Item	Total annual responses	Average time per response (hours)	Total annual burden hours
FRA Form 30	383	.25	95.75
FRA Form 31	1	212	212
FRA Form 32	1	24	24
FRA Form 33	8	79	632
FRA Form 34	2	897	1,794
FRA Form 35	34	383	13,022
FRA Form 229	18	.25	4.5
Additional Buy America Documentation	1	19,944.50	19,944.50
SF Form 270	1	716	716
SF Form 424	1.1	383	421.30
SF Form 424A	3	192	576
SF Form 424B	.25	192	48
SF Form 424C	3	191	573
SF Form 424D	.25	191	47.75
SF 425	1.5	897	1,345
SF Form LLL	.17	383	65.11

* In minutes.

Total Estimated Annual Burden: 39,521 hours.

Pursuant to 44 U.S.C. 3507(a) and 5 CFR 1320.5(b) and 1320.8(b)(3)(vi), FRA informs all interested parties that it may not conduct or sponsor, and a respondent is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Authority: 44 U.S.C. 3501–3520.

Rebecca Pennington,

Chief Financial Officer.

[FR Doc. 2015–23620 Filed 9–18–15; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2015–0095; Notice 1]

Request for Public Comments on NHTSA Enforcement Guidance Bulletin 2015–01: Recommended Best Practices for Protective Orders and Settlement Agreements in Civil Litigation

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Request for public comments.

SUMMARY: NHTSA's ability to identify and define safety-related motor vehicle defects relies in large part on manufacturers' self-reporting. However, although federal regulations may require them to report certain information to NHTSA, manufacturers do not always do so, or do not do so in a timely manner. Additionally, the information a manufacturer is required to report varies greatly depending on the product and company size and purpose. Given these constraints, safety-related information developed or discovered in private litigation is an important resource for NHTSA.

This proposed Enforcement Guidance Bulletin sets forth NHTSA's current thinking on this topic, and guiding principles and best practices to be utilized in the context of private litigation. To the extent protective orders, settlement agreements, or other confidentiality provisions prohibit information obtained in private litigation from being transmitted to NHTSA, such limitations are contrary to Rule 26 of the Federal Rules of Civil Procedure, its state corollaries, and sound principles of public policy. Although such restrictions are generally prohibited by applicable rules and law, the Agency recommends that litigants include a specific provision in any protective order or settlement agreement that provides for disclosure of relevant motor vehicle safety information to NHTSA, regardless of any other restrictions on the disclosure or dissemination of such information.

This notice solicits comments from the public, from counsel, and from other interested parties concerning this proposed enforcement guidance, and best practices to be followed by litigants in private litigation regarding protective orders and settlement agreements that contain confidentiality provisions limiting disclosure of safety-related information.

DATES: All comments should be submitted early enough to ensure that Docket Management receives them not later than October 19, 2015.

ADDRESSES: You may submit comments to the docket number identified in the heading of this document by any of the following methods:

- *Federal eRulemaking Portal:* go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, M–30, U.S. Department of Transportation, West Building Ground Floor, Rm. W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.
- *Hand Delivery or Courier:* U.S. Department of Transportation, West Building Ground Floor, Rm. W12–140, 1200 New Jersey Avenue SE., Washington, DC, 20590 between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* (202) 493–2251.

Regardless of how you submit your comments, you should mention the docket number of this document.

You may call the Docket at 202–366–9324.

Note that all comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Kara Fischer, Office of the Chief Counsel, NCC–111, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590 (telephone: 202–366–8726).

SUPPLEMENTARY INFORMATION: In this notice, NHTSA has begun assembling for guidance and informative purposes an Enforcement Guidance Bulletin which sets forth guiding principles and best practices for private litigants utilizing protective orders and settlement agreements with confidentiality provisions. NHTSA is not establishing a binding set of rules on best practices, or even suggesting that a single set of best practices would apply in all situations. The Agency fully realizes that best practices may vary widely depending on circumstance, and

private litigants remain free to choose the practices that best fit their needs in pursuing litigation.

