FCA
FIAT CHRYSLER AUTOMOBILES

Thomas McCarthy
Head, Vehicle Safety Compliance and
Product Analysis

February 28, 2020

Jonathan C. Morrison
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 Regarding PE19-017

Dear Mr. Morrison:

FCA US LLC (f/k/a Chrysler Group LLC) ("FCA US") is submitting information to the NHTSA Office of Defects Investigation ("ODI") in connection with the above-referenced investigation.

Based on a careful review of this information, FCA US has determined that some of the information 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 the enclosed USB Flash Drives[1], together with this request for confidential treatment and Certificate in Support of Request for Confidentiality, 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 described in the enclosed table titled "2020 02 28 CBI ENCLOSURE TABLE - PE19017.pdf."

Where possible, the information for which confidential treatment is being sought has been indicated with highlighting and/or a banner at the top of the page indicating that some or all of the 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

[1] FCA US has taken steps to assure that the USB Flash Drives are free of any errors or defects that would prevent NHTSA from opening the files. If, however, the agency is unable to open the files, FCA US respectfully requests that the agency inform FCA US of the issue, so that FCA US may take steps to supply NHTSA's Office of Chief Counsel with a drive that is fully functional.

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 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.

FCA US customarily and actually treats the information for which confidential treatment is being requested as private, as do the suppliers of certain materials that are being submitted today.

With regard to assurances of privacy, 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 "assurances" to which it referred.

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 recently-issued guidance. 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-after-supreme-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.").

Here, FCA US has made many submissions of similar information to NHTSA over the years. NHTSA has consistently accorded confidential treatment to the kinds of records that are being submitted today—that is, analyses, tests, change histories, summaries of numbers of service contracts sold, failure mode analyses, trend data, remedy and corrective action analyses, materials information, comparative warranty data, lab reports, product evaluation and returned part analyses, analyses of customer complaints derived from proprietary tracking systems, parts number and parts sales information, designs, specifications, and product evaluation and analysis reports. In particular (though by no means exclusively), NHTSA has accorded such information confidential treatment in the context of voluntary submissions.

NHTSA's past practices in the voluntary-submission context are significant under *Food Marketing Institute* because the confidentiality standard that the Supreme Court adopted in that case is 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* similar confidentiality standard, even when the submissions at issue are legally compelled.

Moreover, much of the information that FCA US 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 FCA US's operational capabilities and enable them to replicate FCA US'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, materials, and specification information contained in these documents would also enable competitors to evaluate and replicate FCA US's designs, materials, and specifications. Part information could be invaluable to entities that compete in the after-market against FCA US, as well as to would-be suppliers who wish to negotiate with FCA US. Design change information could reveal competitively-valuable information about FCA US's design philosophy, operational capabilities, and the robustness of various design options, which would enable competitors to replicate FCA US's designs, assess FCA US's competitive strengths, and avoid the trial and error involved in independent design development. Information about the number of sales of service contracts would enable competitors in the extended service contracts market to evaluate FCA US's market strength and better compete against FCA US in that market. Trend data and comparative warranty data would provide competitors with valuable information about the market without having to incur the substantial costs that would otherwise be required to develop such information independently. The foregoing harms to competitive positions apply equally to FCA's suppliers which are the source of some of the information for which confidentiality is requested. 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.

Accordingly, the confidential treatment of the 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 an assurance of privacy derived from the expectation that NHTSA will continue its past practice—established both in the voluntary- and compelled-submission contexts—of not disclosing confidential commercial information of the kind at issue here.

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))

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) 512-3771
Thomas.McCarthy@fcagroup.com

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FCA US is seeking certificates in support of confidentiality from entities that supplied some of the information for which FCA US is seeking confidential treatment. FCA US will forward those certificates to you upon receipt.

The submission includes VINs from which customer identities may be derivable. FCA US assumes that NHTSA will redact these VINs and any other Personal Identifying Information prior to disclosing any of the submitted information to the public.

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,

[redacted]

Thomas McCarthy

Enclosures

cc: Mr. Scott Yon

Certificate in Support of Request for Confidentiality

I, Thomas McCarthy, pursuant to the provisions of 49 C.F.R. Part 512, state as follows:

(1) I am FCA US LLC's (f/k/a Chrysler Group LLC) Head, Vehicle Safely Compliance and Product Analysis and I am authorized by FCA US LLC to execute documents on its behalf;

(2) I certify that the information contained in the attached documents is confidential and proprietary data and is being submitted with the claim that it is entitled to confidential treatment under 5 U.S.C. 552(b)(4);

(3) I hereby request that the information contained in the indicated documents be protected on a permanent basis;

(4) This certification is based on the information provided by the responsible FCA US LLC personnel who have authority in the normal course of business to release the information for which a claim of confidentiality has been made to ascertain whether such information has ever been released outside FCA US LLC;

(5) Based upon that information, to the best of my knowledge, information and belief, the information for which FCA US LLC has claimed confidential treatment has never been released or become available outside FCA US LLC, except to certain contractors of FCA US LLC with the understanding that such information must be maintained in strict confidence;

(6) I make no representations beyond those contained in this certificate and, in particular, I make no representations as to whether this information may become available outside FCA US LLC because of unauthorized or inadvertent disclosure (except as stated in paragraph 5); and

(7) I certify under penalty of perjury that the foregoing is true and correct.

Executed on February 28, 2020.

[redacted]

Thomas McCarthy