FCA
FIAT CHRYSLER AUTOMOBILES

Jennifer Shute
Director, Safety Compliance and Product Analysis

October 14, 2021

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 Regarding PE21-016

Dear Ms. Carlson:

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 information via secure file transfer, 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 20211014 CBI ENCLOSURE TABLE – PE21-016.pdf.

The information for which confidential treatment is being sought has been indicated with a banner at the top of the page stating 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 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.

[1] FCA US has taken steps to assure that the zip files sent via secure file transfer are free of any errors or defects that would prevent NHTSA from opening the files on 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 file that is fully functional.

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 who are the source of certain of the materials being submitted.

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.

In considering the question of assurances, the United States District Court for the District of Columbia recently has concluded that an assurance of confidentiality is ***not*** required under D.C. Circuit precedent. *See Renewable Fuels Ass'n v. U.S. EPA*, 2021 WL 602913, at *7-*8 (D.D.C. Feb. 16, 2021) (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.").

The United States District Court for the District of Columbia recently concluded that implied assurances were sufficient under Exemption 4. *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*, 2021 WL 602913, at *7-*8), 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, 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, draft documents and product evaluation and analysis reports.

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 aftermarket against FCA US, as well as to would-be suppliers who wish to negotiate with FCA US. The foregoing harms to FCA US's competitive position apply equally to FCA US'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) 494-2681
Jennifer.Shute@stellantis.com

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FCA US is including, with this submission, a certificate in support of confidentiality from an entity that supplied some of the information for which FCA US is seeking confidential treatment.

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,

Jennifer Shute

Enclosures

cc: Mr. Bruce York