However, since NHTSA recognizes the public interest in this topic, we solicit public comment before issuing a final ''Enforcement Guidance Bulletin'' document. Commenters who recommend specific best practices should be careful to address the practical impact that those practices may have on individuals and entities of differing size, and the relative costs and benefits of implementing various practices. After receiving comments, we will issue a subsequent notice delineating a final Enforcement Guidance Bulletin for informative purposes. We will also post the Enforcement Guidance Bulletin on the Agency's Web site for easy reference.

In light of the foregoing, NHTSA proposes the following Enforcement Guidance for private litigants pertaining to the use of confidentiality provisions in protective orders and settlement agreements:

The National Highway Traffic Safety Administration (''NHTSA'' or ''the Agency'') is tasked with, among other things, setting Federal Motor Vehicle Safety Standards (''FMVSS''), identifying and ensuring the remedy of safety-related defects, and monitoring and enforcing compliance with these standards to safeguard the well-being of the American public. The only way the Agency can fully achieve these objectives is if it has the necessary information within its grasp, including information discovered or identified in private litigation.

NHTSA's ability to identify and define safety-related motor vehicle defects relies in large part on timely and accurate reporting by manufacturers, suppliers, and various parties throughout the industry, whether by statutory or regulatory requirement or pursuant to compulsory process. Although federal law may require industry participants to report certain information to NHTSA, they do not always do so, or do not do so in a timely manner. Additionally, the type of information an industry participant is required to report varies greatly depending on the product and company size and purpose. While certain entities are required to report both deaths and injuries resulting from the use of their products, others only must report deaths. In those cases, in the absence of a fatal incident a potentially defective product may not come across NHTSA's radar until dozens, if not hundreds, of people have sustained serious injury—if it ever reaches NHTSA at all.

Given these constraints, safety-related information developed or discovered in private litigation is an important resource for NHTSA. Yet confidentiality restrictions imposed as part of a protective order or settlement agreement in private litigation—whether court-sanctioned or privately negotiated—often prevent parties from providing information about potentially dangerous products to the Agency. As many scholarly articles have noted, as has history has borne out, such restrictions have kept critical safety information out of the hands of both regulators and the public. As a matter of law and sound public policy, NHTSA cannot countenance this situation.

There is no doubt that confidentiality provisions, protective orders, and the sealing of cases are appropriate litigation tools in some circumstances. In most instances, however, the interests of public health and safety trump any confidentiality interests. In matters that concern the safety of the American driving public and pedestrians, it is important that entities and individuals are not prevented from providing relevant information to the very Agency tasked with ensuring that safety.

To the extent protective orders, settlement agreements, or other confidentiality provisions prohibit vehicle safety-related information from being transmitted to NHTSA, such limitations are contrary to established principles of public policy and law, including Rule 26 of the Federal Rules of Civil Procedure and its state corollaries which require a showing of good cause to impose confidentiality. The recent General Motors ignition switch and Takata airbag recalls are but two examples of how vital early identification of motor vehicle risks or defects is for the safety and welfare of the American public.

To further this important public policy, the Agency encourages and recommends that parties include a provision in any protective order or settlement agreement that—despite whatever other restrictions on confidentiality are imposed—specifically allows for disclosure of relevant motor vehicle safety information to NHTSA and other applicable government authorities.

