receiving a full refund within 30 days or participating in respondent's new credit-counseling service without additional charge.

DATE: Complaint and Order issued Oct. 29, 1985.[1]

FOR FURTHER INFORMATION CONTACT: John F. Lefevre, FTC/I-500, Washington, DC 20580. (202) 724-1185.

SUPPLEMENTARY INFORMATION: On Monday, July 29, 1985, there was published in the **Federal Register**, 50 FR 30717, a proposed consent agreement with analysis In the Matter of Service One International Corporation, a corporation, also trading and doing business as Service One Corporation and First Credit Services, and Reza Fayazi and Ali Fayazi, individually and as officers of said corporations, for the purpose of soliciting public comment. Interested parties were given sixty (60) days in which to submit comments, suggestions or objections regarding the proposed form of order.

No comments having been received, the Commission has ordered the issuance of the complaint in the form contemplated by the agreement, made its jurisdictional findings and entered its order to cease and desist, as set forth in the proposed consent agreement, in disposition of this proceeding.

The prohibited trade practices and/or corrective actions, as codified under 16 CFR Part 13, are as follows: Subpart—Advertising Falsely or Misleadingly: § 13.15 Business status, advantages, or connections; § 13.15-70 Financing activities; S 13.50 Dealer or seller assistance; § 13.70 Fictitious or misleading guaranties; § 13.71 Financing; § 13.175 Quality of product or service; § 13.185 Refunds, repairs, and replacements. Subpart—Corrective Actions and/or Requirements: § 13.533 Corrective actions and/or requirements; § 13.533-20 Disclosures. Subpart—Furnishing False Guaranties: § 13.1053 Furnishing False guaranties. Subpart—Misrepresenting Oneself and Goods—Business Status, Advantages or Connections: § 13.1395 Connections and arrangements with others; § 13.1417 Financing activities.—Goods; § 13.1725 Refunds.

List of Subjects in 16 CFR Part 13

Consumer credit, Credit cards, Trade practices.

[1] Copies of the Complaint and the Decision and Order are filed with the original document.

(Sec. 6, 38 Stat. 721; 15 U.S.C. 46. Interprets or applies sec. 5, 38 Stat. 719, as amended; 15 U.S.C. 45)

Emily H. Rock,

Secretary.

[FR Doc. 85-28328 Filed 11-26-85; 8:45 am]

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DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

[Docket No. H-022C]

Hazard Communication

AGENCY: Occupational Safety and Health Administration (OSHA); Labor.

ACTION: Interim final rule, and corrections.

SUMMARY: On November 25, 1983, OSHA published a final rule in the **Federal Register** entitled "Hazard Communications" (48 FR 53280) (29 CFR 1910.1200). Various aspects of the rule were subsequently challenged in the U.S. Court of Appeals for the Third Circuit. On May 24, 1985. the Third Circuit issued its decision on the rule, upholding the OSHA standard in most respects. *United Steelworkers of American* v. *Auchter*. 763 F. 2d 728 (3d Cir. 1985).

This publication responds to the Court's orders with regard to the Hazard Communication Standard's trade secret definition and access of employees and their representatives to trade secrets. The other issue remanded by the Court—the scope of industries covered—will be addressed by the Agency in a separate rulemaking action.

OSHA is publishing these modifications to the Hazard Communication Standard as an interim final rule to be effective upon its publication; as close to November 25, 1985 as possible—the date by which chemical manufacturers and importers were to assess the hazards of the chemicals they produce or import, and were to begin to transmit information on such hazards to employees and employers in the manufacturing sector by means of container labels and material safety data sheets. OSHA invites those affected by the interim rule to submit comments on the issues presented. A final determination will be made after the Agency receives and reviews the public's comments. In addition, two typographical errors in the trade secret access provisions are corrected.

DATES: The interim final rue is effective on November 29, 1985.

Comments must be received on or before January 27, 1986.

ADDRESS: Written comments should be submitted, in quadruplicate, to the Docket Officer, Docket NO. H-022C, Occupational Safety and Health Administration, Room N3670, 200 Constitution Avenue NW., Washington, DC 20210; (202) 523-7894.

Written comments received, as well as all other information already included in Docket H-022, will be available for inspection and copying in Room N3670 at the above address, from 8:15 a.m. to 4:45 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Mr. James F. Foster, Director, Office of Information and Consumer Affairs, Occupational Safety and Health Administration, Room N3637, 200 Constitution Avenue NW., Washington, DC 20210; (202) 523-8148.

SUPPLEMENTARY INFORMATION: References to the rulemaking record are made in the text of this document. The following abbreviations have been used:

1. Ex.: Exhibit number in Docket H-022,

2. Tr.: Hearing transcript page number.

I. Background

OSHA published its final Hazard Communication Standard (HCS) on November 25, 1983. The purpose of the HCS is to provide employees in the manufacturing sector with information about the identity and hazards of the chemicals to which they are exposed in their workplaces. The standard is designed to accomplish this by requiring producers of chemicals, (chemical manufacturers and importers) to evaluate the hazards of the chemicals they produce or import, and to prepare container labels and material safety data sheet conveying this hazard information, as well as precautions for safe handling and use. These labels and meterial safety data sheets are then required to be transmitted to employers purchasing these chemicals. All employers in the manufacturing sector are required to have hazard communication programs for their employees, to transmit and explain hazard information to them through the required labels and material safety data sheets, as well as through employee training programs. For a detailed explanation of the rule's requirements, please see 48 FR 53334-53340. The rule itself was published at

48 FR 53340–53348, and is codified at 29 CFR 1910.1200.

The underlying purpose of these information transmittal requirements in the HCS is to reduce the incidence of chemical source illnesses and injuries in the manufacturing sector. OSHA believes, and the record supports, that when employers have complete information on the hazards of the chemicals in their workplaces, they are better able to devise and implement protective measures for their employees. When employees have such information, they are better able to support and participate in these protective programs, and to take steps to protect themselves.

On November 22, 1983, petitions for judical review of the HCS were filed in the U.S. Court of Appeals for the Third Circuit by the United Steelworkers of America, AFL–CIO, and by Public Citizen Inc., representing themselves and a number of labor groups. Motions to intervene in the case were filed by the Chemical Manufacturers Association, the American Petroleum Institute, the National Paint and Coatings Association, and the States of New York, Connecticut, and New Jersey. In addition, petitions for review of the standard were filed by the State of Massachusetts in the First Circuit; the State of New York in the Second Circuit; the State of Illinois in the Seventh Circuit; the Flavor and Extract Manufacturers' Association in the Fourth Circuit; and the Fragrance Materials Association in the District of Columbia Circuit. These cases were transferred to the Third Circuit and consolidated into one proceeding. The cases brought by the Flavor and Extract Manufacturers' Association and the Fragrance Materials Association were subsequently withdrawn.

