

towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand." The term "small governmental jurisdiction" is defined generally as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand." Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States. We estimate that, of this total, 84,377 entities were "small governmental jurisdictions." Thus, we estimate that most governmental jurisdictions are small. Below, we discuss the total estimated numbers of small businesses that might be affected by our actions.

28. The Educational Broadband Service (EBS) (previously referred to as the Instructional Television Fixed Service (ITFS)) is used to provide educational services to students. The SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such companies generating \$13.5 million or less in annual receipts. According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year. Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million. Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies adopted herein. This SBA small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities. Thus, we estimate that at least 1,932 licensees are small businesses.

29. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions may be included in the definition of a small entity. EBS is a non-profit non-broadcast service. We do not collect, nor are we aware of other collections of, annual revenue data for EBS licensees. We find that up to 1,932 of these educational institutions are small entities that may take advantage of our amended rules to provide additional flexibility to EBS.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

30. There are no new reporting, recordkeeping or other compliance

requirements proposed in the *BRS/EBS 2nd FNPRM*.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

31. RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): "(1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for such small entities; (3) the use of performance, rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities."

32. The Commission has not proposed an approach for licensing EBS spectrum. Instead, the Commission seeks comment on three distinct approaches for licensing EBS spectrum to determine which approach would best suit the needs of schools and universities and other non-profit educational institutions.

F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

33. None.

Ordering Clauses

34. It is further ordered that notice is hereby given of the proposed regulatory changes described in this *Second Further Notice of Proposed Rulemaking*, and that comment is sought on these proposals.

35. It is further ordered that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this *Second Further Notice of Proposed Rulemaking*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 512

[Docket No. NHTSA-06-26140; Notice 3]

RIN 2127-AJ95

Confidential Business Information

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Denial of Petition for Reconsideration.

SUMMARY: This document denies a petition for reconsideration regarding amendments to NHTSA's regulation on Confidential Business Information. The petition, by the American Association for Justice, sought the rescission of class determinations that provide confidential treatment for certain categories of information submitted to NHTSA pursuant to the Early Warning Reporting regulations.

FOR FURTHER INFORMATION CONTACT: Michael Kido, Office of Chief Counsel, NHTSA, telephone (202) 366-5263, 1200 New Jersey Avenue, SE., Washington, DC 20590.

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act, NHTSA has adopted Early Warning Reporting (EWR) regulations. 49 CFR Part 579. *See* 49 U.S.C. 30166(m), Public Law 106-414. Under these regulations, in general, larger manufacturers must submit certain data to the NHTSA on a quarterly basis. Their EWR reports include information on production, incidents involving deaths or injuries, property damage claims, consumer complaints, warranty claims, field reports and common green tires, with some variation based on the reporting sector. In general, smaller manufacturers must report on incidents involving deaths.

On October 19, 2007, NHTSA published regulations addressing the confidentiality of EWR data. 72 FR 59434. The Appendices to the October 2007 notice contain class determinations providing that certain EWR information is confidential. Under Appendix C to 49 CFR Part 512, EWR data on production (except for light vehicles), consumer complaints, warranty claims, field reports and common green tires, as well as copies of field reports are confidential. 72 FR at 59470. Under Appendix D, the last six

(6) characters of the vehicle identification number (VIN) in an EWR report on death(s) or injuries are confidential. *Id.* As explained in the preamble to the October 2007 rule, NHTSA based these class determinations on the substantive criteria in Exemptions 4 and 6 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(4) and (b)(6).

Under FOIA Exemption 4, the standard for assessing the confidentiality of information that parties are required to submit to the government is whether “disclosure of the information is likely to have either of the following effects: (1) To impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial competitive harm to the competitive position of the person from whom the information was obtained.” *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The class determinations in Appendix C to Part 512 are based on Exemption 4. FOIA Exemption 6 provides for the withholding of “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). The agency applied Exemption 6 to the last six (6) characters of the VINs affixed to those vehicles allegedly involved in a death or injury reported under 49 CFR part 579 to protect the identity of individual vehicle owners. The class determination in Appendix D to part 512 is based on Exemption 6. For a more detailed discussion of the agency’s analysis regarding the class determinations in Appendices C and D, we refer readers to the preamble of the October 2007 rule.