I. Legal and Policy Background

''Once a matter is brought before a court for resolution, it is no longer solely the parties' case, but also the public's case.'' *Brown* v. *Advantage Eng'g, Inc.,* 960 F.2d 1013, 1016 (11th Cir. 1992). As a general rule, the public is permitted ''access to litigation documents and information produced during discovery.'' *Phillips* v. *Gen. Motors Corp.,* 307 F.3d 1206, 1210 (9th Cir. 2002). Where there is a presumptive right of public access under the federal rules, courts have discretion upon a showing of ''good cause'' to restrict access to documents or information ''to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.'' Fed. R. Civ. P. 26(c)(1). As the Seventh Circuit has stated, Rule 26(c)'s good cause requirement means that, ''[a]s a general proposition, pretrial discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings.'' *Am. Telephone and Telegraph Co.* v. *Grady,* 594 F.2d 594, 596 (7th Cir. 1978); *see also, Public Citizen* v. *Liggett Group, Inc.,* 858 F.2d 775, 790 (1st Cir. 1988). Trial courts enjoy broad discretion in determining when to issue a protective order and the degree and scope of protection required. *Seattle Times Co.* v. *Rhinehart,* 467 U.S. 20, 36 (1984).

General allegations of harm, unsubstantiated by specific examples or articulated reasoning, however, are insufficient to warrant such an order. *Beckman Indus., Inc.* v. *Int'l Ins. Co.,* 966 F.2d 470, 476 (9th Cir. 1992); *Cipollone* v. *Liggett Group, Inc.,* 785 F.2d 1108, 1121 (3d Cir. 1986). Rather, the burden is on the party seeking protection from disclosure to ''allege specific prejudice or harm'' that will result if the protective order is not granted. *In re Roman Catholic Archbishop of Portland in Oregon,* 661 F.3d 417, 424 (9th Cir. 2011), *cert. denied,* 132 S. Ct. 1867 (2012); *In re Terra Intern., Inc.,* 134 F.3d 302 (5th Cir. 1998) (good cause requirement contemplates a particular and specific demonstration of fact as distinguished from conclusory statements); *Glenmeade Trust Co.* v. *Thompson,* 56 F.3d 476 (3d Cir. 1995) (generalized allegations of injury insufficient to satisfy the good cause requirement for issuance of protective order); *Iowa Beef Processors, Inc.* v. *Bagley,* 601 F.2d 949, 954 n. 5 (8th Cir. 1979) (party seeking protective order bears burden of making ''good cause'' showing that the information being sought falls within scope of Rule 26(c) and that moving party will be harmed by its disclosure).

Even if a court concludes that such harm will result from disclosure, it still must proceed to balance ''the public and private interests to decide whether a protective order is necessary.'' *Phillips,* 307 F.3d at 1211. *See Shingara* v. *Skiles,* 420 F.3d 301, 308 (3d Cir. 2005) (''[A] court always must consider the public interest when deciding whether to impose a protective order.''); *Glenmede*

Trust Co. v. *Thompson,* 56 F.3d 476, 483 (3d Cir. 1995) (''[T]he analysis [of good cause] should always reflect a balancing of private versus public interests.''). In doing so, courts consider a number of factors, including:

> (1) Whether disclosure will violate any privacy interests; (2) whether the information is being sought for a legitimate purpose or for an improper purpose; (3) whether disclosure of the information will cause a party embarrassment; (4) whether confidentiality is being sought over information important to public health and safety; (5) whether the sharing of information among litigants will promote fairness and efficiency; (6) whether a party benefitting from the order of confidentiality is a public entity or official; and (7) whether the case involves issues important to the public.

Glenmede Trust Co., 56 F.3d at 483. *See also In re Roman Catholic Archbishop of Portland in Oregon,* 661 F.3d at 424.