The Court issued its decision on May 24, 1985. The rule was upheld in most respects. The Court remanded the HCS to the Agency for reconsideration and revision of three aspects: (1) To broaden the scope of industries covered to include employees exposed to hazardous chemicals in non-manufacturing industries, except to the extent that it is infeasible; (2) to narrow the definition of "trade secret" incorporated into the rule to ensure that it is not broader than applicable state laws, and does not permit chemical identities to be claimed as trade secrets if such identities can be readily discovered through reverse engineering; and (3) to extend access to trade secret information in non-emergency situations to employees and collective bargaining agents.

Since the first compliance date for the rule was November 25, 1985, OSHA believes it is imperative to have trade secret provisions, revised in accordance with the Court's direction, in place as soon after that date as possible. This is necessary to avoid confusion about the requirements of the standard. Therefore, the Agency determined that the issue of broadening the scope of industries covered should be dealt with in a separate rulemaking action so as not to delay completion of the trade secret revisions. OSHA believes that it is not in the best interests of employee protection to delay the effective dates of the HCS rule to provide time to comply with the Court's order, and that dealing with the remanded issues separately will ensure that those employees currently covered by the rule will receive the protection provided as close to the scheduled effective dates as possible.

II. Summary and Explanation of the Interim Final Rule, and Corrections

The treatment of hazardous chemical identities that are considered to be trade secrets by the chemical manufacturer, importer, or employer, was clearly one of the most difficult issues addressed during the development of the HCS. The information required to be given to employees under the HCS includes the specific chemical identity of the hazardous chemicals to which they are exposed, as well as information regarding the hazards of the substances, physical and chemical characteristics, and precautions for safe handling and use. Although all participants in the rulemaking substantially agreed on the need for disclosure of hazard information and precautionary measures, there was less agreement regarding the need to divulge specific chemical identity information. *See generally* 48 FR 53312–14.

Employee representatives generally supported requiring employers to disclose all chemical identities, including those that are trade secrets, particularly to ensure that they would have such identities to enable them to do independent evaluations of the hazards of the substances if they wished to do so. *See* 48 FR 53313. *See also* Exs. 19–172, 19–175, 122, 123, 168, and 180A; Tr. 305, 612, 1647, 1838, 1938, 2092, 2235, 2643, 2693, 2934, 3057, 3105, 3279, 3602, 3640, 3788, 3978, 4031, 4107. Downstream employers who purchase chemicals from chemical manufacturers and are therefore dependent upon them for chemical identity information, expressed views similar to the unions' with respect to their own need for access to trade secret identity information. *See* 48 FR 53313–14. *See also* Exs. 19–73, 19–150, 19–201; Tr. 564, 675–681, 3684–86.

Conversely, chemical manufacturers, particularly those engaged in formulating mixtures of chemicals, stressed the importance of protecting trade secret chemical identities. These employers argued that chemical identities are legitimate trade secrets in some situations, that protection of *bona fide* trade secrets is well-recognized in common law, and that such trade secrets are often essential to maintaining a viable business. *See* 48 FR 53312–13. *See also* Exs. 19–44, 19–36, 19–87, 19–91, 19–115, 19–155, 19–165, 19–168, 27–15, 177, 179, 182.

The general policy of OSHA reflected in the HCS is that the interests of employee safety and health are best served by full disclosure of chemical identity information. OSHA acknowledges, however, and the record in this proceeding fully supports, the critical need to protect trade secret information because the economic well-being of the employer and its employees may be dependent upon the protection of such information, and once lost, its value as a trade secret cannot be recaptured. OSHA took into account these competing concerns by requiring disclosure of the specific chemical identity to employees, and downstream employers and their employees, in all cases except those few where it is a *bona fide* trade secret. The HCS further requires that even trade secret identities of chemicals be divulged to health professionals providing medical or other occupational health services to exposed employees, provided that the health professional can demonstrate a need for the information, and the means to maintain its confidentiality.

In response to the Third Circuit Court of Appeals order, OSHA is amending its trade secret definition to better reflect the nation's common law, and is extending access to trade secret chemical identities to employees and their designated representatives who demonstrate a "need-to-know" the information, and the means to maintain its confidentiality.

A: Definition of "Trade Secret"

The trade secret concept has been described by courts and textwriters in various ways, and is at best "nebulous". *See* 55 American Jurisprudence 2d section 705 (1971). A trade secret is essentially anything which a business in fact keeps secret from its competitors and the public, provided it is minimally novel and commercially valuable. *Restatement of Torts*, section 757, comment *b* (1939); Cavitch, *Business*

Organizations section 232.01 (1975). Absolute secrecy is not essential; the trade secret may be divulged to employees or licensees with a "need-to-know", provided the holder of the secret has taken the steps to restrict unnecessary access to, and the use of, this privileged knowledge. Cavitch, *supra*, section 232.01[1]. In addition, others may also know of the secret, as for example, when they have discovered the information by independent invention and are also keeping it secret. *Restatement, supra*, at 6. Nevertheless, a substantial element of secrecy must exist, so that it would be difficult for another to acquire the information except by improper means. *Id.* Matters of public knowledge within the business, as well as matters that are "fully available and easily obtainable", cannot be trade secrets. Cavitch, *supra*, at section 232.01[1].

Trade secret protection entitles the holder of a trade secret to its commercial exploitation and to certain judicial remedies for a breach of confidence or dispossession of the trade secret through improper or unethical means (industrial theft, bribery, spying, etc.). The existence of a trade secret, however, will not protect against "discovery by fair and honest means, such as independent invention, accidental disclosure, or by so-called reverse engineering," that is by starting with the known product and working backwards to divine its constituents or process of manufacture. *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470, 476 (1974).

The United States Supreme Court has identified the maintenance of standards of commercial ethics and the encouragement of invention as the broadly stated policies behind trade secret law. *Kewanee Oil Co.* v. *Bicron Corp., id.* at 481. Unlike patents or copyrights, however, there is no comprehensive Federal law of trade secrets, as it is basically a State-created right.

The conflict between hazard communication and trade secret interests arises whenever an employer is asked to reveal information, such as the identity of a chemical, which he or she considers to be a trade secret. While most trade secrets relate to process information, or formula or percentage mixture information, none of which is required to be disclosed by the standard, the identity of a chemical or mixture ingredient may itself be a *bona fide* trade secret.

The HCS requires that the specific chemical identity of each hazardous chemical be indicated on the material safety data sheet for the substance, unless the specific chemical identity is a *bona fide* trade secret. 29 CFR 1910.1200(g)(2). The "specific chemical identity" of a substance is defined in the standard as "the chemical name, Chemical Abstracts Service (CAS) Registry Number, or any other information that reveals the precise chemical designation of the substance". 29 CFR 1910.1200(c).

