

NHTSA'S FINAL RULE ON CONFIDENTIAL BUSINESS INFORMATION

Stephen E. Selander
Warner Norcross & Judd LLP
Southfield, Michigan
248.784.5053

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TREAD Act Town Hall

NOTICE:

- The following slides are **part** of a presentation made by Stephen E. Selander, of Warner Norcross & Judd LLP, at the AIAG Tread Act Town Hall event on August 25, 2003.
- **These slides are intended to be informational only and are not intended as legal advice.**
- If you need legal advice on NHTSA's regulations and standards as they apply to your unique fact situation, consult with your legal counsel or with a member of the Automotive Industry Practice Group of Warner Norcross & Judd, LLP.

49 CFR Part 512-Confidential Business Information

- On July 28, 2003, NHTSA published in the Federal Register its Final Rule relating to Confidential Business Information - 49 CFR 512.
- The rule was issued to update the confidential business information procedures to reflect changes in the case law governing confidentiality and **to address the confidentiality of Early Warning Reporting information.**
- The Final Rule sets forth the requirements and procedures related to confidentiality of all information, with minor exceptions, submitted to NHTSA.
- **Effective Date for the Rule: September 11, 2003**

Confidential Business Information Defined

- ***Confidential business information*** means trade secrets or commercial or financial information that is privileged or confidential, as described in 5 U.S.C. 552(b)(4), (which is part of the Freedom of Information Act).

Trade Secrets

- A ***trade secret*** is a secret, commercially valuable plan, formula, process, that is used for making commodities, and that can be said to be the end product of either innovation or a substantial effort.

Commercial or Financial Information

- Commercial or financial information is considered confidential if it has not been publicly disclosed and:
 - (i) If the information was required to be submitted and the failure to grant confidentiality would
 - likely impair the government's ability to obtain similar information in the future;
 - or if disclosure of the information would likely cause substantial competitive harm to the person who had submitted it; or
 - (ii) If the information was voluntarily submitted and is the kind of information that would not customarily be released to the public by the person from whom it was obtained.

Procedures For Confidential Information Contained In Early Warning Reports And Foreign Recall Reports

§579.28(j)

- If a manufacturer claims that any information it submits is entitled to confidential treatment, it must make such claim in accordance with Part 512 of this chapter

NHTSA'S Prior Position On Confidentiality Of Early Warning Reporting Data Had Caused Serious Concerns

- The Notice of Proposed Rulemaking, Part 512, Appendix B had stated that the Office of Chief Counsel has determined that certain early warning data will be presumed **not** to cause competitive harm.
 - Consumer Complaints
 - Reports related to property damage claims
 - Warranty claims reports
 - Test procedures used to certify compliance

However, There Is Good News!

- The Final Rule **grants confidentiality** for many of the classes of information required to be reported under the Early Warning Reporting rule.

Part 512 Appendix C: Early Warning Reporting Class Determinations

- a) The Chief Counsel has determined that the following types of information **will cause substantial competitive harm and will impair the government's ability to obtain this information in the future, if released:**
 - 1) Reports and data relating to warranty claim information;
 - 2) Reports and data relating to field reports, including dealer reports and hard copy reports; and
 - 3) Reports and data relating to consumer complaints

§512 Appendix C: Early Warning Reporting Class Determinations (Cont)

- b) In addition, the Chief Counsel has determined that the following information will cause **substantial competitive harm** if released: Reports of production numbers for child restraint systems, tires, and vehicles other than light vehicles as defined in 49 CFR 579.4.

Section 512.4 Submission Requirements—The **General Procedures** for Requesting Confidentiality

- **§ 512.4—When Requesting confidentiality, what should I submit?**
 - (a) The materials for which confidential treatment is being requested;
 - (b) A certificate in support of confidentiality, in the form set out in Appendix A;
 - (c) Any supporting information; and
 - (d) Any request for an extension.