The public's interest in access to court records is strongest when the records concern public health or safety. *See, e.g., Brown & Williamson Tobacco Corp.* v. *F.T.C,* 710 F.2d 1165, 1180–81 (6th Cir. 1983) (vacating district court's sealing of court records involving the content of tar and nicotine in cigarettes and emphasizing that the public had particularly strong interest in the court records at issue because the ''litigation potentially involves the health of citizens who have an interest in knowing the accurate 'tar' and nicotine content of the various brands of cigarettes on the market''); *see also United States* v. *General Motors,* 99 FRD. 610, 612 (D.D.C. 1983) (the ''greater the public's interest in the case the less acceptable are restraints on the public's access to the proceedings''); *In re Air Crash at Lexington, Ky., August 27, 2006,* No. 5:06–CV–316–KSF, 2009 WL 16836289, at *8 (E.D. Ky. June 16, 2009) (noting the ''public has an interest in ascertaining what evidence and records the . . . Court [has] relied upon in reaching [its] decisions,'' and that ''the public interest in a plane crash that resulted in the deaths of forty-nine people is quite strong, as is the public interest in air safety''). In balancing the privacy interests of the party seeking protection, a court ''must consider the need for public dissemination, in order to alert other consumers to potential dangers posed by the product.'' *Koval* v. *Gen. Motors Corp.,* 62 Ohio Misc. 2d 694, 699, 610 NE.2d 1199, 1202 (Com. Pl. 1990) (citing *Hendricks* v. *Jeep Corp.* (D. Mont. June 3, 1986), case No. CV–82–092–M–PGH (unreported) and *United States* v. *Hooker Chemicals & Plastics Corp.,* 90 FRD. 421 (W.D.N.Y. 1981)).

A number of states have enacted ''Sunshine in Litigation'' acts, which thrust the interests of public health and safety into the forefront by preventing parties from concealing safety hazards through settlement agreements or protective orders. Some, such as Florida, broadly forbid courts from entering protective orders that may have the ''purpose or effect of concealing a public hazard or any information concerning a public hazard'' or that ''may be useful to members of the public in protecting themselves from injury.'' Fla. Stat. Ann. § 69.081 (West 2015). Others, such as Texas, establish a presumption that court records—including all documents filed with the court, unfiled settlement agreements, and unfiled discovery documents ''concerning matters that have a probable adverse effect upon the general public health or safety''—are open to the general public; records may be sealed only upon a showing that there is a specific, serious, and substantial interest in nondisclosure which clearly outweighs the presumption of public access and any probable effect on public health or safety. Tex. R. Civ. P. 76a.

A federal corollary introduced on May 14, 2015, currently pending before the House of Representatives, H.R. 2336 (114th Congress, 2015–2017), would create a presumption against protective orders and the sealing of settlements and cases ''in which the pleadings state facts that are relevant to the protection of public health or safety.'' The presumption would control unless a party asks a judge to find that a specific and substantial interest in maintaining secrecy outweighs the public health and safety interest and that the order is no broader than necessary to protect the privacy interest asserted. *Id.* It would also prohibit a court from approving or enforcing a provision that restricts a party from disclosing public health or safety information to any federal or state agency with authority to enforce laws regulating an activity related to such information. *Id.*

Several states have taken a broader approach, enacting statutes and court rules to address the question of whether or not courts should enforce confidentiality agreements, regardless of the subject matter. The common theme of these statutes is a balancing of interests. For example, drawing upon federal precedent requiring consideration of the public interest at stake, Idaho Court Administrative Rule 32 directs courts considering shielding requests to first determine whether the interest in privacy or public disclosure predominates and to ''fashion the least restrictive exception from disclosure consistent with privacy interests.'' Idaho R. Admin. 32(f). *See also* Mich. Ct. R. 8.119(F) (records may be sealed upon showing of good cause and that no less restrictive means are available to protect the interest asserted); D.S.C. LCivR 5.03 (party must state why sealing is necessary and explain why less restrictive alternatives will not afford adequate protection). Indiana's legislature went a step further, requiring an affirmative showing that a public interest will be protected by sealing a record, and mandating that records shall be unsealed as soon as possible after the reason for sealing them no longer exists. Ind. Code § 5–14–3–5.5 (2011). *See also,* Richard Rosen, *Settlement Agreements in Com. Disputes,* n. 103 § 10.04 (2015) (citing to statutory provisions in California, Colorado, Michigan, Montana, New Hampshire, New York, Ohio, Oregon, South Carolina, and Utah). Although the specifics of each provision vary, all are consistent with the notion that the safety of public should be given considerable weight in determining whether to restrict access to information.