In the proposed standard for Hazard Communication (March 19, 1982; 47 FR 12092), OSHA did not include a definition for "trade secret". However, a number of participants in the rulemaking urged the Agency to include such a definition in the final rule. *See* 48 FR 53314 (referencing Exs. 19–65, 19–91, 19–116, 19–155, 19–164, 19A–11, 182). *See also* Comments of AFL–CIO, et al., Ex. 180A at 72 ("[F]further guidance to employers and employees should be provided . . . outlining the factors OSHA will consider, in accordance with applicable law, in determining whether a trade secret claim has been substantiated.") The Chemical Manufacturers Association (Ex. 19–91; 182), Procter and Gamble (Ex. 19–116), and Michelin Tire Company (Ex. 19–155), each recommended that a definition be taken from the *Restatement of Torts* section 757 (1939), since it is widely accepted and has been adopted by the common and statutory law of many states. 48 FR 53314.

In response to these comments, OSHA adopted a trade secret definition derived from the commentary in *Restatement of Torts* section 757, comment *b* (1939). The *Restatement of Torts* was published by the American Law Institute (ALI) in 1939 as an "orderly statement of the general common law of the United States . . . ." *Introduction* to *Restatement of Torts* at x ("The sections . . . may be regarded both as the product of expert opinion and as the expression of the law by the legal profession.").

The *Restatement's* trade secret definition is certainly the most often used. The Supreme Court, in its leading decision on trade secrets, used the *Restatement* definition and called it "widely relied-upon." *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. at 474. The major treatise on the subject states, "[t]he most comprehensive definition is that . . . set out in [the] *Restatement*. . . . Various portions of [Section 757], comment *b*, have been cited approvingly in many jurisdictions." 12 Business Organizations, *Milgrim on Trade Secrets*, section 2.01, at 3 (hereinafter *Milgrim*). *See also Milgrim* section 2.01, at 3 n.2 (listing over one hundred and fifty cases in numerous state and Federal jurisdictions that cited the *Restatement* approvingly). The *Restatement's* "principles became primary authority by adoption in virtually every reported case." Klitzke, *The Uniform Trade Secrets Act*. 64 Marquette Law Review 277, 282 (1980).

Therefore, OSHA selected a trade secret definition for the HCS based on the first sentence of the *Restatement's* comments regarding the definition of trade secrets, which reads:

> A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.

OSHA, however, modified this general definition by adding a parenthetical phrase regarding chemical identities. Thus, the HCS trade secret definition read:

> "Trade secret" means any confidential formula, pattern, process, device, information or compilation of information (including chemical name or other unique chemical identifier) that is used in an employer's business, and that gives the employer an opportunity to obtain an advantage over competitors who do not know or use it. 29 CFR 1910.1200(c).

The Agency added the parenthetical phrase to clarify that the only type of trade secret information that would be subject to disclosure under this rule would be that dealing with specific chemical identity, not the more common process or percentage types of trade secrets mentioned above.

The Third Circuit Court of Appeals was not persuaded that the addition of this parenthetical phrase served merely to clarify the definition. The Court concluded that the addition of the parenthetical phrase broadened the definition by providing protection for chemical identities which are determinable by reverse engineering, thus permitting information to be considered a trade secret in situations where states utilizing the *Restatement* definition would not. 763 F.2d at 740. The Court directed OSHA "to reconsider a trade secret definition which will not include chemical identity information that is readily discoverable through reverse engineering." *Id.* at 743.

OSHA did not intend through inclusion of the parenthetical phrase to allow employers to make spurious claims of trade secrecy, or even to change the criteria currently used in common practice to determine the legitimacy of a trade secret claim. "[The] definition adopted . . . was not intended to exclude the various factors noted in the [Restatement] comment. Rather they

remain relevant to construing the definition." Brief for the Secretary of Labor at 66 n.61. The HCS requires employers to substantiate the legitimacy of their trade secret claims (29 CFR 1910.1200 (i)(7)(iii)). OSHA maintains that this is the appropriate approach, and that employers should continue to bear the burden of demonstrating that their trade secret claim is *bona fide*. The Agency will evaluate the appropriateness of that substantiation in the event that an employer denies a request for disclosure of the trade secret, and a complaint is made to OSHA.

To carry out the Court's direction regarding the definition, and clarify the intent of the Agency with regard to enforcement of the rule, OSHA is hereby deleting the parenthetical phrase included in the definition of trade secret. This makes the definition identical to the *Restatement of Torts* definition, eliminates the potential for interpreting the definition in a broader manner than was intended, and, therefore, is consistent with state laws.

It should be noted, however, that the *Restatement of Torts* section 757, comment *b*, does not define trade secrets in "blackletter law." As the *Restatement* itself acknowledges: "An exact definition of a trade secret is not possible." *Accord Milgrim* section 2.01, at 16–17; 55 Am. Jur. 2d section 705 (1971). The *Restatement* is a commentary on the commonly accepted factors that should be considered when determining whether given business information is a trade secret. The determination is a factual question—it must be made based on the facts of the particular case. *See Milgrim* section 203, at 32:

Therefore, to fully respond to the Court's concerns and to help ensure uniform interpretation by affected parties, OSHA is adopting the principles enunicated by the *Restatement*. Section 757, comment *b*, as the criteria the Agency will use to evaluate an employer's substantiation of a trade secret claim. OSHA is publishing, verbatim, the *Restatement of Torts*, section 757, comment *b* (1939), in a new Appendix D to 29 CFR 1910.1200.

OSHA is publishing the pertinent provisions of the *Restatement* with the knowledge that the ALI has chosen to omit trade secret commentary, along with other Restatements of the law regarding unfair trade practices, from the *Second Restatement of Torts* published in 1979. The omission was made, according to ALI, because the fields of Unfair Competition and Trade Regulations, within which trade secret law falls, have developed into independent bodies of law with little reliance upon the traditional principles of Tort law. 4 *Restatement of Torts*, 2d 1–2 (1979). OSHA is publishing section 757, comment *b*, because the Restatement no longer contains the trade secret provisions and they are still apposite. *See, e.g. FMC Corp.* v. *Taiwan Tainan Giant Industrial Co.*, sections 730 F.2d 61, 63 & n.3 (2d Cir. 1984) (applying New York law which follows *Restatement* section 757, comment *b*, despite the Second Restatement's omission of those provisions).

The *Restatement* section 757, comment *b* lists six factors to be examined when determining whether a trade secret exists. These factors are commonly accepted as being indicative of a legitimate trade secret claim. *Accord* McGarity & Shapiro, *The Trade Secret Status of Health and Safety Testing Information: Reforming Agency Disclosure Policies*, 93 Harvard Law Review 837, 862 n.126 (1980) ("The oft-quoted factors for determining trade secrecy. . . .").

The first of these factors is the extent to which the information is known outside of the employer's business. If the information is widely known, the employer cannot make a credible argument for the specific chemical identity being a legitimate trade secret, and thus justify withholding it from health professionals, downstream employers, and employees.

