

## **Instructions for Completing the EPCRA Trade Secret Substantiation Form**

[*Note: EPA has a new mailing address for filing trade secret substantiation forms for 2003. The new address appears in this document under the heading “Where to Send the Trade Secrecy Claim.” EPA is in the process of amending the Code of Federal Regulations (40 CFR Part 350.16) to change the mailing address that appears in the regulation.*]

### **General Information**

EPA requires that the information in a trade secret substantiation requested in a trade secret substantiation be completed using this substantiation form in order to ensure that all facility and chemical identifier information, substantiation questions, and certification statements are completed. Submitter-devised forms will not be accepted. Incomplete substantiations will in all likelihood be found insufficient to support the claim, and the claim will be denied. (*Moreover, the statute provides that a submitter who fails to provide information required will be subject to a \$10,000 fine.*) For the submitter's own protection, therefore, the EPA form must be used and completed in its entirety. The statute for section 322 establishes a two-phase process in which the submitter must do the following:

1. At the time a report is submitted, the submitter must present a complete set of assertions that (if true) would be sufficient to justify the claim of trade secrecy; and
2. If the claim is reviewed by EPA, the submitter will be asked to provide additional factual information sufficient to establish the truthfulness of the assertions made at the time the claim was made.

In making its assertions of trade secrecy, a submitter should provide, where applicable, descriptive factual statements. Conclusory statements of compliance (such as positive or negative restatements of the questions) may not provide EPA with enough information to make a determination and may be found insufficient to support a claim.

### **What May Be Withheld**

Only the specific chemical identity required to be disclosed in sections 303, 311, 312, and 313 submissions may be claimed trade secret on the Title III submittal itself. (Other trade secret or confidential business information included in answer to a question on the substantiation may be claimed trade secret or confidential, as described below.)

Location information claimed as confidential under section 312 (d)(2)(F) should *not* be sent to EPA; this should only be sent to the SERC, LEPC, and the fire department, as requested.

## **Sanitized and Unsanitized Copies**

You must submit this form to EPA in sanitized and unsanitized versions, along with the sanitized and unsanitized copies of the submittal that gives rise to this trade secrecy claim (except for the section 303 submittal, and for MSDS, under section 311). The *unsanitized* version of this form contains specific chemical identity and CAS number and may contain other trade secret or confidential business information, which should be clearly labeled as such. Failure to claim other information trade secret or confidential will make that information publicly available. In the *sanitized* version of this form, the specific chemical identity and CAS number must be replaced with the chemical's generic class or category and any other trade secret or confidential business information should be deleted. *You should also send sanitized copies of the submittal and this form to relevant State and local authorities.*

Each question on this form must be answered. *Submitters are encouraged to answer in the space provided.* If you need more space to answer a particular question, please use additional sheets. If you use additional sheets, be sure to include the number (and if applicable, the subpart) of the question being answered and write your facility's Dun and Bradstreet Number on the lower right-hand corner of each sheet.

## **When the Forms Must be Submitted**

The sanitized and unsanitized report forms and trade secret substantiations must be submitted to EPA by the normal reporting deadline for that section (e.g., section 313 submissions for any calendar year must be submitted on or before July 1 of the following year).

## **Where to Send the Trade Secrecy Claim**

*[Note: The address given below is the new EPA mailing address for filing trade secret substantiation forms for 2003. EPA is in the process of amending the Code of Federal Regulations (40 CFR Part 350.16) to change the mailing address that appears in the regulation.]*

All trade secrecy claims should be sent to the following address:

EPCRA Substantiation Packets  
P.O. Box 1515  
Lanham - Seabrook, MD 20703-1515

Fed Ex and Courier Packages should be sent to the following address:

EPCRA Substantiation Packets  
c/o Computer Sciences Corporation  
Suite 300  
8400 Corporate Drive  
New Carrollton, MD 20785

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In addition, you must send sanitized copies of the report form and substantiation to relevant State and local authorities. States will provide addresses where the copies of the reports are to be sent.

### **Packaging of Claim(s)**

A completed section 322 claim package must include four items, packaged in the following order.

1. An unsanitized trade secret substantiation form.
2. A sanitized trade secret substantiation form.
3. An unsanitized 312 or 313 report (it is not necessary to create an unsanitized section 303 submittal or MSDS for submission under section 311).
4. A sanitized (public) section 303, 311, 312, or 313 or report.