Basic contract principles also dictate that the public health and safety concern should be of paramount significance in drafting and approving protective orders and settlement agreements. While parties are generally free to contract as they see fit, ''courts will not hesitate to declare void as against public policy contractual provisions which clearly tend to the injury of the public in some way.'' 17A C.J.S. Contracts § 281 (2015) (internal citations omitted); *see Thomas James Associates, Inc.* v. *Jameson,* 102 F.3d 60, 66 (2d Cir. 1996) (''[C]ourts must not be timid in voiding agreements which tend to injure the public good or contravene some established interest of society.'') (internal quotations and citations omitted); *see also Vasquez* v. *Glassboro Service Ass'n, Inc.,* 83 N.J. 86, 415 A.2d 1156 (1980) (citing text for general proposition that courts have broad power to declare agreements violative of public policy).

''While the term 'public policy' lacks precise definition, . . . it may be stated generally as a legal principle which holds that no one may lawfully do that which has a tendency to injure the public welfare. . . .'' *O'Hara* v. *Ahlgren, Blumenfeld and Kempster,* 537 NE.2d 730 (Ill. 1989). ''An agreement is against public policy if it is injurious to the interests of the public, contravenes some established interest of society, violates some public statute, is against good morals, tends to interfere with the public welfare or safety, or is at war with the interests of society or is in

conflict with the morals of the time.'' *E & B Mktg. Enterprises, Inc.* v. *Ryan,* 568 NE.2d 339, 209 Ill. App. 3d 626 (1st Dist. 1991). *See also Johnson* v. *Peterbilt of Fargo, Inc.,* 438 NW.2d 162 (N.D. 1989) (''Public policy, with respect to contract provisions, is a principle of law whereby a contract provision will not be enforced if it has a tendency to be injurious to the public or against the public good.''). An agreement is unenforceable if the interest in its enforcement is outweighed by the public policy harmed by enforcement of the agreement. 17A C.J.S. Contracts § 281 (citation omitted).

In fact, the Florida Sunshine in Litigation Act specifically codifies this concept: ''Any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard, is void, contrary to public policy, and may not be enforced.'' Fla. Stat. Ann. § 69.081(4). *See also* Ark. Code Ann. § 16–55–122 (2011) (rendering void any settlement provision purporting to restrict disclosure of an environmental hazard). Although the Florida provision broadly addresses any contract, this notion is particularly applicable in the context of protective orders or settlement agreement terms that prevent litigants from disclosing information to NHTSA.

The good cause requirements found in Rule 26 and related state provisions, and the doctrines underlying NHTSA's own regulations all advance the unassailable public policy of maintaining and preserving the health and welfare of the public. This strong policy has been realized and enforced by the refusal of many courts and litigants to engage in protective orders or settlement agreements that keep regulators and the public in the dark about potential safety hazards. *See Culinary Foods, Inc.* v. *Raychem Corp.,* 151 FRD. 297 (N.D. Ill.), *clarified* 153 FRD. 614 (1993) (any information as to whether products liability defendant's products were dangerous, and whether defendant knew of dangers and either failed to take action or attempted to conceal information, would not be encompassed by protective order under discovery rule); *Cipollone* v. *Liggett Group, Inc.,* 113 FRD. 86, 87 (D.N.J. 1986) (''Discovery may well reveal that a product is defective and its continued use dangerous to the consuming public. . . . It is inconceivable to this court that under such circumstances the public interest is not a vital factor to be considered in determining whether to further conceal that information and whether a court should be a party to that concealment.''); *Toe* v. *Cooper Tire & Rubber Co.* (Iowa District Court, Polk County, No. CL 106914) (Order on Defendant's Motion to Continue Protective Order, Jan. 18, 2012) (unsealing transcript where confidential documents related to tire defect were discussed). *See also, Ohio Valley Envtl. Coal.* v. *Elk Run Coal Co., Inc.,* 291 FRD. 114 (S.D. W.Va. 2013) (good cause did not exist for issuance of protective order in environmental group's suit against company because there was no specific showing of identifiable harm company would suffer and case involved issues of importance to public health and safety); *In re Roman Catholic Archbishop of Portland in Oregon,* 661 F.3d 417 (9th Cir.), *cert. denied,* 132 S. Ct. 1867 (2011) (private interest in nondisclosure was not outweighed by public interests in protecting public safety).