The second factor is the extent to which the information is known by employees and others involved in the business. If the specific chemical identity is truly a trade secret, it can be expected that the employer would use some means to limit access to it within the facility.

A related factor is the extent of measures taken by the employer to guard the secrecy of the information. If a specific chemical identity is a trade secret, it can be assumed that security measures to protect the information would be designed and implemented by the employer.

The trade secret must have some value to the employer or to his competitors. If holding the information as a trade secret does not result in a competitive or economic advantage to the employer, then the existence of a legitimate trade secret is questionable.

The amount of effort or money expended by the employer in developing the information is also a factor to be considered. Many employers spend considerable time and effort developing novel products, and protection of the information allows them to develop a market and recoup the costs of development. Such effort would help establish the legitimacy of the trade secret as well. It should be noted that some employers might be able to obtain a patent for this type of information, and thus gain exclusive use of their findings for some specified period of time. In this situation a trade secret cannot be claimed because the information must be divulged to obtain the patent, and is thus public.

The sixth factor is the ease or difficulty with which the information could be properly acquired or duplicated by others. This is the factor related to the reverse engineering concept that was of concern to the Court. If the specific chemical identity of a component can be readily determined, it does not qualify as a legitimate trade secret. If the product is a complex mixture, and extensive analysis would be required to determine its ingredients, it is more likely that the product would qualify for some trade secret status.

With the information provided by the employer relating to these factors, OSHA will be better able to judge the legitimacy of the claim; employers will be aware of the level of proof to which they will be held; and employees will be better assured that trade secret claims will not be spurious. Administratively, these factors and principles are best specified within an Appendix to the standard, rather than including them in the definition itself. With the deletion of the parenthetical phrase, the definition is now conceptually identical to that found in the *Restatement of Torts*, section 757, comment *b* (1939). It appears that maintaining this identical wording is essential to ensure that further differences of opinion regarding intent do not arise through the introduction of novel language. The specific language for the change to the definition is indicated below. OSHA believes that these changes and the additional discussion of the criteria for evaluation address the Court's concerns, are consistent with the rulemaking record, and clarify the intent of the rule for purposes of compliance and enforcement.

B. Employee Access to Trade Secret Information

Although the provisions of the HCS permit employers to withhold the specific chemical identity information if it is a *bona fide* trade secret, the standard also requires this information be disclosed to health professionals under certain conditions of need and confidentiality. In medical emergencies, a treating physician or nurse would be entitled to receive the information immediately. After the emergency is

abated, the holder of the trade secret could require the treating physician or nurse to sign a written statement of need and a confidentiality agreement, but it is left to the determination of the health professional as to whether an emergency which necessitates immediate disclosure exists. *See* 29 CFR 1910.1200(i)(2).

In non-emergency situations, a health professional providing medical or other occupational health services to exposed employees would be entitled to the information under certain conditions. The health professionals entitled to this non-emergency disclosure would be physicians, industrial hygienists, toxicologists and epidemiologists. The request for the disclosure of trade secret information has to be submitted to the holder of the trade secret in writing; it must specify the occupational health need for the information; explain why disclosure of the specific chemical identity is necessary, and why other information would not allow the health professional to provide the necessary services; describe the procedures that will be used to maintain the confidentiality of the information; and the requestor must agree to keep the information confidential. *See* 29 CFR 1910.1200(i)(3).

As stated previously, in the development of the final rule, OSHA sought to take into account the competing interests of the employer in maintaining the confidentiality of legitimate trade secrets, and of the employee in having access to the information. The record seemed to indicate that use of the specific chemical identity information would require some professional expertise. Workers generally stated that their need for the information would be to give it to someone providing services to them, *e.g.*, their physician (48 FR 53318).

Thus, in the final rule, OSHA devised a regulatory scheme that permitted employers to withhold specific chemical identity information when it is a *bona fide* trade secret, but required that it be disclosed to health professionals. OSHA believed that this approach would ensure that the information disclosed would result in adequate protection for employees in those few situations where a legitimate trade secret exists, and is withheld from those employees and downstream employers and their employees.

The United Steelworkers of America argued to the Third Circuit Court of Appeals that many employees may not have access to health professionals, yet have a "need-to-know" the trade secret information. If an employee satisfies the need-to-know requirements of the standard at 29 CFR 1910.1200(i)(3)(ii), and is willing to sign a confidentiality agreement, the Steelworkers argued that the employee should also be entitled to access. *See* Brief for Petitioner United Steelworkers of America, AFL–CIO–CLC at 37–43.

The Third Circuit was persuaded by this argument, and "conclude[d] that the restriction in the [HCS] of access to trade secret information to health professionals is not supported by substantial evidence in the record. . . ." section 763 F.2d at section 743. The trade secret access provision was held "invalid insofar as it limits access to health professionals, but is otherwise valid," and the Agency was "directed to adopt a rule permitting access by employees and their collective bargaining representatives". *Id.*

In response to the Court's decision, and since the other provisions relating to trade secret disclosure were held to be valid, OSHA is adding language to the rule to give employees and their representatives access to trade secret chemical identities under the same conditions as health professionals. Consequently, employees and their representatives will have to submit written requests establishing a need-to-know the information, and be willing to sign a confidentiality agreement. Rather than using the term "collective bargaining agent", however, the modifications use "designated representative" to be consistent with the other requirements of the HCS. "Designated representative" is defined in the HCS, and a collective bargaining agent is automatically considered a designated representative under that definition. 29 CFR 1910.1200(c). Thus the modified language carries out the Court's instructions.

C. Corrections

In addition to addressing the issues noted above, OSHA is correcting two typographical errors in the HCS trade secret access provisions. The first regards § 1910.1200(i)(3)(v), which requires that health professionals, and the employers or contractors of their services, agree in a written confidentiality agreement that the health professional will not use the trade secret information for any purpose other than the health need(s) asserted or release it under any circumstances other than to OSHA or as agreed by the parties. The provision notes parenthetically that an employer or contractor of a health professional's services may be a "downstream employer, labor organization or individual employer."

Clearly, "individual employer" should read "individual employee." As explained in the HCS preamble, [t]he requirement that the employer or contractor of the health professional's services be a cosignatory to the agreement applies equally regardless of whether the health professional is providing occupational health or medical services to a downstream employer, labor organization, or *individual employees* . . . ." 48 FR at 53339 (emphasis added). The provision was intended to assure "that both the principal and the agent are legally responsible for compliance with the agreement", whether the principal is an employer, union or employee, and applies "regardless of whether the health professional is being paid for his services." *Id.* OSHA, therefore, is correcting section 1910.1200(i)(3)(v) to indicate that an "individual employee" who employs or contracts for a health professional's services must cosign confidentiality agreements under the HCS.

