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PROTECTION FOR TRADE SECRETS UNDER
THE TOXIC SUBSTANCES CONTROL ACT OF
1976

In 1976, after several years of considering proposed legislation,1 Congress enacted the Toxic Substances Control Act (TSCA).2 The purposes of the TSCA are two-fold. One is to regulate the manufacture and use of chemical substances3 which are dangerous to health or the environment.4 The other is to compile a comprehensive catalogue of the chemical substances produced and distributed in the United States.5 In order to facilitate achievement of these objectives, a division was established in the Environmental Protection Agency (EPA) with the authority to collect information on chemical substances.6

1 The need for such legislation was first expressed in a report by the Council on Environmental Quality in 1971. In 1972, 1973, and 1975 the House and Senate each passed legislation regulating toxic substances, but the two bodies could not agree on major provisions. The primary roadblock to this legislation in 1972 and 1973 was the question of the extent of the EPA's authority to require screening and testing before marketing. The Senate preferred a more restrictive bill while the House was more sympathetic to industry and would have required much less testing. The TSCA represents a compromise position. For a general history of toxic substance legislation, see Crewdson, Toxic Substance Controversy Continues, 34 CONG. Q. WEEKLY REP. 13 (1976); Crewdson, Toxic Substance Control, 34 CONG. Q. WEEKLY REP. 706 (1976); Crewdson, Toxic Substances, 34 CONG. Q. WEEKLY REP. 764 (1976).

2 Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (1976) (codified at 15 U.S.C. §§ 2601-2629 (1976)). Under the TSCA, each time a company decides to manufacture or process a new chemical substance, the company must give notice of its intent and request permission from the EPA. 15 U.S.C. § 2604(a) (1976). The company must also submit data showing that it believes the manufacture, distribution, and use of the new substance will not present an unreasonable risk of injury to health or the environment. Id. § 2604(b). The Administrator for Toxic Substances may require that the company conduct additional tests on any chemical that will have substantial human exposure, or about the effects of which there are insufficient data. Id. § 2603(a).

3 A chemical substance as defined in TSCA is "any organic or inorganic substance of a particular molecular identity, including—(i) any combination of such substances occurring in whole or in part as a result of a chemical reaction or occurring in nature, and (ii) any element or uncombined radical." 15 U.S.C. § 2602(2)(A) (1976). The definition does not include any pesticide, tobacco product, nuclear material, food, food additive, drug, cosmetic, or device, all of which are regulated by other specific legislation. Id. § 2602(2)(B).

4 Id. § 2605.
5 Id. § 2607(b).
A vital part of the toxic substances regulatory scheme involves the voluntary submission of data to the Toxic Substances Division of the EPA by the chemical industry. This scheme, however, creates a conflict between the EPA's need for information and industry's need to protect trade secrets and confidential business information. Often the information that is required to be submitted by TSCA is crucial to the competitive position of a firm developing a new chemical. The TSCA provides protection for this confidential information in order to encourage industry to comply with the reporting requirements.  

This article will examine the protection provided by the Act and the measures the EPA has adopted for implementing the Act's provisions. The approach will be to focus on the different functional areas in which disclosure may take place. Part I examines the scheme for designating information as confidential and the mechanics of the reporting system under TSCA. Part II deals with disclosures of confidential information made while implementing the TSCA. Part III focuses on legal disclosures of information submitted as confidential. Finally, Part IV examines the measures taken within the EPA to guarantee the safety of confidential information, the penalties for persons illegally disclosing such confidential information, and the remedies for an affected business.

I. DESIGNATION & IDENTIFICATION OF CONFIDENTIAL INFORMATION UNDER THE TSCA

A. Congressional Response to the Role of Trade Secrets in the Chemical Industry

While the primary purpose of the TSCA is to provide for collection of information so that dangerous chemicals may be more carefully regulated, a secondary purpose is to make this information readily available to the public so that Americans may have

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7 15 U.S.C. § 2601(b)(3) (1976). The interference with research and development was the major stumbling block to all previous toxic substance legislation. Dow Chemical Company predicted that the additional testing would cost the chemical industry about $2 billion per year. The Manufacturing Chemists Association predicted a cost to industry of between $360 million and $1.3 billion per year with $100 million in start-up costs. Crewdson, Toxic Substance Controversy Continues, 34 Cong. Q. Weekly Rep. 13, 17 (1976). The EPA and General Accounting Office (GAO), on the other hand, predicted costs to industry of between $80 and $200 million per year. The EPA and GAO estimates have proven to be much closer to reality than the industry figures. Epstein, Polluted Data, The Sciences 16, 18 (July/Aug. 1978).