II. Recommended Best Practices

Consistent with the foregoing legal and policy background, it is NHTSA's position that protective orders and settlement agreements should not be used to shield critical safety information from the Agency, either intentionally or unintentionally. This is not to say that parties should not enter into these agreements. To the contrary, these tools are often necessary to promote full and complete disclosure, to prevent abuses of the discovery process, and to protect legitimate privacy and proprietary interests. However, as explained above, they cannot be used to preclude disclosure of safety-related information from regulatory agencies and other government authorities. To do so is contrary to law and the underlying policies inherent in Rule 26 and state corollaries, and against sound public policy.

NHTSA recommends that all parties include a provision in any protective order or settlement agreement that—despite whatever other restrictions on confidentiality are imposed, and whether entered into by consent or judicial fiat—specifically allows for disclosure of relevant motor vehicle safety information to NHTSA and other applicable authorities. Such a provision could be stated generically, providing that nothing in the order or agreement shall be construed to prohibit either party from disclosing information to a regulatory agency or governmental entity who has an interest in the subject matter of the underlying suit. For example, the provision could state that ''discovery material may only be disclosed to . . . governmental entities with an interest in the public safety hazards involving [description of product/vehicle].'' Or, it could specifically address NHTSA's interest, as contemplated by the recent NHTSA Consent Order requiring Chrysler to ''develop and implement a plan ensuring that, in safety-related litigation, FCA US uses its best efforts to include in any protective order, settlement agreement, or equivalent, a provision that explicitly allows FCA US to provide information and documents to NHTSA.'' *See* In re: FCA US LLC, AQ14–003, July 24, 2015 Consent Order, Attachment A, p. 27 at ¶ (B)(12), *available at www.safercar.gov/rs/chrysler/pddfs/FCA_Consent_Order.pdf.*

Whatever the language, confidentiality agreements and protective orders should not be utilized to prevent the parties from producing information that implicates public safety to the very entity charged with ensuring and protecting that safety. Instead, such orders and agreements should clearly authorize and facilitate the disclosure of safety-related information to NHTSA. Such a provision is consistent with, and in some cases mandated by, federal and state statutory schemes and regulations and applicable case law, and is wholly in line with principles of sound public policy.

Applicability/Legal Statement: This Enforcement Guidance Bulletin sets forth NHTSA's current interpretation and thinking on this topic and guiding principles and best practices to be utilized in the context of private litigation. This Bulletin is not a final agency action and is intended as guidance only. This Bulletin is not intended, nor can it be relied upon, to create any rights enforceable by any party against NHTSA, the Department of Transportation, or the United States. Moreover, these recommended practices to not establish any defense to any violations of the statutes and regulations that NHTSA administers. This Bulletin may be revised in writing without notice to reflect changes in NHTSA's evaluation and analysis, or to clarify and update text.

Authority: 49 U.S.C. 30101, *et seq.;* delegations of authority at 49 CFR 1.95(a), 501.2(a)(1), 501.5.

Issued: September 14, 2015.

Timothy H. Goodman,

Assistant Chief Counsel for Litigation and Enforcement.

[FR Doc. 2015–23638 Filed 9–18–15; 8:45 am]

BILLING CODE 4910–59–P