The second typographical error concerns § 1910.1200(i)(3)(iii). That provision requires that written requests for trade secret chemical identities explain in detail why the disclosure is essential to the requestor, and why disclosure of alternative information by the trade secret holder would not satisfy the requestor's purposes and needs as described in "paragraph (ii)". The reference to paragraph (ii) is a typographical error. No paragraph exists with that designation. The provision should read "paragraph (i)(3)(ii)," the subparagraph that lists acceptable occupational health needs for trade secret disclosure and which immediately precedes the provision in question. OSHA, therefore, is correcting § 1910.1200(i)(3)(iii) so that it references the occupational health needs described in paragraph (i)(3)(ii).

III. Legal Authority for Issuing an Interim Final Rule

In accordance with the Third Circuit Court of Appeals decision, OSHA is making two modifications to the HCS, *i.e.*, deleting the parenthetical phrase from the trade secret definition, and adding employees and designated representatives to the list of individuals entitled to trade secret access. These modifications are issued as an interim final rule to be effective upon its publication in the **Federal Register**, as close to November 25, 1985, as possible—the date by which chemical manufacturers, importers, and distributors were to begin to provide information with shipments of hazardous chemicals by means of labels

on containers and material safety data sheets.

OSHA believes that public comment prior to implementation of these minor changes is legally unnecessary because: (1) The changes merely carry out the Court's explicit direction to the Agency; (2) the issues have already been extensively commented upon during the lengthy HCS rulemaking; (3) the Court did not order OSHA to take more evidence and public comment; and (4) the Court made its own specific findings based on applicable controlling law with regard to the trade secret definition, and on its reading of the rulemaking record with regard to the access issue. Moreover, OSHA believes it has "good cause" under the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(B), for issuing an interim final rule because the Court decision and the November 25, 1985, effective date of the Court validated HCS provisions make it "impracticable, unnecessary and contrary to the public interest" to delay implementation of the modifications past the date of their publication, which would be necessary to receive and review public comments. Likewise, OSHA has concluded that under section 553(d)(3) of the APA, the Agency has "good cause" to dispense with the 30-day delayed effective date ordinarily required, and instead implement the interim rule on the date it is published.

Nevertheless, OSHA invites interested parties to submit comments on the interim provisions contained within this document. Procedures for submitting comments are listed in Part V of this preamble. A final determination on the HCS's trade secret definition and access provisions will be made after the public's comments are reviewed.

The Court did not order the Agency to follow notice and comment procedures prior to modifying the trade secret provisions. The Court decision makes specific findings of law and fact that require OSHA to amend two provisions of the HCS prior to its implementation. Regarding the trade secret definition, the Court had found that a parenthetical phrase added by OSHA to the *Restatement of Torts* definition "enlarge[d] considerably" that definition by providing protection for chemical identities which can be duplicated without great difficulty, a "type of information not traditionally afforded trade secret protection under state laws." 763 F.2d at 740. The Court directed OSHA "to reconsider a definition which will not include chemical identity information that is readily discoverable through reverse engineering." *Id.* at 743. Clearly, the Court made a finding that the addition of the parenthetical phrase was improper.

Regarding the trade secret access rule, the Court held the pertinent provisions valid in all respects, except where they limited access to trade secrets to health professionals. The Court found that the evidence in the record supported the United Steelworkers' contention that employees and their collective bargaining representatives who "need to know" trade secrets should be entitled to access on the same basis as health professionals. *Id.* at 742–743. The Court directed OSHA to adopt a trade secret access rule that permits access to employees and their collective bargaining representatives. *Id.* at 743.

The Third Circuit Court of Appeals, therefore, made its own findings on these two issues based on the controlling law and its reading of the extensive rulemaking record. The Court did not conclude that the record lacked evidence on the issues, or that the Agency failed to discuss them. Consequently, in order to implement the HCS, OSHA need only make technical amendments in accordance with the Court's findings, *i.e.*, delete the parenthetical phrase added to the *Restatement of Torts* trade secret definition, and add employees and their representatives to the list of individuals entitled to trade secret access under the standard. Accordingly, the gathering of more evidence and public comment is legally "unnecessary" before OSHA issues these amendments to the only two provisions of the HCS to be held invalid.

In addition, OSHA has concluded that, under the APA, 5 U.S.C. 553(b)(B) and 553(d)(3), and the Agency's rules for issuing standards (29 CFR 1911.5), "good cause" exists for issuing this interim rule to be effective immediately. Under section 553(b)(B) of the APA, notice and comment procedures are not necessary when an agency finds these procedures are "impracticable, unnecessary, or contrary to the public interest." Under section 553(d)(3), the APA's requirement that agency rules be published at least 30 days before their effective date also may be avoided if the agency has "good cause" for doing so. As noted above, OSHA believes that the manner and extent of the Third Circuit's decision makes notice and comment "unnecessary" in this case. OSHA also believes a 30-day delayed effective date is "unnecessary" because the substance of the rule changes and their imminence have been apparent to the affected public since the date of the Court decision.

In addition, OSHA feels that the circumstances surrounding this action made it "impracticable" to provide 30 days notice or a comment period prior to implementing the modifications. The Court's decision addressed several extremely important issues concerning the regulatory authority and decisionmaking processes of the Agency. OSHA has worked diligently to assess its appeal options within the legally allotted time, decide on a rulemaking agenda, and prepare and draft this and related documents. However, there was not enough time remaining between the date of the Court decision and the effective date of the HCS to provide an adequate period for the public to respond to the proposals, and for the Agency to review those comments and redraft, if necessary, the rule changes in final form. Therefore, the Agency has found it "impracticable" to complete notice and comment procedures before implementing the rule changes. *Cf. Petry* v. *Block*, section 737 F.2d 1193, 1201 (D.C. Cir. 1984) (Department of Agriculture's decision to issue an interim rule was held "entirely reasonable, given the requisite time to conduct a notice-and-comment proceeding.").

The most important factor identified by OSHA in deciding to publish an interim final rule is that to delay implementation of the trade secret provisions or the HCS itself would be "contrary to the public interest". The HCS is an occupational safety and health standard designed to reduce the incidence of chemically-related illnesses and injuries among the 14 million employees exposed to hazardous chemicals in the manufacturing sector. None of the parties challenging the HCS contended that the manufacturing sector should not be covered by a hazard communication standard. *See* 763 F.2d at 736. Indeed, the Third Circuit Court of Appeals found "there is substantial evidence in the record that the manufacturing sector has the highest incidence rate of chemical exposures which the Agency has authority to regulate." *Id.* at section 737. To undermine or delay implementation of the HCS, most of which was upheld by the Court, by undertaking rulemaking proceedings prior to adoption of this interim rule would prevent the due and timely execution of OSHA's function "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions. . . ." 29 U.S.C. 651(b).