* See Toxic Substances Control Act: Hearings on H.R. 7229, H.R. 7548, and H.R. 7664
a better idea of the chemicals to which they are continuously exposed.10 Section 5(d) of the TSCA requires the Administrator of the EPA to publish the names and uses of every chemical substance manufactured or processed in the United States on an inventory in the Federal Register.11

The chemical industry objected to the automatic inclusion of each substance’s name on the list, claiming that simple publication of a substance’s name can be damaging to the producer’s competitive position. Members of the industry said that publication of even a generic name could reveal that the substance is being manufactured or at least considered for sale, facts the producing company might want to keep secret until its sales campaign has been prepared.12 It was argued that publication of the fact of manufacture would discourage innovation because the competitive advantage of being the first to develop a new chemical substance would be severely diminished or altogether lost.13 Proponents of publication said that patents could be used to protect all new chemical developments.14 The chemical industry responded that patents do not apply to foreign chemical manufacturers and so would provide no protection outside the United States.15 Moreover, the confidential business and commercial information which might be included on the inventory is unlikely to be protected by patents.16


10 See notes 19-21 and accompanying text infra. See also articles cited in note 1 supra.

11 This provision reads in pertinent part:
     [T]he Administrator shall publish in the Federal Register a notice which—
     (A) identifies the chemical substance for which notice or data has been received;
     (B) lists the uses or intended uses of such substance; and
     (C) . . . describes the nature of the tests performed on such substance and any data which was developed pursuant to subsection (b) of this section or rule under section 2603 of this title.


12 Hearings on H.R. 7229, H.R. 7548, and H.R. 7664, supra note 9, at 449-50 (letter from Ralph Engel, Chemical Specialties Manufacturers Assoc., Inc.); id. at 474 (letter from J.P. St. Clair, Shell Oil Co.).

13 Id.


15 Id. Pt. 2, 119 (statement of Orin Smith, M&T Chemical Co.).

16 Under federal patent law, “[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefore, subject to the conditions and requirements
In response to the industry's arguments, environmentalists and public health groups maintained that it would defeat the purpose of the TSCA to allow companies to "hide" information behind a "confidential" designation. They said that the effectiveness of the inventory would be decreased if some chemicals were excluded and they were concerned that public sector scientists such as academicians, physicians, and environmentalists be given an opportunity to aid and review the EPA in data evaluation.

of this title." 35 U.S.C. § 101 (1976). The following definitions are included in the statute:

"(a) The term "invention" means invention or discovery. (b) The term "process" means process, art or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material." 35 U.S.C. § 100 (1976). Clearly, confidential business or commercial information would not fit any of the categories listed in 35 U.S.C. § 101.

Furthermore, methods of bookkeeping and transacting business have long been held to be nonpatentable. In re Patton, 127 F.2d 324 (C.C.P.A. 1942); Conover v. Coe, 99 F.2d 377 (D.C. Cir. 1938); Hotel Security Checking Co. v. Lorraine Co., 160 F. 467 (2d Cir. 1908).

"Earlier versions of toxic substances legislation incorporated 18 U.S.C. § 1905 (1976), which provides protection from disclosure not only for trade secrets, but also "processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association." The industry preferred this broad coverage, but it was argued that "this language goes far beyond the Freedom of Information Act. It would . . . destroy the Agency's power to release material when necessary for public health." Hearings on H.R. 7229, H.R. 7548, and H.R. 7664, supra note 9, at 353 (statement of Anita Johnson). See id. at 88 (statement of Anthony Mazzochi, Oil, Chemical and Atomic Workers International Union). See also notes 155-56 and accompanying text infra.

"If you are secreting health and safety studies, you are not able to get the opinions of outside scientists. If the data is open, graduate students can come in and examine it, they can write articles on the data, professors . . . and professional societies could come in and examine data. EPA, being understaffed as it is, desperately needs all the scientific comment that it can get. That is, data would essentially sit in EPA's files waiting for EPA to get around to doing something about it unless it were open to the public.

