se*. In addition, early warning data will encompass far too many types of information, and contain far too general summary data, to constitute designation as a "class" for Part 512 purposes.

As the agency has repeatedly made clear, early warning data should and will, sensibly, be treated as all other data has traditionally been treated, and will be subject to the same types of requests for confidentiality and administrative processes. This is the appropriate and legal approach, and was addressed in the NPRM on Part 512 with an explicit list of those documents traditionally classified as confidential business documents, including blueprints, engineering drawings and the like. NHTSA's request for suggestions for appropriate additional class determinations under FOIA is the proper mechanism for any requests in this area, rather than maneuvering intended to establish special treatment for early warning information.

The Alliance attempts to launch a further argument that the comprehensiveness of the early warning information *in itself* justifies special treatment of this information. Essentially, the Alliance is seeking a blanket prior restraint on information that would relieve submitters from asking for confidential treatment of particular business documents. This would fall far outside of the agency's rulemaking on Part 512 and indeed, outside of it authority under either FOIA or TREAD.

None of the few cases cited by the Alliance provide any basis for this novel argument, and allowing it to control the agency's determinations would in fact flip the rationale underlying the TREAD Act on its head. The two cases that are cited by the Alliance in support of its claim of competitive harm are interpretations of the law under FOIA. The decisions in those cases are confined to their facts, as they address an internecine dispute related to the disclosure of particular information on U.S. Customs Service Import forms. *See Trans-Pacific Policing Agreement v. U.S. Customs*, 177 F.3d 1022 (1999); *Timken Co. v. U.S. Customs Service*, 491 F.Supp. 557 (1980).

As noted on appeal, the District Court in the *Trans-Pacific* case specifically found that the information withheld by Customs could be used by a competitor to "gain a picture of an importer's intentions, profit margins and other plans" and thus was correctly withheld. As far a general holding under FOIA's exemption four, this particular finding lacks precision. Nonetheless, nowhere in its comments does the Alliance produce evidence that suggests that it could satisfy even this *de minimus* showing that competitors could utilize information to predict future behavior, thereby failing to meet its own suggested standard of proof. Nor does the Alliance show that harmful information cannot be redacted from particular submissions in a manner that mitigates any harm, as the reviewing court required upon remand in *Trans-Pacific*. In addition, the summary quality of most early warning information is a far cry from the identifiers at issue in the cases, and renders the Alliance argument dubious at best.

Instead, the Alliance has submitted a wish-list of broad categories of allegedly sensitive information to be withheld. Yet assertions at the wholesale level are useless. As in the Customs cases above, as well as other FOIA precedent, and the proposed revisions to Part 512, industry submitters should raise any objections at the time they submit particular documents. None of the various "class-related" claims of harm are sufficient, as presented in the Alliance's comments, to permit a real evaluation of the validity of its claims under FOIA; nor are the showings significant enough to provide the agency with information it would need to create a new class determination under its consideration of changes to Part 512.

Furthermore, it would be extremely unwise as a policy and legal matter to derive from these paltry few Customs cases a general principle of withholding government information that could be assembled by any party which might actually inform the public of threats to their safety. There is literally no boundary around this idea as formulated, thereby threatening a stranglehold on government dissemination of information. The Alliance does not explain, for example, how the government's early warning data would inflict unique competitive harm over and above that information already available to the public in the form of make/model comparative crash test data under the New Car Assessment Program (NCAP) or through composite indices of quality prepared by consumer groups such as Consumers Union or the Insurance Institute for Highway and Auto Safety. Surely, the Alliance does not claim that all the information in NCAP should now be de-published, or that consumers have no right to inform themselves about the quality of the vehicles they purchase.

If enlarged in the manner suggested, the principle as articulated by the Alliance would mean that the more informative data are, and the more complete the picture that they enables users to form, the less information government can disclose. The Alliance is evidently deeply disturbed by the prospect of empowering consumers with good information rather than, as now, profoundly incomplete information. The agency's position, on the other hand, solves this problem: If the pieces of various submissions are releasable individually, combining them in a format that makes sense and releasing them together cannot violate any confidentiality rule.