II. American Association for Justice Petition and NHTSA’s Response

In a December 3, 2007 letter, the American Association for Justice (AAJ), formerly known as the Association of Trial Lawyers of America, petitioned for reconsideration of the class determinations on EWR data. AAJ asks NHTSA to withdraw the class determinations, based on two arguments.

First, AAJ asserts that Federal law requires NHTSA to apply a balancing test used by a court in evaluating a motion to unseal court records filed in a products liability action. *See Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304 (11th Cir. 2001). Under this test, AAJ argues, an agency must balance the manufacturer’s interest in keeping the information confidential with the alternate contention that

disclosure serves the public interest in health and safety. AAJ asserts that a blanket exemption under the FOIA would violate this federal balancing test and that the agency must continue to evaluate the disclosure of a manufacturer’s EWR data on a case-by-case basis.

Second, AAJ asserts that automobile companies would not suffer detrimental competitive consequences from the disclosure of their EWR submissions. It states that industry’s arguments regarding the competitive impact of the disclosure of EWR data should be discounted because manufacturers already learn about their competitors’ products through reverse-engineering. AAJ cites an article in WIRED magazine discussing the vehicle tear-down process followed by manufacturers in general, and General Motors Corporation in particular. *See* Carl Hoffman, *The Teardown Artists*, WIRED (Feb. 2006). AAJ contends that since manufacturers already conduct these types of activities, disclosing EWR data may not have an additional impact on competition and that it could significantly improve public safety.

As to both of these arguments, we disagree with AAJ’s views regarding the applicable legal principles. In *Chicago Tribune*, a balancing test was applied in the unsealing of documents produced in a products liability lawsuit. In our view, the body of law that governs the disclosure of EWR data is FOIA law, rather than the law on the unsealing of documents in *Chicago Tribune*. More particularly, as explained in the preamble to the October 2007 rule, the proper standard is that of Exemption 4 of the FOIA. *See* 72 FR at 59437. In Exemption 4, Congress has already struck the balance and no further balancing of the public interest is warranted. *See Public Citizen Health Research Group v. FDA*, 185 F.3d 898, 904 (D.C. Cir. 1999); 72 FR at 59437 and 59449–50. In any event, to the extent relevant, the agency weighed the public’s interest in these data against its continued ability to obtain EWR data under its impairment prong analyses. *See, e.g.*, 72 FR at 59449–51 (consumer complaints), 59456–57 (warranty claims), and 59460–62 (field reports). AAJ does not dispute our impairment analyses.

We also disagree with AAJ’s related contentions that this information would protect consumers and that NHTSA did not dispute AAJ’s claim that the disclosure of EWR information is vital to the public interest but that NHTSA gave greater weight to competitive consequences that would result from the release of the data, which were

presented by the automotive industry. AAJ’s conclusory contentions on the value of the information to the public were not supported in its submission. And, we had explained that the disclosure of the EWR data covered by the Appendices would provide limited, if any, safety benefits to the public, *see, e.g.*, 72 FR at 59450, 59457, and 59462, but would be likely to cause substantial competitive harm to manufacturers and significantly impair the agency’s ability to carry out the EWR program effectively. *See, e.g.*, 72 FR at 59441–63.¹ In the course of our assessment, we applied the FOIA law and considered the administrative record in reaching the determinations in Appendices C and D. AAJ and others had the opportunity to submit detailed comments presenting their views and any facts in support of them.

The AAJ petition and article from WIRED do not provide justification for revision of the October 2007 rule and its appendices on the grounds that automobile companies would not likely suffer detrimental competitive harm from the disclosure of EWR data. The article points out that teardowns and related activities can yield valuable information about a competitor’s products, such as dimensions, parts weight, and how parts are assembled together. However, the AAJ petition and article do not indicate, much less demonstrate, that teardowns provide information comparable to EWR data.