Hearings on H.R. 7229, H.R. 7548, and H.R. 7664, supra note 9, at 352 (statement of Anita Johnson).

This argument presupposes that the testing done by industry and the review of that testing by the EPA will be ineffective to catch potentially hazardous substances. But whenever the EPA Administrator determines that the completed tests do not adequately prove a substance's safety, he may order additional tests done by either the submitting company or an independent contractor of the EPA. While it is possible that the EPA will become so overburdened that it will not be able to perform adequate analyses and will not realize that more tests are needed, the detailed information required to be submitted for each new chemical should make this determination relatively routine. There is no evidence that the Toxic Substances Division will be unable to handle the volume of data it receives, or that there will be need for checks by public sector scientists. In light of the uncertain and rather haphazard protection such "public sector" checks could provide, this is not a compelling reason for disclosure. But see Landau, Redundancy, Rationality, and the Problem of Duplication and Overlap, 29 Pub. Ad. Rev. 346 (1969), where the author suggests that sufficient redundancy can make a system more reliable than any of its parts.

More importantly, such publication would be available to private sector scientists—those employed by competitors of the submitting company. This poses such a threat
The proponents of a complete listing were chiefly concerned that information from health and safety studies be available to the public. These studies include "any study of any effect of a chemical substance or mixture on health or the environment or on both, including . . . studies of occupational exposure to a chemical substance or mixture, toxicological, clinical, and ecological studies of a chemical substance or mixture . . . ." In the past, results of such tests had often been hidden by the developing company until the damage to health or the environment was too visible to be kept secret.

To ensure the effectiveness of the TSCA, it was necessary for Congress to strike a balance between the industry's desire for broad secrecy and environmentalists' desire for total disclosure. The TSCA reflects this balance by allowing industry to designate information it believes to be trade secrets for confidential treatment, but not allowing health and safety studies to be concealed. The Administrator for Toxic Substances may disclose

to the competitive positions of submitting companies that Congress decided to strike the balance in favor of non-disclosure in order to ensure industry compliance with the reporting requirements of the TSCA.

*Hearings on H.R. 7229, H.R. 7548, and H.R. 7664, supra note 9, at 352 (statement of Anita Johnson); Hearings on S. 776, supra note 14, at 168-69 (statement of Dr. Sidney Wolfe, Health Research Group).

In the 1975 bill before Congress, H.R. 7229, 94th Cong., 1st Sess. § 14 (1975), these health and safety studies would have received protection under the trade secret designation. TSCA § 14 requires the Administrator to release all health and safety information which does not disclose processes used in manufacture or the portions of any chemical substances in a protected mixture. 15 U.S.C. § 2613 (1976). *See Hearings on S. 776, supra note 14, at 178 (statement of Jacqueline Warren, Environmental Defense Fund).*

Epstein, *supra* note 7. For example, Allied Chemical Company suppressed studies showing the carcinogenicity of kepone for about 10 years, "until workers at Life Sciences, an Allied spin-off corporation in Honeywell, Virginia, developed crippling neurological and other diseases from exposure to very high levels of kepone in grossly deficient working conditions." *Id.* at 20. "Dow and DuPont have admitted 'routine destruction' of workers' records after ten years employment, including those of workers exposed to occupational carcinogens, as a matter of policy." *Id.* at 21.

Examples cited in the Senate hearings were Hoffman-LaRoche's failure to report liver damage from the use of its product Marsalid to the Food and Drug Administration (FDA), resulting in fifty-three deaths that could have been prevented by disclosure; Richardson-Merrell's failure to report to the FDA that some users of Thalidomide experienced peripheral neuritis (such a report might have prevented the widespread experimentation with Thalidomide in this country); and Johnson & Johnson's failure to inform the FDA that Flexin was associated with fifteen deaths, resulting in six years of wide-spread sale of Flexin before it was withdrawn from the market. These disasters occurred, it was claimed, because the FDA regards toxicology data, or health and safety studies on nonantibiotic drugs, to be trade secrets. *Hearings on S. 776, supra* note 14, at 159 (statement of Dr. Sydney Wolfe, Health Research Group), & 178 (statement of Jacqueline M. Warren, Environmental Defense Fund).

the results of any health and safety study which does not reveal "processes used in the manufacturing or processing of a chemical substance or mixture or, in the case of a mixture, . . . the portion of the mixture comprised by any of the chemical substances in the mixture." While this test does not provide the full protection the industry desired, protecting more information would be inconsistent with the statutory purpose of providing public access to information about health and the environment. Therefore, the balance was struck in favor of greater disclosure.