It is important to securely fasten together (binder clip or rubber band) each of the reporting forms and substantiations for the particular chemical being claimed trade secret. This process will make it clear that a claim is physically complete when submitted. When submitters submit claims for more than one chemical, EPA requests that the four parts associated with each chemical be assembled as a set and each set for different chemicals be kept separate within the package sent to EPA. Following these guidelines permits the agency to make the appropriate determinations of trade secrecy, and to make public only those portions of each submittal required to be disclosed.

### **How to Obtain Forms and Other Information**

- Visit the CEPPPO Tier II Reporting website:  
<http://yosemite.epa.gov/oswer/ceppoweb.nsf/content/tier2.htm>
- Call the EPCRA Call Center at (800) 424-9396 (toll free) or (703) 412-9810 (metropolitan DC area)
- Additional copies of the Trade Secret Substantiation Form may be obtained by writing to:

EPCRA Reporting Center  
P.O. Box 1515  
Lanham - Seabrook, MD 20703-1515

## **Instructions for Completing Specific Section of the Form**

### **Part 1. Substantiation Category**

*1.1 Title III Reporting Section.* Check the box corresponding to the section for which this particular claim of trade secrecy is being made. Checking off more than one box for a claim is *not* permitted.

*1.2 Reporting Year.* Enter the year to which the reported information applies, not the year in which you are submitting the report.

*1.3a Sanitized.* If this copy of the submission is the “public” or sanitized version, check this box and complete 1.3.1a, which asks for generic class or category. Do *not* complete the information required in the unsanitized box (1.3b.).

*1.3.1a Generic class or Category.* You must complete this if you are claiming the specific chemical identity as a trade secret and have marked the box in 1.3a. The generic chemical name must be structurally descriptive of the chemical.

*1.3b Unsanitized.* Check the box if this version of the form contains the specific chemical identity or any other trade secret or confidential business information.

*1.3.1b CAS Number.* You must enter the Chemical Abstract Service (CAS) registry number that appears in the appropriate section of the rule for the chemical being reported. Use leading place holding zeros. If you are reporting a chemical category (e.g. copper compounds), enter N/A in the CAS number space.

*1.3.2b Specific Chemical Identity.* Enter the name of the chemical or chemical category as it is listed in the appropriate section of the reporting rule.

### **Part 2. Facility Identification Information**

*2.1-2.3 Facility Name and Location.* You must enter the name of your facility (plant site name or appropriate facility designation), street address, city, State and ZIP Code in the space provided. You may not use a post office box number for this location.

*2.4 Dun and Bradstreet Number.* You must enter the number assigned by Dun and Bradstreet for your facility or each establishment within your facility. If the establishment does not have a D & B number, enter N/A in the boxes reserved for those numbers. Use leading place holding zeros.

### **Part 3. Responses to Substantiation Questions**

The six questions posed in this form are based on the four statutory criteria found in section 322(b) of Title III. The information you submit in response to these questions is the basis for EPA’s initial determination as to whether the substantiation is sufficient to support a claim of trade secrecy. EPA has indicated in §350.13 of the final rule the specific criteria that it regards as the legal basis for evaluating whether the answers you have provided are sufficient to warrant protection of the chemical identity. You are urged to review those criteria before preparing answers to the questions on the form.

### **Part 4. Certification**

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An *original* signature is required for each trade secret substantiation submitted to EPA, both sanitized and unsanitized. It indicates the submitter is certifying that the particular substantiation provided to EPA is complete, true, and accurate, and that it is intended to support the specific trade secret claim being made. Noncompliance with this certification requirement may jeopardize the trade secret claim.

4.1 *Name and Official Title.* Print or type the name and title of the person who signs the statement at 4.2.

4.2 *Signature.* This certification must be signed by the owner or operator, or a senior official with management responsibility for the person (or persons) completing the form. An *original* signature is required for each trade secret substantiation submitted to EPA, both sanitized and unsanitized. Since the certification applies to all information supplied on the forms, it should be signed only after the substantiation has been completed.

4.3 *Date.* Enter the date when the certification was signed.

#### Appendix A-Restatement of Torts Section 757, Comment b

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 section 759) in that it is not simply information as a single or ephemeral event 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 operation 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 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;

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(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 to 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.

#### **References:**

Federal Register, July 29, 1988 (Volume 53, Number 148). [Rules and regulations] [Pages 28814-28815]

Environmental Protection Agency 40 CFR PART 350 [FRL - 3388] Trade Secrecy Claims for Emergency Planning and Community Right-to-Know Information; and Trade Secret Disclosures to Health Professionals; Final Rule amended as necessary March 31, 1997.