M. KRISTIN GLAZNER
SVP, General Counsel and Chief Human
Resources Officer, & Secretary

Direct Dial: 765.771.5595
kristin.glazner@wabashnational.com

January 10, 2022

EMAILED VIA SECURED LINK TO:
daniel.rabinovitz@dot.gov

Ann Carlson
Chief Counsel
National Highway Traffic Safety Administration
1200 New Jersey Avenue, SE, Room W41-227
Washington, D.C. 20590

RE: Request for confidential treatment of Wabash National Corporation submission in response to DP21-004

Dear Ms. Carlson,

Wabash National Corporation ("Wabash") hereby submits our response to the National Highway Traffic Safety Administration's December 9, 2021, letter requesting information related to the agency's assessment of side underride guards under DP21-004.

Wabash has determined that the contents of this response are confidential and should be accorded confidential treatment under the agency's regulations at 49 CFR Part 512 and Exemption 4 of the Freedom of Information Act ("FOIA"), 5 USC § 552(b)(4). Therefore, Wabash requests confidential treatment of this response and submits the information required under 49 CFR Part 512, including my signed Certificate in Support of Request for Confidentiality.

In order to facilitate the prompt and efficient flow of updated or additional information, Wabash reserves the right to rely on this Request and Certificate as applicable to any and all subsequent submissions of confidential information relating to this matter. I understand that this approach should be acceptable for all such future submissions, however if my understanding is inaccurate, please promptly contact me.

A. Description of the Information; 49 CFR § 512.8(a)

The above-referenced information, compiled in the document entitled "Wabash Response to Information Request Re DP21-004" (hereinafter the "Document"), contains commercial and financial information, including an evaluation of products still under development by the company. Wabash customarily and actually treats such information as confidential as part of our daily operations.

B. Confidentiality Standard; 49 CFR § 512.8(b)

The Document qualifies for confidential treatment under 49 CFR § 512.15(b) because it is commercial information that Wabash customarily and actually treats as private and which, if made public, would likely cause substantial harm to the competitive position of Wabash.

C. Justification for Confidential Treatment; 49 CFR § 512.8(c)

General: Part 512 establishes the "procedures and standards by which NHTSA will consider claims that information submitted to the agency is entitled to confidential treatment under 5 USC 552(b), most often because it constitutes confidential business information as described in 5 USC § 552(b)(4), and to address the treatment of information determined to be entitled confidential treatment." 49 CFR § 512.1.

Determining whether to grant confidential treatment to information provided to NHTSA by businesses is therefore guided by case law interpreting FOIA Exemption 4.

Substantial Competitive Harm: Release of the Document would cause substantial harm to the competitive position of Wabash because it would disclose commercial information Wabash customarily keeps private. FOIA Exemption 4 protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." 5 USC § 552(b)(4). The word "confidential" is not defined in FOIA, but a recent Supreme Court decision defined "confidential" information in this context to mean information that is "private" or "secret." *See Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019).

In *Argus Leader*, the Court rejected the test established by *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), which required submitters to establish a likelihood of "substantial competitive harm" to receive confidential treatment. *Argus Leader*, 139 S. Ct. at 2364-65. The Supreme Court held that "at least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is 'confidential' within the meaning of Exemption 4." *Id.* at 2363. In guidance released after the *Argus Leader* decision, the U.S. Department of Justice directed that "agencies should no longer apply the 'substantial competitive harm' test from *Nat'l Parks* to determine whether information is 'confidential' under Exemption 4. Rather, as the Supreme Court detailed in its opinion, agencies should apply the ordinary meaning of that term." *Exemption 4 After the Supreme Court's Ruling in Food Mktg. Inst. v. Argus Leader Media*, DOJ (Oct. 4, 2019), https://www.justice.gov/oip/exemption-4-after-supreme-courts-ruling-food-marketing-institute-v-argus-leader-media.

The information in the Document meets the *Argus* standard in that Wabash customarily and actually treats this information as private, and Wabash has provided it to NHTSA via this request, in order that it be treated as confidential by the agency and thus exempt from disclosure. This Document has not been shared outside of Wabash, but if it were, this would only be done with an expectation of complete confidentiality.

D. Class Determination; 49 CFR § 512.8(d)

The information in the Documents is not subject to a Class Determination under Appendix B.

E. Duration for which Confidential Treatment is Sought; 49 CFR § 512.8(e)

Because the Document for which Wabash seeks confidential treatment is the type Wabash does not anticipate ever actually or customarily disclosing to the public, Wabash requests that NHTSA permanently treat the Document as confidential.

F. Contact Information; 49 CFR § 512.8(f)

Please direct all inquiries to the undersigned at:

1000 Sagamore Parkway
South Lafayette, IN 47905



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Corporate Secretary
Wabash National Corporation