In order that the inventory may be a complete listing of all chemical substances manufactured or processed in the United States, there is to be an appendix to the inventory, made up of generic or family names for each of the chemical identities which are to be accorded trade secret status. In this way, the public knows that something of that general family of chemicals is being produced, but the specific identity is protected.

B. Standards for Confidential Treatment

The protection for trade secrets and confidential business information is provided by section 14 of the TSCA. This section requires free disclosure of all information received by the EPA except that protected by the fourth exemption of the Freedom of Information Act. This exemption covers "trade secrets and commercial and financial information obtained from a person and privileged or confidential." The FOIA exemption was chosen

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23 Id. § 2613 (b).

24 For the standards to be applied by the EPA in determining whether a chemical substance will be accorded trade secret status, see note 105 and accompanying text infra.

TSCA provides more protection for trade secrets that are part of test data than does prior legislation. The Federal Environmental Pesticide Control Act of 1972 (FEPCA) differs from the TSCA in that it does not require disclosure of health and safety studies. While permitting companies to designate information as confidential, however, the FEPCA leaves the determination of that status to the Administrator's judgment. "[T]he Administrator shall not make public information which in his judgment contains or relates to trade secrets or commercial or financial information obtained from a person and privileged or confidential . . . ." 7 U.S.C. § 136(h)(b) (1976). Based on that mandate, the Administrator decided that no test results were to have confidential status. In Chevron Chemical Co. v. Costle, 443 F. Supp. 1024 (N.D. Cal. 1978), brought under the aforementioned statute, the court held that the Administrator could not exclude all test data from confidential protection. Such a policy was deemed arbitrary and in violation of the statute and the legislative intent.


27 5 U.S.C. § 552(b)(4) (1976). If Congress had not specifically included this exemption,
because there is an established body of law interpreting it, giving the industry and the Administrator for Toxic Substances a guideline for implementing section 14 of the TSCA. It also ensures a uniform standard of evaluation for the EPA to apply in handling all FOIA requests for information.\(^{25}\)

Most of the litigation interpreting the fourth exemption has primarily dealt with the meaning of "confidential and financial information." There has been little litigation as to the definition of a "trade secret" because the considerations that go into making that determination were well-defined at common law. These common law criteria are still used, as in the recent case of *Chevron Chemical Co. v. Costle.*\(^{29}\) In determining trade secret status, the *Chevron* Court cited: (1) the cost of developing the data; (2) the value of the data to the owner and to competitors, i.e., the extent of the competitive advantage; (3) the extent to which the data are not independently known or available to others; and (4) the extent to which the owner has maintained this confidentiality.\(^{30}\)

The court in *National Parks and Conservation Association v. Morton*\(^{31}\) developed a test for identifying "confidential commercial and financial information" that has consistently been followed:

\(\text{[C]ommercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.}\(^{32}\)

The court in *National Parks* stated that where information is required by statute to be reported, as with the TSCA, the government's ability to obtain information cannot be impaired.\(^{33}\) That

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23 Id. at 1031.
24 498 F.2d 765 (D.C. Cir. 1974).
25 Id. at 770 (emphasis added). See also Exxon Corp. v. FTC, 589 F.2d 582 (D.C. Cir. 1978); Continental Oil Co. v. FTC, 519 F.2d 31 (5th Cir. 1975); Nemetz v. Dep't of Treasury, 446 F. Supp. 102 (N.D. Ill. 1978).
26 The TSCA provides for a civil penalty of a fine up to $25,000 per day for any failure to comply with the rules or reporting requirements of the Administrator. In addition to or in lieu of the civil penalty, a person failing to comply with the act may be subject to a
leaves "substantial harm to competitive position" as the only test of the confidentiality of commercial or financial information under TSCA.

C. Procedure for Designating Information as Confidential

The EPA's regulations allow a company to claim confidential treatment for six specific items of information. These items are: "company name; [manufacturing or storage] site; the specific chemical identity; whether the chemical substance is manufactured, imported or processed; whether the chemical substance is manufactured and processed only within one site and not distributed for commercial purposes outside that site; and the quantity manufactured, imported or processed." The regulations require that any claim of confidentiality be submitted on the same form as the item of information, and substantiated at that time in a manner specified in the form instructions. If this substantiation does not accompany the information, the EPA will consider it a waiver of the confidentiality claim, and will publish the information without further notice to the submitting company.