More Good News! The Procedures to Request Confidentiality of Early Warning Information In Appendix C Are Different

- NHTSA states,
 - “We have created a series of class determinations covering those portions of the early warning reporting information we have determined are entitled to confidential treatment. We are permitting the information in these classes to be submitted and given confidential treatment **without the filing of a part 512 justification and the accompanying certificate.**”

§ 512.4 SUBMISSION REQUIREMENTS Don't Apply to Early Warning Information Subject to the Class Determinations in Appendix C

- § 512.4 states that it applies to “[a]ny person submitting information to NHTSA, **other than information in a class identified in Appendix C of this part**, and requesting that the information be withheld from public disclosure pursuant to 5 U.S.C.552(b) [of the Freedom of Information Act]...

§512.9 What Are The Requirements If The Information Comes From A Third Party?

- Issue is not an Early Warning Reporting issue.
- However, it is a significant issue for suppliers of vehicle manufacturers that NHTSA is investigating.

§512.9 What Are The Requirements If The Information Comes From A Third Party? (Cont.)

- “...the **submitter** is responsible for **obtaining from the third party** the information that is necessary to comply with §512.4 of this part, including a certificate in the form set out in Appendix A of this Part.”

§ 512.4 When Requesting Confidentiality, What Should I Submit?

- (a) The materials for which confidential treatment is being requested;
- (b) A certificate in support of confidentiality, in the form set out in Appendix A;
- (c) Any supporting information; and
- (d) Any request for an extension.

Appendix A—Key Elements

- Request that it be kept confidential by NHTSA for a specified period of time
- Statement that the information in the certification is based on information provided by corporate personnel who have authority with respect to the release of the information
- Statement that the information has not been released except as hereinafter specified
- No other certifications beyond those specified
- Certify under penalty of perjury that the foregoing is true and correct

§512.8 What Supporting Information Should I Submit With My Request?

- a) Describe the information for which confidentiality is being requested
- b) Identify confidentiality standards under which request should be evaluated;
- c) Justify the basis for the claim for confidentiality:
 - 1) Why information is a **trade secret**, if basis for confidentiality is trade secret
 - 2) If claim is based upon **substantial competitive harm**, what the harmful effects are, and why they are substantial;
 - 3) If claim is based upon **impairment to government interests**, what interests will be impaired and why disclosure is likely to impair such interests;
 - 4) Measures taken by submitter to ensure information has not been disclosed to public;
 - 5) Any **other basis for confidentiality under 552(b)(4)** of the Freedom of Information Act

§512.8 What Supporting Information Should I Submit With My Request? (Cont.)

- d) Indicate any items of information that fall within any of the class determinations included in Appendix B to this Part;
- e) Indicate the time period during which confidential treatment is sought;
- f) Provide the name address and phone number of a person to whom NHTSA's response and inquiries should be directed.

THE FUTURE FOR THE RULE ON CONFIDENTIAL BUSINESS INFORMATION

- I believe that the required Early Warning Reporting information should be confidential, because disclosure would cause competitive harm.
 - Information can be helpful to competitors.
 - Information can be misleading to the public.
 - Information not comparable between manufacturers.
 - Raw data requires manipulation to make it usable.
 - Information in and timing of periodic reports also leads to strong capacity to mislead the public.

THE FUTURE FOR THE RULE ON CONFIDENTIAL BUSINESS INFORMATION (CONT)

- However, I believe that the “public interest” groups will, at a minimum file petitions for reconsideration of the final rule with respect to the Appendix C class determinations.
- I would not be surprised to see litigation on the issue of the confidential class determinations.

Summary:

- The Final Rule **grants confidentiality** for many of the classes of information required to be reported under the Early Warning Reporting rule.
 - 1) Reports and data relating to warranty claim information;
 - 2) Reports and data relating to field reports, including dealer reports and hard copy reports;
 - 3) Reports and data relating to consumer complaints; and
 - 4) Reports of production numbers for child restraint systems, tires, and vehicles other than light vehicles as defined in 49 CFR 579.4.

Summary (continued)

- The general submission requirements for confidentiality requests do not apply to classes of Early Warning confidential data covered by Appendix C of the final rule, easing the procedural requirements for confidentiality.
- NHTSA is permitting the information in these classes to be submitted and given confidential treatment without the filing of a part 512 justification and the accompanying certificate.