Since the Court held the trade secret definition and the rule limiting trade secret access to health professionals

invalid, delay in adopting the provisions of the interim rule would cause confusion among employers and employees alike, serious hazards to employees who need to know trade secret chemical identities but are denied access (in direct contradiction of the Court's decision), and irreversible economic harm to employers who publish *bona fide* trade secret information that they would have legitimately withheld had they been given guidance as to the applicable law. Therefore, because chemical manufacturers, importers, and distributors had to be in compliance with the HCS by November 25, 1985, and require guidance as near to that date as possible, the interim rule is effective immediately. *Cf. American Federation of Government Employees* v. *Block*, 655 F.2d 1153, 1157 (D.C. Cir. 1981) ("good cause" existed for issuing interim rules where court order created a sudden need for new regulations to provide necessary guidance to the affected industry and where confusion and economic harm would result from their absence).

OSHA would like to stress, however, that although it believes there is ample "good cause" for implementing these modifications at the time of their publication, OSHA intends to complete its review of the public's comments on these issues as soon as possible. If any further modifications to the HCS are deemed necessary as a result of that review, they will be promulgated in an expeditious manner.

IV. Analyses of Regulatory Impact, Regulatory Flexibility, and Environmental Impact

The U.S. Court of Appeals for the Third Circuit has ordered OSHA to revise the definition of trade secrets in the Hazard Communication Standard (HCS), and to expand access to trade secrets to employees and their designated representatives. The revision of the definition in response to the Court does not change OSHA's interpretation of "trade secret" under the standard, since OSHA has always intended to interpret that term consistent with the factors generally agreed upon under common law in this area. These factors have been described in detail in preceding sections of this preamble. Therefore, OSHA believes that the revision of the definition does not affect the costs of the standard. The following discussion deals solely with a general assessment of the parameters of the regulatory situation resulting from implementing the Court's direction, and the economic impact of the provisions for expanded access to trade secret information. OSHA's analysis indicates that this is not a major rule.

Under the final rule, physicians and nurses are entitled to receive trade secrets from chemical manufactures and importers to provide necessary medical treatment in emergency situations. In non-emergency situations, OSHA's final standard provided access to trade secret chemical identities to health professionals (i.e. physicians, industrial hygienists, toxicologists and epidemiologists) under specific conditions of need and confidentiality. The health professionals could obtain trade secrets when there was an occupational health need for that information (as defined in 29 CFR 1910. 1200(i)(3)(ii)), and when the professional requesting the information demonstrated the means to protect the confidentiality of the trade secret, and was willing to sign an agreement to do so.

Health professionals could refer employer denials of their requests for trade secrets to OSHA for a determination as to whether their requests were improperly denied. The HCS placed on health professionals the burden of demonstrating to OSHA that their procedures were adequate to protect the secrets. Employers claiming trade secrets were required to substantiate those claims if they denied a request from a health professional for the information.

The number of chemical substances and mixtures which manufacturers and importers claim to be trade secrets will obviously affect the impact of this rule. However, the extent of such claims cannot be quantitatively determine. There are a number of factors that should serve to limit the number of such claims under the rule, and thus limit the requests for such information. OSHA believes that producers of commodity chemicals (single substances) will generally have very few claims, since they are marketing these chemicals by specific name and not under some unidenitified proprietary name. Formulators of products are more likely to claim that identities of chemicals in a mixture are trade secrets. It should be noted, however, that for mixtures, the HCS does not require that information be disclosed for hazardous chemicals in trace concentrations of less than one pecent, and one tenth of one percent for carcinogens. The standard also does not require that process information or the percentages of the ingredients in a mixture be disclosed. Many trade secrets involve these types of information, rather than just the specific chemical identity. If an ingredient is not hazardous, disclosure is not required, and if a mixture has been tested as a whole and found not to be hazardous, ingredient disclosure is limited.

The existence of the rule itself should serve to diminish the number of trade secret claims. In the past, employers provided information on chemicals voluntarily, not as a response to regulatory requirements. Thus since there was no requirement to divulge information, some employers frequently identified such data as being proprietary. The requirements of the rule, combined with the increased desire of customers to receive all available information on a product, have caused many employers to reevaluate, and limit, their trade secret claims. Thus all of these factors combined should serve to limit claims overall, and subsequently limit the need for health professionals, employees, or designated representatives to request such information.

Economic impact of the interim final rule

In order to estimate the cost of access to trade secret chemical identities provided by the Court order, OSHA first estimated the costs associated with the access allowed to health professionals under the HCS. Then OSHA estimated the combined costs of access for health professionals and employees and their designated representatives, and subtracted the cost of access for health professionals to find the difference. It is necessary to compute the additional cost of the Court order in this way because the average cost of processing requests is not a constant (see below).

The cost of allowing access to trade secret chemical identities is a function of the number of requests. This costs can be calculated as the product of the number of requests (N) times the average cost of processing a request. OSHA recognizes that the cost of considering and responding to an individual request will depend upon the circumstances surrounding that request and upon the management practices of the company receiving that request. The varying circumstances and management practices will no doubt result in a wide range of costs for processing these requests.

For the initial mid-point of the range of managerial and legal resources associated with considering and responding to a request, OSHA estimated that a request would use an average of 4 hours of management time at $25 per hour and 4 hours of legal counsel at $50 per hour. This yields an initial average cost of resources for processing a request of $300. However,

companies can be expected to handle each subsequent request more efficiently. Therefore, OSHA expects that the average cost of processing a request would decline as the number of requests gets larger, from the initial average of $300 each for a few requests to an average $125 each for 70,000 requests (about two hours of management time and an hour and a half of legal counsel time). Therefore, for the average cost OSHA uses a function which declines as the number of requests increases. The formula is [$100+($200/(N)/1000+10))]. This cost function reflects economies of experience that are obtained as the number of requests increases. Of course, the total cost increases as the number of requests increases.

OSHA has alternative assumptions for the number of requests that would have been made in the absence of the Court order. These provide a high and low estimate of the cost to business of the access afforded to health professionals. OSHA hypothesizes that the number of persons who would make requests for trade secret chemical identities (in the absence of the Court order) is approximately equal to the number of members of the American Industrial Hygiene Association (AIHA), or about 6000. This number is greater than the number of other health professionals working at manufacturing facilities. For example, the American Occupational Medicine Association has about 4900 members, but only a smaller subset of those members work at manufacturing plants (the actual number is not known).

OSHA expects that industrial hygienists will work in concert with physicians on these matters and duplication of requests will be avoided. Therefore, the number of physicians is not added to the estimated 6000 requesters. OSHA further assumes that the requesters would make an average of 1 or 2 requests per year. This number is assumed to be small, because even though access to trade secret chemical identities extends the scope of inquiry for the health professionals, they continue to have their regular responsibilities. This yields from 6,000 to 12,000 requests a year, at a cost of $1.3 million to $2.3 million, based on the average cost of processing requests discussed above.