For most of the information submitted to the EPA, the confidential classification and substantiation will not be evaluated immediately upon receipt, but the information will immediately receive confidential treatment. The need for confidentiality will only be considered when the EPA receives a request for the information pursuant to the Freedom of Information Act. This, however, is not the procedure when specific chemical identities are submitted as confidential. In that case the regulations provide a separate procedure for proving the need for confidentiality.

In addition to the detailed, written substantiation required for any claim of confidentiality, there are four requirements which

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34 40 C.F.R. § 710.7(a) (1979).
35 Id. § 710.7(b).
36 Id. § 710.7(d).
38 This process of evaluation is described in part III B infra.
39 40 C.F.R. § 710.7(e)(2) (1979). Two of these are self-explanatory and will not be discussed in detail. These are that the submitter must [r]eport the specific chemical identity, [and h]ave available, and agree to furnish to EPA upon request ... either an x-ray diffraction pattern (in the case of inorganic substances) or a mass spectrum for the particular chemical substance (in the case of most other substances), a sample of the substance in its purest
the submitting company of a chemical identity must meet in order to avoid waiver of its claim of confidentiality. One is that the submitting company must propose a generic name for the chemical for inclusion in the appendix to the inventory. This generic name may only be as general as necessary to protect the chemical's identity. If the Administrator finds the proposed name too vague, he will ask the company to submit more specific names. If none of these names is satisfactory, the Administrator will select a generic name he believes will protect the chemical identity and yet be as specific as possible. The Administrator will then give the company 30 days notice prior to placing its chosen name in the appendix.

The fourth requirement is that the submitting company must also agree that the EPA may disclose to a person with a "bona fide intent to manufacture the substance . . . the fact that the particular chemical substance is included in the inventory for purposes of . . . premanufacture notification." Thus, when a company wants to manufacture a new chemical substance that is not on the inventory, but may fall within one of the generic chemical names listed in the appendix, the manufacturer may ask the EPA whether the specific substance is already included in the inventory. This saves the company the time and expense of going through the premarket notification and screening required under section 2604 for a new chemical substance. The procedure the EPA employs to determine whether the inquiring

form, an elemental analysis, any additional or alternative spectra, or other data that may be required to resolve uncertainties with respect to the identity of the substance.

Id. This would result in the inclusion of the chemical identity on the inventory.

Id. See Part I supra for a discussion of the industry's hesitation to allow even a generic name to be published on the inventory.

40 C.F.R. § 719.7(f) (1979).

4 Id. § 719.7(e)(2).

45 See note 7 supra. This savings is substantial because a reliable test for carcinogenicity requires at least 2-3 years, uses many animals, and costs between $200,000 and $400,000 per chemical. Any simpler, faster methods can be expected to give the wrong result twenty percent of the time. Consider also that in 1956 Dow Chemical Company spent $1-3 million on research and development for each pesticide that became commercially successful. Today the cost is closer to $13.5 million. Dow requires 8-9 years to develop a new pesticide. It is not surprising that between 1956 and 1965 an average of thirty-nine new drugs per year were introduced commercially, but between 1966 and 1977 the average fell to only fifteen per year. Blair, Toxic Substances Legislation: Regulators v. Science, Envir. Pol. & Law 138, 139 (1976). Most chemicals do not have the potential for harm that drugs and pesticides present and so may require less extensive testing. These figures do show, however, the recent significant increase in research costs and make it clear that escaping premarket screening involves a substantial saving of time and money.
company has a bona fide intent to manufacture and whether the specific substance is identical to the substance represented on the appendix to the inventory by the generic name are discussed in part III A.

II. Disclosures of Confidential Information Authorized by the TSCA Within the Executive Branch

A. Disclosure Pursuant to Requests by Federal Officers or Federal Agencies Besides the EPA

Section 14(a)(1) of the TSCA provides for disclosure of information classified as confidential to "any officer or employee of the United States (A) in connection with (his) official duties . . . under any law for the protection of health or the environment, or (B) for specific law enforcement purposes." While the Act provides no notice to the submitting company prior to such disclosure, the EPA regulations provide for notice to the company ten days prior to disclosure to another federal agency. The EPA has made clear, however, that it considers this notice to be discretionary, with no statutory or constitutional requirement.