We note that any apparent claims of unfairness of releasing data of varying levels of inclusion and verifiability that were made by the Alliance are easily avoided by publishing a disclaimer concerning extant informational discrepancies in the database. Clearly, information that is inaccurately submitted is the industry's own burden to correct and there are penalties to encourage such correction under TREAD and existing law. The solution to informational discrepancies created by incomplete records submitted by industry is for the industry to submit more information that would enable the public to make sense of the data, and is no argument for the secrecy of that information.

On the issue of warranty data, the Alliance appears to ask for both a blanket treatment of warranty data *per se* as secret under FOIA and for a class determination under Part 512. It also asks that manufacturers be let off the hook for having to *request* confidential treatment under FOIA, essentially due to the inconvenience. These proposals are profoundly out-of-step with applicable law and historical agency practice. Warranty data will be submitted only in summary format by make/model, and was specifically referenced as a crucial part of the data collection in the language of the statute drafted by Congress (*see* Section 30166(m)(3)(A), "*Warranty and claims data"*). With respect to warranty claims, in the NPRM, NHTSA stated that it "frequently receives requests for confidential treatment for these types of materials and consistently denies such requests," s*ee* 67 FR 21198, 21200, therefore rendering this type of information an excellent candidate for a determination to be *disclosed* as a class.

The Alliance also contends that release of warranty information could cause competitive harm and that this claim is substantiated by the availability of warranty trend data for purchase in Automotive Industry Status Reports, thus demonstrating its "competitive value." *See* Alliance comments of July 1, 2002 at 9. The availability of this information for purchase by interested competitors, however, destroys the ability of industry to seek to preserve its confidentiality under FOIA. The Alliance must show that information published by NHTSA is capable of inflicting harm that is unique when compared to the sea of information already available to anyone willing and able to pay for such data, and it fails to do so.

We also note that the industry's intense alarm about public access to safety information long held by manufacturers is an indication to us that the early warning rule may actually work in the manner that Congress intended – by correcting information inequalities in the marketplace between buyers and sellers of automotive products. To the extent that this major market correction is long overdue, the industry's argument is essentially a desperate, last-moment attempt to hold onto its information monopoly and its unwarranted power to continue to put unwitting consumers at risk.

Indeed, the theory of "competitive harm" articulated by the Alliance ignores the much-heralded salutary effects of introducing additional consumer information to the marketplace, an effect which will doubtless improve customer sophistication, lower costs by introducing powerful new incentives for high-quality safety production and design, and reduce or eliminate the opportunity for highly damaging debacles such as Ford/Firestone to develop. As the Congressional record amply demonstrates, the incentives for better performance that would result from publicly releasing safety

information was a critical part of the Congressional strategy to protect consumers and make the industry and agency accountable for defect-related decisions. These incentives must be preserved in order for the spirit and letter of TREAD to be honored.

VII. The Agency's Disclosure Guidelines Must Be Integrated Into Arrangements Governing the Early Warning Database

In passing the TREAD Act, Congress provided a mandate for NHTSA to prevent future injuries and deaths to American motorists by removing the cloak of silence that has historically surrounded safety defects in automobiles and tires. We were therefore shocked that, in its September 24th public meeting regarding the early warning reporting system, NHTSA officials stated that they are waiting for the Part 512 policy changes developed by the agency's Chief Counsel's office before beginning the process of integrating these disclosure policies into the operation of the early warning database.

It is critical that NHTSA officials work together to produce a seamless procedure informed by both the latest thinking on implementation of amendments to Part 512 and the need for expeditious review of any claims for confidential treatment submitted by manufacturers. The types of claims that are routinely rejected by the agency will also need to be integrated into the practice of reviewing the completeness of submissions, to reduce the likelihood of agency harassment by industry's repeated and redundant claims for confidential treatment.

