INFORMATION REDACTED PURSUANT TO THE FREEDOM OF INFORMATION ACT (FOIA), 5 U.S.C. 552(B)(6)

January 10, 2023

John Donaldson, Acting Chief Counsel
Thomas Healy, Trial Attorney
Office of Chief Counsel
National Highway Traffic Safety Administration
1200 New Jersey Avenue, S.E.
Washington D.C. 20590

Subject: Request for Confidential Treatment –Presentation Regarding the Scope of 20V035

Dear Messrs. Donaldson and Healy;

Today, Mitsubishi Motors North America, Inc. ("MMNA") is voluntarily submitting a presentation concerning the scope of the 20V035 recall. The information contained in the presentation was voluntarily created and is being voluntarily submitted to NHTSA to assist NHTSA's regarding the scope of the 20V035 recall.

Because the presentation consists of confidential business information that satisfies the standards for withholding under Exemption 4 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4), MMNA respectfully requests confidential treatment for the presentation and asks that this information not be disclosed to the public.

The information required under NHTSA regulations at 49 CFR Part 512 is set forth below.

A. Description of the Information (49 C.F.R. § 512.8(a))

The confidential business information consists of information about the use and production volumes of service parts, the analyses undertaken by Mitsubishi Motors Corporation ("MMC") and MMNA regarding the scope of a recall, and information about MMNA and MMC records. In addition, because MMNA and MMC do not customarily disclose the existence or content of voluntary presentations to NHTSA, the entirety of the presentation should be considered confidential.

B. Confidentiality Standard (49 C.F.R. § 512.8(b))

Prior the United States Supreme Court's decision in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019) ("*Food Marketing Institute*"), the submission would have been subject to the voluntary submission standard set forth in 49 C.F.R. § 512.15(d).

C. Justification for Confidential Treatment (49 C.F.R. § 512.8(c))

In *Food Marketing Institute*, the Supreme Court held that information is "confidential" within the meaning of FOIA Exemption 4 when it is "both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy." 139 S. Ct. at 2366.

MMC and MMNA customarily and actually treat the information as private. MMC and MMMA have specifically taken steps to protect the confidentiality of this information by limiting access to the presentation to only a few individuals within MMC and MMNA. In addition, the presentation is marked Mitsubishi Confidential-C to restrict internal and external distribution. To the best of MMNA's knowledge and belief, this confidential information has not been publicly disclosed by MMC or MMNA.

With regard to an "assurance of privacy," the Supreme Court expressly declined to hold that such an assurance actually is a ***necessary*** condition for confidentiality. *See Food Marketing Inst.*, 139 S. Ct. 2363. Because the information at issue in *Food Marketing*

Institute had been provided under a regulatory assurance, the Court did not need to decide that issue. Nor did the Court explain what would suffice for an assurance, if an assurance of some kind were required.

In considering the question of assurances, the United States District Court for the District of Columbia has concluded in numerous cases that an assurance of confidentiality is ***not*** required. *See Naumes v. Dep't of the Army*, 2022WL 594541, at *8 (D.D.C. Feb. 28, 2022) ("This Circuit does not require assurances of privacy as a separate component of confidentiality, and this Court will not 'read the word "confidential" to impose a blanket requirement that the government provide an assurance of privacy in every case in which it asserts Exemption 4.'") (quoting *Renewable Fuels Ass'n v. EPA*, 519 F. Supp. 3d 1, 12 (D.D.C. 2021)); *Cause of Action Inst. v. Export-Import Bank of the U.S.*, 2022 WL 252028, at *18 (D.D.C. Jan. 27, 2022) (stating that the Supreme Court did not resolve whether assurances are a mandatory element of confidentiality under Exemption 4, and "this Court has since explained that binding Circuit precedent compels an answer in the negative"); *Renewable Fuels*, 519 F. Supp. 3d at 12 (declining to require proof of an assurance of confidentiality in part because such a requirement would lead to "many fairly arbitrary disputes over whether such an assurance can be implied").

At most, according to the D.C. district court, an assurance is "relevant but not strictly required." *See Wilson v. FCC*, 2022 WL 4245485, at *7 (D.D.C. Sept. 15, 2022) Indeed, "[i]f anything, courts here have taken the position that privately held information is generally confidential absent an express statement by the agency that it would *not* keep information private, or a clear implication to that effect (for example, a history of releasing the information at issue)." *Id.* at *10 (internal quotation marks and citation omitted).

Moreover, even if an assurance of some kind were required under *Food Marketing Institute,* such an assurance need not take the form of a promise by an agency to protect the confidentiality of confidential business information. Although a promise of confidentiality was involved in *Food Marketing Institute*, in ordinary speech, an actual promise need not be made for information to be communicated "under an assurance of privacy."