In one of the first actions to arise under the TSCA, Polaroid Corporation brought suit against the EPA seeking an injunction to delay the submission to the EPA of what it claimed was confidential information on twenty highly critical chemicals. In that action, filed prior to the promulgation of the regulations requiring notice by the EPA, Polaroid claimed its due process rights would be violated if it were required to submit confidential information before final protective regulations were promulgated, and before

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7" [S]uch notice may be given by notice published in the FEDERAL REGISTER at least 10 days prior to disclosure, or by letter sent by certified mail return receipt requested or telegram either of which must be received by the affected business at least 10 days prior to disclosure.
43 Fed. Reg. 39,997, 39,998-99 (1978). In a letter dated Sept. 1, 1978, accompanying the changes to 40 C.F.R., Administrator Costle stated, Notwithstanding EPA's position that notice is not legally required [prior to disclosure to Federal agencies], EPA has decided as a matter of policy to give notice in the case of disclosures to other Federal agencies and Congress, and pursuant to Federal court orders . . . . The additional notice requirements in these regulations will result in additional administrative burdens on EPA's programs. If these burdens begin to hamper the effective implementation of EPA's statutory mandates, the Agency may have to reconsider these notice requirements and further amend these regulations after rulemaking and public comment.
Id.
it had an opportunity to challenge those regulations. 50

The trial court issued a temporary injunction ordering Polaroid
to submit the information, but prohibiting the EPA from releasing
it to other federal agencies, contractors, or anyone else. 51 The
district court found that Polaroid had a reasonable likelihood of
establishing that the lack of standards for such release, for notice,
and for hearing and judicial review might make disclosure of
confidential information under the TSCA a deprivation of prop-
erty without due process of law. Both the EPA and Polaroid were
directed to submit briefs on the constitutionality of the disclosure
provisions. 52 In the meantime, however, the EPA promulgated
the provisions requiring notice, and Polaroid’s subsequent with-
drawal of its claim deprived the court of the opportunity to decide
whether notice is constitutionally required. 53

In another recent case, Exxon Corp. v. FTC, 54 the District
Court for the District of Columbia held that there is no constitu-
tional requirement of notice to the company prior to disclosure of
information by an agency to Congress. 55 While that court was
principally concerned with judicial interference with the legisla-
tive process, it gave another reason for not finding notice to be
constitutionally mandated which may also be found to be applic-
able to disclosure to other federal agencies. Relying on an earlier
opinion in which disclosure to Congress was held not to be “public

8 ENVIR. L. REP. (ELI) 65,572 (1978). Polaroid claimed that trade secrets are property
interests protected by the due process clause of the Fifth Amendment. It sought only
interim relief, pending the promulgation of specific TSCA security regulations. Id.

Polaroid was particularly concerned with the lack of provision in the existing regulations
for notice prior to disclosure to federal agencies, Congress, and EPA contractors, contend-
ing that without a notice requirement, those regulations were inadequate to protect confi-
dential information. Notice to the submitting company prior to disclosure is necessary to
enable the company either to request a hearing as to the confidentiality designation, or
to file suit to enjoin disclosure, both significant protections. See parts II B and III C infra.

The EPA’s position was that since 15 U.S.C. § 2613 did not require the promulgation
of regulations, the absence of those regulations did not justify Polaroid’s exclusion from
the reporting requirements. The EPA argued that existing regulations and the criminal
penalties in the TSCA provide adequate protection for confidential information. 8 ENVIR.
L. REP. (ELI) 65,572 (1978). This argument, however, was not directly responsive to
Polaroid’s claim of a violation of due process through the lack of a notice provision. First,
the severity of the criminal penalties is an inadequate measure of the protection afforded
trade secrets. See note 180 infra. In addition, Polaroid was concerned with legal disclosures
to other federal agencies, EPA contractors, and Congress, not with the criminal penalties
for illegal disclosure; it was uncontested that the criminal penalties were sufficiently
rigorous.

9 ENVIR. REP. (BNA) 361 (1978).

10 Id.

9 ENVIR. REP. (BNA) 1302 (1978). Spokesmen for Polaroid said that the firm was
satisfied with the final confidentiality regulations issued by the EPA and with the final
internal security procedures adopted by the EPA for the physical handling of confidential
data. Id.

