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August 29, 2019

AIR COURIER

Jonathan C. Morrison
Chief Counsel
National Highway Traffic Safety Administration
1200 New Jersey Avenue SE
West Building Room W41-227
Washington, DC 20590

Re: NEF-104car/EA19-001: Mitsubishi Request for Confidential Treatment

Dear Mr. Morrison:

Mitsubishi Motors North America, Inc. (“MMNA”) is responding to the Information Request (“IR”) in the above-referenced proceeding. Because MMNA’s submission includes confidential business information, MMNA is submitting its response through your office with this request for confidential treatment and the attached Certificate in Support of Confidentiality.

Because of the large volume of documents being submitted, MMNA has not been able to conduct an exhaustive review of the documents for confidentiality, but rather has marked all of the documents being submitted today as confidential. MMNA will expeditiously review the documents and will inform you if MMNA concludes that any of the documents are not confidential under the applicable standard.

The information required by NHTSA’s regulations at 49 C.F.R. Part 512 is set forth below.

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

The information is responsive to the IR in the EA19-001, which calls for production data; information about, and documents relating to, complaints, field reports and other reports, claims, lawsuits, and arbitration proceedings; analyses, tests, investigations, and evaluations relating to the alleged defect as defined in the IR; specified testing information; diagrams, specifications, and design information; part information; fault and/or diagnostic codes; engineering drawings, photographs, and documents; and MMNA’s assessments of the alleged defect.

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 substantial-competitive-harm confidentiality standard set forth in 49 C.F.R. § 512.15(b).

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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.” *Food Marketing Inst.*, 139 S. Ct. at 2366.

MMNA both customarily and actually treats the kind of information at issue in this confidential treatment request as confidential.

Regarding “assurance[s] of privacy” (139 S. Ct. at 2366), the Supreme Court expressly declined to hold that an assurance is, in fact, a necessary condition for confidentiality. *Id.* at 2363. Nor did the Court describe the nature of the “assurance” to which it referred.

In ordinary speech, an actual promise of confidentiality by the receiving party is not necessary for something to be communicated in “confidence.” Past practice can suffice for someone to have a reasonable assurance that what is communicated will be held in confidence.

Here, MMNA previously has provided NHTSA with information that is similar to the information that MMNA is submitting today. In the context of voluntary submissions, NHTSA has accorded confidential treatment to information that MMNA has customarily and actually treated as confidential. The confidentiality standard adopted by the Supreme Court in *Food Marketing Institute* is substantially similar to the former voluntary-submission standard. Compare *Food Marketing Inst.*, 139 S. Ct. at 2366, with, e.g., *Center for Auto Safety v. NHTSA*, 244 F.3d 144, 147 (D.C. Cir. 2001); 49 C.F.R. § 512.15(d). Thus, NHTSA’s past practice with regard to voluntary submissions provides a reasonable basis to predict how NHTSA will (and should) evaluate confidentiality requests under *Food Marketing Institute*’s substantially similar confidentiality standard.

In the many instances in which MMNA has previously voluntarily submitted information that MMNA does not customarily disclose to the public, NHTSA has consistently accorded the information confidential treatment. Pending further communication with the Office of Chief Counsel, MMNA views this practice as sufficient assurance—assuming that an assurance of some sort is even necessary—for the confidentiality of the instant submission.

Accordingly, the confidential treatment of the information that MMNA is submitting is warranted because that information is both customarily and actually treated as private by MMNA and is being provided to the government with the expectation and assurance 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.

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Moreover, much of the information that MMNA is submitting today would have qualified for confidential treatment under the substantial-competitive-harm standard that was superseded by *Food Marketing Institute*. Analyses, tests, investigations, and evaluations would, if disclosed, apprise competitors of MMNA's operational capabilities and enable them to replicate MMNA's procedures and methodologies without incurring the substantial costs associated with independent development of these procedures and methodologies. Similarly, the release of testing information would enable competitors to develop their own testing capabilities at a fraction of the investments in time and money that would be required for independent development. The designs, diagrams, and specification information would enable competitors to evaluate and replicate MMNA's designs and specifications. Part information could be invaluable to entities that compete in the after-market against MMNA, as well as to would-be suppliers who wish to negotiate with MMNA. All of these damaging results of a release of such information have been deemed sufficient to establish substantial competitive harm in the past, when that standard applied.

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

The engineering and design drawings are subject to the class determination set forth in paragraph (1) of Appendix B to Part 512.

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

Because MMNA does not anticipate ever adopting a practice of disclosing such information in the future, and the information will retain its competitive value indefinitely, MMNA requests that the information be accorded confidential treatment permanently.

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

Please direct all inquiries to the undersigned at the address and telephone number on the letterhead.

A certificate in support of confidentiality is attached.

The information being submitted today may include personal identifying information of consumers and other individuals. We understand that, under the Privacy Act and FOIA Exemption 6, NHTSA must redact or otherwise remove all such information prior to publicly disclosing documents containing such information.

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

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Sincerely, 




Adam C Sloane

cc: Kurt Kurata