The Department of Justice Office of Information Policy ("OIP") recognized that fact in guidance concerning *Food Marketing Institute*. Specifically, OIP instructed agencies that an ***express*** assurance of confidentiality is not required. See Exemption 4 After the Supreme Court's Ruling in *Food Marketing Institute v. Argus Leader Media*, https://www.justice.gov/oip/exemption-4-aftersupreme-courts-ruling-food-marketing-institute-v-argus-leader-media, at 5 (second paragraph in subsection headed "Second Condition – Assurance of Confidentiality by Government") ("[A]n assurance of confidentiality can be either explicit or implicit.").

As the OIP guidance explains, past agency practice with regard to similar information can suffice for establishing an "implied assurance" of confidentiality. *See id.* (second paragraph under subsection headed "Implied Assurance") ("Factors to consider include the government's treatment of similar information . . . . For example, an agency's long history of protecting certain commercial or financial information can serve as an implied assurance to submitters that the agency will continue treating their records in the same manner.").

The United States District Court for the District of Columbia also concluded that, if an assurance of confidentiality were necessary at all, an implied assurances would be sufficient under Exemption 4. *See Flyers Rights Educ. Fund, Inc. v. FAA*, 2021 WL 4206594, at *7-*9 (D.D.C. Sept. 16, 2021) (appeal filed). Having noted that the plaintiff

disputed the FAA's examples of alleged express assurances of privacy, the court found that Boeing had received implied assurances of privacy. Those assurances were derived from the context of the submission and, in particular, from the FAA's past practices with respect to withholding proprietary information. *See id.* at *8-*9.

The court reached a similar conclusion in *Center for Medical Progress v. U.S. Dep't of Health & Human Services.*, 2022 WL 4016617 (D.D.C. Sept. 3, 2022). There, the court found that there were "implied" assurances of confidentiality based on a government declaration stating that the putative Exemption 4 information had been "'routinely withheld at [the National Institutes of Health ("NIH")] and other agencies . . . precisely in recognition of the commercial sensitivity of the information,'" as well as on a submitter declaration indicating the submitter's understanding of and reliance upon NIH's standard practices. *Id.* at *11 (quoting declaration).

MMC and MMNA, as well as other companies, have made many voluntary confidential submissions to NHTSA throughout the years. NHTSA has consistently treated voluntarily submitted information (like today's submission) as confidential if, as is the case here, the submitter of the information does not customarily disclose such information to the public. NHTSA's past practice of treating information like that being submitted today as confidential should be deemed to suffice as an "assurance" of privacy—to the extent that an assurance is required at all.

Thus, the information that MMC and MMNA are submitting is entitled to confidential treatment under *Food Marketing Institute*: The information is both customarily and actually treated as private by MMC and MMNA, and it is being provided to the government with the expectation that NHTSA will continue its past practice of withholding voluntarily-submitted confidential commercial information, except where under a legal requirement to disclose it, or in exceptional circumstances as provided for under 49 C.F.R. § 512.23.

In the post-*Food Marketing Institute* context, the harms sufficient to satisfy the foreseeable harm requirement of 5 U.S.C. § 552(a)(8)(A)(i)(I) include impairment of the legitimate commercial, financial, business, or research interests of the submitter. *See Naumes*, 2022 WL 594541, at *10. Here, the disclosure of the presentation would enable companies competing with MMC and MMNA to assess their practices with regard to, and production of, service parts, and would provide competitively valuable information about their recordkeeping practices and analytic capabilities. Such information could readily be used to compete more effectively against MMC and MMNA without incurring the costs and expending the time necessary for independent development of this information. Such a disclosure, therefore, would foreseeably harm the legitimate commercial, financial, and business interests of MMC and MMNA.

D. Class Determination (49 C.F.R. § 512.8(d))

The information is not subject to a class determination.

E. Duration for Which Confidential Treatment is Sought (49 C.F.R. § 512.8(e))

MMC and MMNA request that this information be accorded confidential treatment indefinitely.

F. Contact Information (49 C.F.R. § 512.8(f))

Please direct all inquiries and responses to Kurt Kurata **at KKurata@mmsa.com.**

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A copy of the presentation and a certificate in support of confidentiality are enclosed.

Because MMC and MMNA are seeking confidential treatment for the presentation in its entirety, a redacted version is not being submitted.

If you receive a request for disclosure of the information, MMC and MMNA respectfully request notification and an opportunity to provide further justification for confidential treatment, if warranted.

Sincerely,



Daniel Ball
Vice President, Aftersales
Mitsubishi Motors North America, Inc.