



David.Menotti@shawpittman.
com
08/10/2004 09:29 AM

To Mary Dominiak/DC/USEPA/US@EPA
cc Rich Leukroth/DC/USEPA/US@EPA
bcc
Subject Incineration ECA/ OGC letter re CBI manual interpretation

Mary:

I am forwarding the attached letter to me from Don Sadowsky (OGC), dated February 3, 2004, for inclusion in the ECA docket (if it is not there already). It was provided to me in the course of the negotiations on the incineration ECA's, and relied upon by the telomer and fluoropolymer manufacturers in reaching their decisions to agree to these ECAs. It also should be included in the separate docket on the incineration ECAs, that Rich Leukroft has informed me is being created.

Thanks.

David

(See attached file: EPA CBI

Letter.PDF)

David E. Menotti
202-663-8675

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postmaster@shawpittman.com. Thank You. EPA CBI Letter.PDF



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
GENERAL COUNSEL

February 3, 2004

David Menotti
Shaw Pittman LLP
2300 N Street, NW
Washington, DC 20037

Dear Mr. Menotti,

I am writing in response to a question you have raised regarding EPA's TSCA CBI Protection manual and confidentiality regulations. As you are aware, TSCA and the implementing regulations permit other federal agencies to have access to TSCA CBI. EPA's TSCA CBI manual sets forth a number of substantive and procedural requirements that federal agencies must satisfy before receiving access to TSCA CBI at EPA (also called "on site" access). These requirements are outlined in sections 2.3, 2.3.1 and 2.3.2 of the TSCA CBI manual.

The TSCA CBI manual also provides that other federal agencies may receive access to TSCA CBI at their own facilities provided certain conditions are met (also called "off site" access). Section 2.3.3 of the manual lists specific requirements that must be satisfied at another agency's facility before EPA will allow "off site" access to TSCA CBI.

Your e-mail message of January 22, 2004, asked whether the manual, as well as "substantive requirements for the release of CBI by other agencies," also apply when a federal agency receives "off site" access to TSCA CBI. The answer to your question is clear. Federal agencies must meet the requirements of the manual regardless of whether they are seeking "on site" or "off site" access to CBI. Enclosed for your information are the relevant sections of the TSCA CBI manual.

In addition, disclosure of TSCA CBI by EPA to other federal agencies is governed by EPA confidentiality regulations at 40 CFR part 2, subpart B. Section 2.209(c)(5) requires that the agency agree to the following before EPA may disclose CBI:

(5) The other agency agrees in writing not to disclose further any information designated as confidential unless --

(i) The other agency has statutory authority both to compel production of the information and to make the proposed disclosure, and the other agency has, prior

to disclosure of the information to anyone other than its officers and employees, furnished to each affected business at least the same notice to which the affected business would be entitled under this subpart;

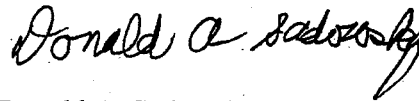
(ii) The other agency has obtained the consent of each affected business to the proposed disclosure; or

(iii) The other agency has obtained a written statement from the EPA General Counsel or an EPA Regional Counsel that disclosure of the information would be proper under this subpart.

This provision applies regardless of whether the access to CBI is on-site or off-site.

I hope this answers your questions. Please contact me if you require further assistance.

Sincerely,



Donald A. Sadowsky

Acting Assistant General Counsel
for Pesticides and Toxic Substances

Enclosure

TSCA CBI Protection Manual



**United States
Environmental Protection Agency**

**Office of Pollution Prevention and Toxics
Washington, DC 20460 (7407 M)**

**October 20, 2003
7700 A1**

2.2.11.2 Unaccounted For Documents

The contractor DCO must assume that a TSCA CBI document is unaccounted for when it is not received within 5 business days of issuing the contractor employee the list of items logged out to him/her, and report this fact under the procedures in CHAPTER 5.

2.2.12 Change In Corporate Status

When a contractor or subcontractor with access to TSCA CBI is acquired by or merged into another company (or otherwise alters its corporate status by associating in some way with another company) it shall provide notice to EPA prior to the transaction. EPA will allow the contractor or subcontractor 30 days from the time of notice to complete the corporate and employee TSCA CBI clearance procedures discussed in this section 2.2 above. If the required notice is not given within 90 days of the transaction, then access during that time will be considered unauthorized, and the Agency will follow the unauthorized disclosure procedures in Chapter 5.

2.3 TSCA CBI ACCESS CERTIFICATION FOR OTHER FEDERAL AGENCIES

Access to TSCA CBI data may be granted to other federal agencies under the following circumstances:

- When TSCA CBI data is required to perform work for EPA.
- When TSCA CBI data is required to perform the other agency's legal duties to protect health or the environment.
- When TSCA CBI data is required for specific law enforcement purposes.

All persons contemplating disclosure of TSCA CBI to other federal agencies should review the regulations at 40 CFR Sections 2.209(c) and 2.306.