The TREAD Act was passed in order to put an end to such chicanery. Disclosure of the crucial elements composing the database should be routinized to the maximum possible degree to avoid delay. The agency's guidelines for data engineers and database specialists should be regularly updated so that each time a ruling is made on the disclosure of a specific type of material, a precedent is established and manufacturers are kept from submitting repeat applications for non-disclosure *ad nauseam*.

VIII. NHTSA Should Require, As It Proposed, That Manufacturers Have a Duty to Update the Agency Should the Conditions Supporting a Request for Non-Disclosure Change

The "knowing concealment" standard for submissions to NHTSA regarding conditions surrounding a request for confidentiality has long been far too weak and has unjustly created a situation in which a FOIA request for information may be denied by the agency long after the conditions justifying its confidentiality have been removed. As the agency proposes, manufacturers must have a duty to update the record and to maintain their requests; to the extent that this imposes a burden, it will serve as a check upon extremely time-sensitive requests, as the manufacturer will now be obliged to notify NHTSA when the rationale for confidentiality no longer exists.

In the alternative, NHTSA could implement an automatic cut-off for the confidentiality of documents after, for example, three years, unless an extension request is specifically filed by a manufacturer as to that document. This would also safeguard

both bureaucratic efficiencies and the public's interest in maximizing the disclosure of documents.

Conclusion: NHTSA Should Honor the Public Purposes of TREAD

As we anticipated, the most difficult and fundamental struggle over the fair implementation of the TREAD Act concerns the public availability of early warning information regarding defects. Fortunately, NHTSA appears thus far to recognize the importance of this assignment from Congress and appears resolute in its obligation to make the industry publicly accountable for defects.

To underscore the real and continuing cost of the information chasm that now divides consumers and the automotive industry, below is a short transcript of a deposition by consumer attorney Tab Turner of Jack Cline, an employee of Value Rent-A-Car, concerning the decision by Ford in the early 1990s not to recall the Aerostar minivan:

> Question by Tab Turner: At some point in time, Mr. Cline, did you travel up to Detroit, or Dearborn, Michigan, for a meeting with representatives of Ford Motor Company, people who were working for Ford?
> Answer by Jack Cline: Yes, sir I did.
> Question: Who did you meet with up there?
> Answer: I met with John Mavis, the general counsel for Ford, and an engineer by the name of Sye Linovitz.
> Question: And during this meeting, were you visiting with Ford Company employees about the Aerostar minivan?
> Answer: Yes, sir, that's correct.
> Question: And were you visiting with them about rollover and roof strength issues relating to the Aerostar minivan?
> Answer: Yes, sir, that's correct.
> Question: During the course of your conversations, Mr. Cline, with these employees of Ford Motor Company, did you give them any specific information about you, Jack Kline's, feelings about the Aerostar minivan?
> Answer: Yes, sir, we did.
> Questions: And during the course of this conversation about recalling the Aerostar minivan, Mr. Cline, tell us what Mr. Mavis told you.
> Answer: Mr. Mavis said they would not recall the minivan, it would be cheaper to pay the claims involving the Aerostar.

Ever since the Ford Pinto case in the late 1970s highlighted the deeply cynical nature of the industry in measuring costs against saving lives, the public has been all too well aware of the practice of bean-counting by automotive manufacturers. Indeed, American motorists have been provided with consistent examples in which the cost of the fix, rather than the seriousness of the safety defect and the risk it poses to human life, determines the automakers' decision-making process on remedies. Yet consumers have been helpless to defend themselves against this practice.

Now that Congress has finally acted, out of its disgust and outrage, to remedy this tragic information inequity and market failure, the industry has roared back with a campaign to undermine the best of Congressional intentions with subterfuge and backdoor dealings.

Consumers should be empowered to make their own decisions regarding the hazards posed by the products that they use. In this rulemaking and in its arrangements for the early warning database, NHTSA must honor the true intent of this important new law and keep its statutory obligations and responsibilities for disclosure under the Freedom of Information Act free of such distractions and impediments. Nothing more is needed, but nothing less will suffice.