In response to the Court's decision, and since the other provisions relating to trade secret disclosure were held to be valid, OSHA's interim final rule gives employees and their designated representatives access to trade secret chemical identities under the same conditions as health professionals. Consequently, employees and their representatives will have to submit written requests establishing a need-to-know the information and be willing to sign a confidentiality agreement.

It should be noted that the cost to the requestor of maintaining adequate security for trade secret information will influence the number of requests and, therefore, will affect the cost of access. However, this cost is not a cost of the standard, because it is not a cost to a business that is required to release the information.

The Court order creates a wide pool of people who could conceivably have access to trade secrets, but OSHA has reason to believe that the actual number of requests will be small. Under a related rule, the Access to Employee Exposure and Medical Records regulation (29 CFR 1910.20), employees are permitted access to information about their hazardous exposures upon request. No information need be disclosed by employers automatically. A review of OSHA enforcement data regarding that rule reveals that only approximately 20 citations a year result from complaints received from employees not receiving requested information under the access rule. If requests are infrequent when information is not sent automatically, then they should also be infrequent under the HCS when employees are given extensive information regarding hazards and and precautions for safe use.

OSHA estimates that the number of employees and designated representatives who might request trade secret chemical identities will be determined by industry's use of hazardous chemicals and the related presumption that trade secrets are most commonly found in those industry sectors with high hazardous chemical usage. Industry sectors potentially affected by the Court order were identified and the expectation of trade secret requests was made based upon OSHA's assessment identifying use of hazardous chemicals. Table 1 projects the results of the different request expectations for each industry affected. OSHA estimates the number of requests that will be made by employees and their designated representatives by 2 digit Standard Industrial Classification (SIC) Codes. The estimated total number of these requests is the sum of the products of the number of production workers in each of the affected SIC's times the expected rate of requests per thousand production workers in that SIC. There is a high and a low rate for each SIC. The rates of requests per thousand workers are highest (4 to 8) in chemical and related industries. OSHA estimates that there will be about 11,000 to 21,000 employee requests per year for access to trade secret information.

TABLE 1.—ESTIMATION OF REQUESTS FOR TRADE SECRET CHEMICAL IDENTITIES FROM EMPLOYEES AND THEIR DESIGNATED REPRESENTATIVES

2 digit SIC	Industry description	Production workers[1] (hundreds)	Estimated requests per 1,000 workers	Range of projected requests
22	Textile Mill Products	618	1.0 to 2.0	618 to 1,236.
24	Lumber, Wood Prod.	480	1.0 to 2.0	480 to 960.
25	Furniture, Fixtures	350	1.0 to 3.0	350 to 1,050.
26	Paper, Allied Prod.	459	1.0 to 2.0	459 to 918.
28	Chemicals, Allied Prod	504	4.0 to 8.0	2,016 to 4,032.
29	Petrol, Coal Prod.	99	4.0 to 8.0	396 to 792.
30	Rubber, Misc. Plastics	522	4.0 to 8.0	2,088 to 4,176.
31	Leather, Leather Prod.	172	2.0 to 4.0	344 to 688.
32	Stone, Clay, Glass	408	2.0 to 3.0	816 to 1,224.
33	Primary Metal	639	0.5 to 1.0	320 to 639.
34	Fabricatec Metal Prod.	1,066	0.5 to 1.0	533 to 1,066.
35	Machinery, not electric	1,347	0.5 to 1.0	674 to 1,347.
36	Electric & Electronic	1,201	0.5 to 1.0	601 to 1,201.
37	Transportation Equip.	1,070	0.5 to 1.0	535 to 1,070.
38	Instruments & Related	362	0.5 to 1.0	181 to 362.
39	Misc. Manufacturing	280	1.0 to 2.0	280 to 560.
Totals		9,577	1.1 to 2.2	10,690 to 21,321.

[1] From the 1985 Statistical Abstract of the United States.
Note that four major SIC groups (20, Food and kindred products; 21, Tobacco manufacture; 23, Apparel manufacture; and 27, Printing) are not included. They are not expected to be a signifficant source of these requests.

The extension of access to employees and their designated representatives under the Court order increases the number of requests by about 11,000 to 21,000 (the low and high estimates). As stated previously, OSHA's low and high estimates of the number of requests by health professionals are 6,000 and 12,000 respectively. Therefore, the low estimates of requests from health

professionals and employees and their designated representatives add to about 17,000 (6,000 plus 11,000 requests). The high estimates of requests from health professionals and employees and their designated representatives add to about 33,000 (12,000 plus 21,000). Therefore, the combined cost of access for health professionals and employees and their designated representatives will be from $3.0 million to $4.8 million, with the Court order accounting for $1.7 million to $2.5 million. Compared with the total annual cost of the HCS prior to the Court order ($158.78 million), the Court order may add from 1.1% to 1.6% to the cost.

Regulatory flexibility and environmental impact analysis

OSHA cannot perform a regulatory flexibility analysis on the access to trade secrets order by the Court, as OSHA is not in a position to consider alternatives that might reduce the costs of compliance to business. In any event, the costs of the Court order (as determined above) cannot be seen to present any significant economic burden to industry as a whole or to small entities.

The interim final rule has been reviewed in accordance with the requirements of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321), the Guidelines of the Council on Environmental Quality (CEQ) (40 CFR Part 1500), and OSHA's DOL NEPA Compliance regulations (29 CFR Part 11). As a result of this review, the Agency has determined that the interim rule will not significantly affect the environment.

V. Public Participation

Interested persons are invited to submit written data, views, and arguments on this interim rule. These comments must be received on or before January 27, 1986, and be submitted in quadruplicate to the Docket Officer, Docket H–022C, Occupational Safety and Health Administration, Room N3670, 200 Constitution Avenue, NW., Washington, DC 20210; (202) 523–7894. Written submissions must clearly identify the provisions of the interim rule which are addressed, and the position taken on each issue.

All written submissions, as well as other information gathered by the Agency, will be considered in any action taken. The record of this rulemaking, including written comments and materials submitted in response to this notice, will be available for inspection and copying in the Docket Office, Room N3670, at the above address, between the hours of 8:15 a.m. and 4:45 p.m.

VI. Authority, Signature, and Interim Final Rule

This document was prepared under the direction of Patrick R. Tyson, Acting Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Pursuant to sections 6(b), 8(c) and 8(g) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 655, 657), section 4 of the Administrative Procedure Act (5 U.S.C. 553), Secretary of Labor's Order No. 9–83 (48 FR 35736), and 29 CFR 1911.5, 29 CFR 1910.1200 is hereby amended as set forth below.

List of Subjects in 29 CFR Part 1910

Occupational Safety and Health, Hazard Communication.

Signed at Washington, DC this 25th day of November 1985.

Patrick R. Tyson,

Acting Assistant Secretary for Occupational Safety and Health.