2.3.1 Procedures for Other Federal Agencies to obtain TSCA CBI Access

Other federal agencies may obtain access to TSCA CBI by following the applicable requirements outlined in 40 CFR 2.209(c), and including taking the following steps:

An authorized agency representative must submit a written request to the IMD Director preferably at least one month before access is to begin. The request must specify the following:

- Information to which access is requested.
- Reason(s) why access is necessary (including the official purpose).
- Supporting details.

The request must be signed by an agency official whose authority is at least equivalent to that of an EPA division director.

The IMD Director reviews the TSCA CBI access request and notifies the agency's requesting official of his/her decision. If access is approved, the IMD Director informs the agency of the following stipulations:

- TSCA CBI is being disclosed under TSCA authority
- Unauthorized disclosure of the information may subject the agency's employees to criminal penalties in Section 14(d) of TSCA (see CHAPTER 5)
- The agency seeking TSCA CBI access must provide written agreement that it will not disclose TSCA CBI, except in any one of the following situations:
 - (i) The agency has statutory authority both to compel production of the information and to make the proposed disclosure, and it has furnished affected businesses with at least the same notice that EPA would provide under EPA regulations.
 - (ii) The agency has obtained the consent of each affected business prior to the proposed disclosure.

- (iii) The agency has obtained a written statement from the EPA general counsel, or an EPA regional counsel, that disclosure of the information is authorized under EPA regulations.

[**Note:** If the other federal agency is obtaining access to TSCA CBI for purposes not on behalf of EPA, notice must first be provided to affected businesses as provided in Section 2.3.2 just below].

Once access has been granted, designated employees of the other federal agency can obtain access to specified TSCA CBI on EPA premises. The procedures for individual employees to obtain certification for TSCA CBI access are explained in **Section 2.1** of this Manual. Employees of other federal agencies are not allowed to remove from EPA premises any documents, notes, or correspondence containing TSCA CBI and must not discuss TSCA CBI with unauthorized individuals. Only a DCO may remove TSCA CBI from EPA premises. TSCA CBI must therefore be transferred from an EPA DCO to a Facility Agency DCO.

When a programmatic need can be demonstrated (and when the other federal agency needs TSCA CBI access to perform a function on behalf of EPA) **expedited approval** may be granted by the IMD Director which will allow a federal agency access to TSCA CBI before receiving final approval from the OPPT DCO.

2.3.2 Notice to Affected Businesses

Before granting TSCA CBI access to another agency, in order to do work **not** on behalf of EPA, IMD provides written Notice to affected businesses. The Notice must be given at least 10 calendar days before access can be granted via publication in the *Federal Register*, telegram, or certified mail (return receipt requested). No Notice to affected businesses is required however, when EPA discloses TSCA CBI to another agency to perform work for EPA (as described in 40 CFR Sections 2.209(c) and 2.306(h)).

IMD will prepare the Notice, which must include the following:

- Identity of the agency to which TSCA CBI access is granted.
- Official purpose for the access.
- If access is authorized on EPA premises or at the other agency's facilities (see **Section 2.3.3**).
- Types of information to be disclosed.
- Period of time for which access to TSCA CBI is authorized.

2.3.3 Security Requirements at Other Federal Agencies

In order for the other agency to obtain access to TSCA CBI on its own premises, the requesting official to whom TSCA CBI is to be transferred, must nominate at least two people as a DCO and an Alternate DCO (ADCO). The nomination, submitted in writing to the OPPT DCO for approval, must include the names, telephone and fax numbers, and e-mail and mailing addresses of the nominees. The requesting official or the DCO can also nominate ADCOs to assist the DCO in day-to-day operations. ADCOs can perform the same duties as DCOs (including signing EPA Form 7740-28).

The following are required for TSCA CBI access on the other agency's premises:

- Agency security procedures and standards that equal or surpass those set forth in this manual. The requesting official must provide to TSS a written statement of the agency's security procedures for handling TSCA CBI. The statement should state that the security procedures in this Manual have been adopted, or how the security procedures used by the agency differ from those in this Manual.
- EPA TSS inspection and approval of the agency's TSCA CBI storage facilities. The inspection is to be arranged by the requesting official.

[NOTE: TSS will not be required to inspect facilities in other federal agencies where CBI is stored in approved storage containers as referenced in **Section 4.3.3.**]

2.4 REQUESTS FROM CONGRESS OR THE GENERAL ACCOUNTING OFFICE (GAO)

EPA, federal, and contractor employees must notify the IMD Director immediately when they receive a request from Congress or the GAO for information that requires access to TSCA CBI. Pursuant to 40 CFR 2.209, TSCA CBI access is allowed only when the request is made by the Speaker of the House of Representatives, the President of the Senate, a chairman of a Congressional committee or subcommittee, or the Comptroller General. All document access will be provided by the OPPT DCO, who will record all transactions on the Federal Agency, Congress, and Federal Court Sign-Out Log, Form 7740-24 (see **APPENDIX S**).

- When EPA allows access to TSCA CBI by Congress or the GAO, EPA must provide written notice to affected businesses at least 10 calendar days prior to disclosure unless Congress or GAO directs otherwise or does not give