589 F.2d 582 (D.C. Cir. 1978).

56 For a discussion of disclosures to Congress under the TSCA, see part III C infra.
disclosure," the court said, "[b]ecause such divulgement is not ‘public’, it does not in itself impair the value of the trade secrets involved, and thus does not involve a deprivation prior to which a hearing is required."

The EPA could argue that disclosure to other federal agencies is also not “public disclosure” and for that reason notice is not constitutionally required. This analogy of agency access to congressional subpoena power, however, is unpersuasive. Congress historically has enjoyed a privileged position in its information-gathering efforts. The courts are so reluctant to interfere with Congress that a presumption of good faith has been placed on congressional treatment of confidential information. In the absence of an express intent to disclose, the courts will presume that Congress will not release the information. There is no necessity for such a presumption in favor of access by federal agencies. Agencies are the creations of Congress and are not entitled to the judicial deference granted Congress itself under the separation of powers doctrine.

The EPA should retain the notice provision for practical reasons. The success of the TSCA depends on the cooperation of the industry. The greater the respect the EPA shows for industry concerns, the higher the degree of cooperation that can be expected from the industry.

B. Disclosure to EPA Contractors

In order to avoid having to expand greatly its research staff and facilities in order to implement the TSCA, the EPA plans to use

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54 Ashland Oil, Inc. v. FTC, 548 F.2d 977 (D.C. Cir. 1976).
55 Exxon, 589 F.2d at 589. Thus, it might be argued that absent a showing that information given to a federal officer or agency will definitely be made public, such disclosure is also not public and so does not require notice.

The Exxon court stated that information submitted to the FTC under an agreement that notice would be given prior to a disclosure to Congress could not later be disclosed without such notice. Id. at 589. It is unclear whether information submitted while the current regulations which require notice are in effect could not be disclosed without notice should the notice requirement later be removed from the regulations. The Exxon court refused to impose a mandatory ten-day notice requirement on the FTC, but did say that “normally reasonable advance notice can be required, [however] in exigent circumstances Congress has full authority to issue forthwith subpoenas and formally request immediate disclosure.” Id. at 588.

56 The Ashland court gave little guidance in determining what would constitute “public disclosure.” It said simply that in that case there was no showing that the confidential materials would be “made public” if disclosed to Congress, and that absent such a showing, Congress would not be precluded from obtaining the trade secrets pursuant either to subpoena or formal request. 548 F.2d at 979.
57 Ashland Oil v. FTC, 548 F.2d 977, 979 (D.C. Cir. 1976).
contractors to do much of the testing the Act requires. Section 14(a)(2) provides for disclosure of confidential information to EPA contractors "if in the opinion of the Administrator such disclosure is necessary for the satisfactory performance by the contractor of a contract with the United States . . . in connection with this chapter." The TSCA provides no notice to the submitting company prior to disclosure to the contractor, but notice is required by the regulations. This notice is to "include a description of the information to be disclosed, the identity of the contractor or subcontractor, the contract or subcontract number, if any, and the purposes to be served by such disclosure." The submitting company must be given at least five working days in which to respond with comments.

C. Disclosure During TSCA Proceedings

The TSCA provides that confidential business information "may be disclosed when relevant in any proceeding under this chapter, except that disclosure in such a proceeding shall be made in such manner as to preserve confidentiality to the extent practicable without impairing the proceeding." This disclosure may be made without notice to the submitting company.

There are three types of proceedings under the TSCA to which this provision applies. First are the meetings held by the Intragency Testing Committee established by the TSCA to evaluate new chemical substances. This committee makes recommenda-

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60 These contractors may be college students and professors, or large chemical research companies, depending on the EPA's needs. Interview with Steven D. Jellinek, supra note 37. See Hearings on H.R. 7229, H.R. 7548, and H.R. 7664, supra note 9, at 94 (proposed amendments to H.R. 7664 by Mr. McCollister):

It is important, however, that all information obtained pursuant to the Act be made available to contractors of the U.S. if such disclosure is necessary for the satisfactory performance of the contract. Since much of the Agency's workload undoubtedly will be contractual this provision is vital to the legislation's successful implementation.