PART 1910—[AMENDED]

1. The authority citation for Subpart Z of Part 1910 is amended by adding the following citation:

Authority. Secs. 6 and 8, Occupational Safety and Health Act, 29 U.S.C. 655, 657; Secretary of Labor's Orders No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), or 9–83 (48 FR 35736) as applicable; and 29 CFR Part 1911.

* * * * *

Section 1910.1200 also issued under 5 U.S.C. 553.

* * * * *

2. Section 1910.1200 of Title 29 of the Code of Federal Regulations, is amended by revising the definition of "Trade secret" in paragraph (c), by revising (i)(1)(iv), (i)(3) introductory text, (i)(3)(iii), (i)(3)(v), (i)(6), (i)(7)(i), (i)(8), (i)(9) introductory text, (i)(9)(ii), (i)(9)(iii), and (i)(10)(i), and adding a new Appendix D, to read as follows:

§ 1910.1200 Hazard communication.

* * * * *

(c) * * *

"Trade secret" means any confidential formula, pattern, process, device, information or compilation of information that is used in an employer's business, and that gives the employer an opportunity to obtain an advantage over competitors who do not know or use it. Appendix D sets out the criteria to be used in evaluating trade secrets.

* * * * *

(i) * * * (1) * * *

(iv) The specific chemical identity is made available to health professionals, employees, and designated representatives, in accordance with the applicable provisions of this paragraph.

* * * * *

(3) In non-emergency situations, a chemical manufacturer, importer, or employer shall, upon request, disclose a specific chemical identity, otherwise permitted to be withheld under paragraph (i)(1) of this section, to a health professional (i.e. physician, industrial hygienist, toxicologist, epidemiologist), providing medical or other occupational health services to exposed employee(s), and to employees or designated representatives, if:

* * * * *

(iii) The request explains in detail why the disclosure of the specific chemical identity is essential and that, in lieu thereof, the disclosure of the following information to the health professional, employee, or designated representative, would not satisfy the purposes described in paragraph (i)(3)(ii) of this section:

* * * * *

(v) The health professional, and the employer or contractor of the services of the health professional (i.e. downstream employer, labor organization, or individual employee), employee, or designated representative, agree in a written confidentiality agreement that the health professional, employee, or designated representative, will not use the trade secret information for any purpose other than the health need(s) asserted and agree not to release the information under any circumstances other than to OSHA, as provided in paragraph (i)(6) of this section, except as authorized by the terms of the agreement or by the chemical manufacturer, importer, or employer.

* * * * *

(6) If the health professional, employee, or designated representative receiving the trade secret information decides that there is a need to disclose it to OSHA, the chemical manufacturer, importer, or employer who provided the information shall be informed by the health professional, employee, or designated representative prior to, or at the same time as, such disclosure.

(7) * * *

(i) Be provided to the health professional, employee, or designated representative, within thirty days of the request;

* * * * *

(8) The health professional, employee, or designated representative, whose request for information is denied under paragraph (i)(3) of this section may refer the request and the written denial of the request to OSHA for consideration.

(9) When a health professional, employee, or designated representative refers the denial to OSHA under paragraph (i)(8) of this section, OSHA shall consider the evidence to determine if:

* * * * *

(ii) The health professional, employee, or designated representative, has supported the claim that there is a medical or occupational health need for the information; and

(iii) The health professional, employee, or designated representative, has demonstrated adequate means to protect the confidentiality.

(10)(i) If OSHA determines that the specific chemical identity requested under paragraph (i)(3) of this section is not a *bona fide* trade secret, or that it is a trade secret, but the requesting health professional, employee, or designated representative has a legitimate medical or occupational health need for the information, has executed a written confidentiality agreement, and has shown adequate means to protect the confidentiality of the information, the chemical manufacturer, importer, or employer will be subject to citation by OSHA.

* * * * *

Appendix D to § 1910.1200—Definition of "Trade Secret" (Mandatory)

The following is a reprint of the *Restatement of Torts* section 757, comment *b* (1939):.

b. Definition of trade secret. A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business (see § 759 of the *Restatement of Torts* which is not included in this Appendix) in that it is not simply information as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees, or the security investments made or contemplated, or the date fixed for the announcement of a new policy or for bringing out a new model or the like. A trade secret is a process or device for continuous use in the operations of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

Secrecy. The subject matter of a trade secret must be secret. Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret. Matters which are completely disclosed by the goods which one markets cannot be his secret. Substantially, a trade secret is known only in the particular business in which it is used. It is not requisite that only the proprietor of the business know it. He may, without losing his protection, communicate it to employees involved in its use. He may likewise communicate it to others pledged to secrecy. Others may also know of it independently, as, for example, when they have discovered the process or formula by independent invention and are keeping it secret. Nevertheless, a substantial element of secrecy must exist, so that, except by the use of improper means, there would be difficulty in acquiring the information. An exact definition of a trade secret is not possible. Some factors to be considered in determining whether given information is one's trade secret are: (1) The extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Novelty and prior art. A trade secret may be a device or process which is patentable; but it need not be that. It may be a device or process which is clearly anticipated in the prior art or one which is merely a mechanical improvement that a good mechanic can make. Novelty and invention are not requisite for a trade secret as they are for patentability. These requirements are essential to patentability because a patent protects against unlicensed use of the patented device or process even by one who discovers it properly through independent research. The patent monopoly is a reward to the inventor. But such is not the case with a trade secret. Its protection is not based on a policy of rewarding or otherwise encouraging the development of secret processes or devices. The protection is merely against breach of faith and reprehensible means of learning another's secret. For this limited protection it is not appropriate to require also the kind of novelty and invention which is a requisite of patentability. The nature of the secret is, however, an important factor in determining the kind of relief that is appropriate against one who is subject to liability under the rule stated in this Section. Thus, if the secret consists of a device or process which is a novel invention, one who acquires the secret wrongfully is ordinarily enjoined from further use of it and is required to account for the profits derived from his past use. If, on the other hand, the secret consists of mechanical improvements that a good mechanic can make without resort to the secret, the wrongdoer's liability may be limited to damages, and an injunction against future use of the improvements made with the aid of the secret may be inappropriate.

Information not a trade secret. Although given information is not a trade secret, one who receives the information in a confidential relation or discovers it by improper means may be under some duty not to disclose or use that information. Because of the confidential relation or the impropriety of the means of discovery, he may be compelled to go to other sources for the information. As stated in Comment *a*, even the rule stated in this Section rests not upon a view of trade secrets as physical objects of property but rather upon abuse of confidence or impropriety in learning the secret. Such abuse or impropriety may exist also where the information is not a trade secret and may be equally a basis for liability. The rules relating to the liability for duties arising from confidential relationships generally are not within the scope of the Restatement of this Subject. As to the use of improper means to acquire information, see § 759.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[A-7-FRL-2931-7; EPA Action MO 1699]

Designation of Areas for Air Quality Planning Purposes; State of Missouri

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rulemaking.