FCA
FIAT CHRYSLER AUTOMOBILES

Jennifer Shute
Director, Safety Compliance and Product Analysis

May 27, 2022

Ann E. Carlson
Chief Counsel
National Highway Traffic Safety Administration
1200 New Jersey Ave., SE,
Room W41-227
Washington, DC 20590

Re: Request for Confidential Treatment of Business Information Submitted for May 20, 2022, "PE19-017 Meeting" Materials

Dear Ms. Carlson:

FCA US LLC (f/k/a Chrysler Group LLC) ("FCA US") is voluntarily submitting additional information to the National Highway Traffic Safety Administration ("NHTSA") Office of Defects Investigation ("ODI") in connection with the above-referenced meeting.

Based on a careful review of this information, FCA US has determined that the information being provided is confidential and should be accorded confidential treatment under this agency's regulations at 49 C.F.R. Part 512 and Exemption 4 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(4). Therefore, FCA US is submitting this information, together with this request for confidential treatment, to the Office of Chief Counsel.

The information required by Part 512 is set forth below.

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

The business information for which confidential treatment is being sought is within the following enclosure(s):

- **20220520_PE19-017 Update_CONF BUS INFO.pdf,** consisting of one .pdf file containing entire page confidential business information; (Bates page numbers 05/27/2022: – ADDITIONAL REQUEST – VOLUNTARY SUBMISSION –FCA US LLC – 000001-000010). This consists of information provided in response to the above referenced meeting.

The information for which confidential treatment is being sought has a banner at the top indicating that the entire page consists of confidential business information.

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

Prior to the Supreme Court's decision in *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), this submission would have been subject to the confidentiality standard set forth

in 49 C.F.R. § 512.15(b) for information that the submitter is required to submit to the agency. The standard for confidential treatment is now set forth in *Food Marketing Institute*, 139 S. Ct. at 2366.

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 Exemption 4 of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(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.

FCA US customarily and actually treats documents, such as the document for which it is seeking confidential treatment, as private and confidential. FCA US does not disclose such information because they would reveal confidential and commercially valuable information about FCA US's deliberative process and market considerations.

With regard to an "assurance of privacy," the Supreme Court expressly declined to hold that an assurance is a ***necessary*** condition for confidentiality. *Id*. at 2363. Nor did the Court describe the nature of the "assurances" to which it referred.

In considering the question of assurances, the United States District Court for the District of Columbia repeatedly has concluded that an assurance of confidentiality is ***not*** required under D.C. Circuit precedent. *See Naumes v. Dep't of the Army*, Civ. A. No. 21-1670 (JEB), slip op. at 19 (D.D.C. Mar. 1, 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.*, Civ. A. No. 19-1915 (JEB) (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, as a result of the *Food Marketing* decision, *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992) (en banc), which does not refer to assurances, governs the application of FOIA Exemption 4 in the D.C. Circuit, and because such a requirement would lead to "many fairly arbitrary disputes over whether such an assurance can be implied").

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.").

A recent district court opinion reached the same conclusion. *See Flyers Rights Educ. Fund, Inc. v. FAA*, Civ. A. No. 19-3749, slip op. at 17-18 (Sept. 16, 2021) (Mem. Op.). After noting that courts in the district had concluded that assurances are not required (*id.* at 15-16), the court stated that it "need not determine whether the second prong of *Food Marketing* is mandatory because it is satisfied that the withheld information was provided by *Boeing* to the FAA under an 'assurance of privacy'" (*id.* at 16). 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, upon the FAA's past practices with respect to withholding proprietary information. *See id.* at 17-18.

Because the *Critical Mass* voluntary submission standard now governs *all* submissions of information in the D.C. Circuit (*see Renewable Fuels Ass'n*, 519 F. Supp. 3d at 12), NHTSA's prior practice with regard to *voluntary* submissions provides the relevant standard for whether NHTSA's past practice provides an assurance of privacy—if an assurance is required at all. In the context of voluntary submissions, NHTSA has consistently accorded confidential treatment to the kinds of records that are being submitted today—that is, analyses, change histories, design validation information, parts number information, designs, and specifications.

FCA US has voluntarily communicated confidential business information to NHTSA many times over many years. When considering confidential treatment requests for voluntarily-submitted information, NHTSA has adhered to a practice of keeping such information confidential and not disclosing it if—as is the case here—the information for which confidential treatment is being requested consists of information that FCA US does not customarily disclose to the public. Pending further communication with the Office of Chief Counsel, FCA US views this practice as sufficient assurance—assuming that an assurance of some sort is even necessary—for the instant submission.

Accordingly, the confidential treatment of the designated information that FCA US is submitting is warranted because that information is both customarily and actually treated as private by FCA US and is being provided to the government with the expectation that NHTSA will continue its past practice of not disclosing confidential commercial information except where under a legal requirement to do so or in exceptional circumstances as provided for under 49 C.F.R. § 512.23. [1]

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

The information for which confidential treatment is sought does not fit within a class determination.

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

[1] It also is "reasonably foreseeable" (5 U.S.C. § 552(a)(8)(A)(i)(I)) that a disclosure would harm FCA US's commercial interests by providing information that competitors could use for their own benefit. In the post-*Food Marketing Institute* context, reasonably foreseeable harms sufficient to justify withholding under FOIA Exemption 4 include impairment of the legitimate commercial, financial, business, or research interests of the submitter. *See Naumes*, slip op. at 22-23.

FCA US does not anticipate ever adopting a custom of disclosing to the public the kind of information for which confidential treatment is being sought. Therefore, FCA US requests 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 the undersigned at:

800 Chrysler Drive
CIMS 482-00-83
Auburn Hills, MI 48326
(248) 494-2681
Jennifer.Shute@stellantis.com

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If you receive a request for disclosure of the information for which confidential treatment is being sought before you have completed your review of our request, FCA US respectfully requests notification of the request(s) and an opportunity to provide further justification for the confidential treatment of this information, if warranted.

Sincerely,

Jennifer Shute

Enclosures
cc: Mr. Josh Neff