The preamble to the October 2007 rule discussed EWR data and explained, among other things, the competitive value of those data. AAJ does not address how an entity could use tear-down information to develop EWR information or comparable information. NHTSA addressed EWR consumer complaints, warranty claims, and field reports. *See* 72 FR at 59444–63. The compendium of EWR consumer complaint data provides valuable information on customer satisfaction and how well products were received, quality and field experience. *See* 72 FR at 59444–48. Tear-downs do not provide this information. *See e.g.*, 72 FR at 59445, 59447–48.

EWR warranty data provide a compendium of information on the quality and in-use performance of significant systems or components. *See* 72 FR at 59451–55. These data serve as a valuable indicator of the field performance and experience of parts and systems in vehicles and tires. *See*

¹ We note that the EWR information on deaths and injuries are not covered under the class determinations in Appendix C.

72 FR at 59454–55. Vehicle tear-downs do not provide this information.

EWR field report data address malfunctions or performance problems. See 72 FR at 59457. They reflect the in-use experience of a manufacturer's product collected at its expense and with the intent of identifying problems associated with its products. 72 FR at 59459; see also 72 FR at 59457–60. These data provide in-use information on technologies employed by manufacturers and provide competitively valuable information on product performance and experience in the field, including at times reliability and durability of systems and components. 72 FR at 59459–60. Again, vehicle tear-downs do not provide this information.

Furthermore, NHTSA addressed EWR production data and explained why they are confidential (other than for light vehicles). See, e.g., 72 FR at 59441–44. AAJ's petition does not address production data at all. NHTSA also explained why EWR common green tire identifiers are confidential. 72 FR at 59462–63. AAJ does not address this information either.

Also, AAJ does not address the issue of costs in collecting information on competitor products. In general, the

ability of a competitor to engage in reverse engineering, which forms a basis for AAJ's contentions, does not alone resolve the confidentiality of information; cost is a significant factor. See 72 FR at 59448 (quoting *Worthington Compressors v. Costle*, 662 F.2d 45, 51–52 (D.C. Cir. 1981)). The article from *Wired* alluded to the considerable costs incurred by GM to conduct vehicle tear-downs. It noted that a full vehicle tear-down takes approximately six weeks and requires work by technicians and the use of sophisticated equipment. The article also noted that the process focuses on costs; cost estimators estimate the price of every part used in the examined vehicle. AAJ does not address any of these vehicle tear-down costs. If there was a means by which competitors could acquire the competitive information provided by EWR submissions, such as consumer complaints, warranty claims, and field reports, these costs would certainly be considerable. See, e.g., 72 FR at 59448, 59454, and 59459.

Lastly, AAJ does not address Appendix D or any of the FOIA Exemption 6 issues detailed in the preamble to the October 2007 rule

related to the disclosure of the full VIN reported in an incident involving an alleged death or injury. See 72 FR at 59463–65. For example, it does not address the privacy concerns raised by the agency if complete VIN information were disclosed. It does not address the fact that the agency's final rule permits the disclosure of the first eleven (11) of the seventeen (17) characters that comprise each VIN or that the first eleven characters are sufficient to identify the make, model, and model year of a vehicle. And, it does not address relevant case law. See *Center for Auto Safety v. NHTSA*, 809 F. Supp. 148 (D.D.C. 1993); see also 72 FR at 59465.

III. Conclusion

For the reasons stated above, the agency is denying AAJ's petition for reconsideration.

Authority: 49 U.S.C. 322; 5 U.S.C. 552; 49 U.S.C. 30166, 49 U.S.C. 30167; 49 U.S.C. 32307; 49 U.S.C. 32505; 49 U.S.C. 32708; 49 U.S.C. 32910; 49 U.S.C. 33116; delegation of authority at 49 CFR 1.50.

Issued on: April 30, 2008.

James F. Ports, Jr.,

Deputy Administrator.

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