62 40 C.F.R. § 2.301(h)(2) (1979), as applied to TSCA by 40 C.F.R. § 2.201(e) (1979).
63 Id. This notice, like that prior to disclosure to federal officers, is considered by the EPA to be merely a matter of policy and is changeable at any time. See notes 48-53 and accompanying text supra. The considerations that led the Exxon court to hold that notice prior to disclosure to Congress is not constitutionally required are not as clearly present in the case of disclosure to contractors. Disclosure to contractors can be more easily perceived as public and thus notice might be found to be required.
64 Id. § 2.301(h)(2)(iii).
66 Id. § 2603(e)(1)(A). The committee is to consist of eight members from federal agencies and departments as follows:

(i) One member appointed by the Administrator from the Environmental Protection Agency.
tions to the Administrator as to which chemicals require more research and testing before they can be accurately evaluated.87

Another form of proceeding under the TSCA is a court hearing initiated by the Administrator. A proceeding of this type can be initiated to serve two purposes. If the Administrator determines that there are insufficient data about a chemical with which to make a reasoned evaluation as to its health and environmental effects, or if the chemical is likely to enter the environment in substantial quantities, he may seek an injunction to prohibit or limit its manufacture until sufficient information becomes available.88 The Administrator may also seek an injunction if, in the absence of sufficient information, the manufacture, processing, or distribution "may present an unreasonable risk of injury to health or the environment . . . ."89 The Administrator may also start a civil action in the appropriate district court for seizure of "an imminently hazardous chemical substance"70 or for other relief.71

(ii) One member appointed by the Secretary of Labor . . . .
(iii) One member appointed by the Chairman of the Council on Environmental Quality . . . .
(iv) One member appointed by the Director of the National Institute for Occupational Safety and Health . . . .
(v) One member appointed by the Director of the National Institute of Environmental Health Sciences . . . .
(vi) One member appointed by the Director of the National Cancer Institute . . . .
(vii) One member appointed by the Director of the National Science Foundation . . . .
(viii) One member appointed by the Secretary of Commerce . . . .

Id. § 2603(e)(2)(A). Each member appointed is to be an officer or employee of the same department as the person who selects that member. Id. § 2603(e)(1)(B)(i).

87 Id. § 2603(e)(1)(A). Factors the committee is to consider in making its determinations are: (1) the quantities in which the substance is or will be manufactured; (2) the quantities in which it will reach the environment; (3) the number of individuals who are or will be exposed to it in their places of employment, and the duration of the exposure; (4) the extent to which human beings in any capacity are or will be exposed to the substance; (5) the extent to which the substance is closely related to a substance known to present an unreasonable risk of injury to health or the environment; (6) existing data concerning the substance's effects on health and the environment; (7) the reasonably foreseeable availability of facilities and personnel for performing testing on the substance. Id.

In establishing its list of the chemicals about which the data are most uncertain, the committee is to give priority to those chemical substances "which are suspected of causing or contributing to cancer, gene mutation or birth defects." Id.

88 Id.
89 Id. § 2604(e)(2)(B)(ii)(I).
71 The TSCA provides that
[T]he relief authorized . . . may include the issuance of a mandatory order requiring (A) in the case of purchasers of such substance, mixture, or article known to the defendant, notification to such purchasers of the risk associated with it; (B) public notice of such risk; (C) recall; (D) the replacement or repurchase of
The third type of TSCA proceedings is informal hearings conducted by the Administrator. These hearings can arise in two contexts: (1) in evaluating the risks presented by the manufacture of a chemical substance and determining what regulations to issue; and (2) in determining whether to require a company to institute more rigorous quality control measures. The EPA regulations provide that prior to any public disclosure of information, such substance, mixture or article; or (E) any combination of the actions described in the preceding clauses.

Id. § 2606(b)(2).

These hearings are considered informal because "[t]he Administrator may prescribe such rules and make such rulings concerning procedures in such hearings to avoid unnecessary costs or delay." Id. § 2605(c)(3)(B). This is not, however, an indication that the EPA considers them unimportant.

15 U.S.C. § 2605(c)(3)(D) (1976) provides for a verbatim transcript to be taken of any oral presentation made in any informal hearing under subsection (c), and "[s]uch transcript shall be available to the public." It seems, however, that this subsection cannot be read literally because the TSCA provides that "disclosure in such a proceeding shall be made in such manner as to preserve confidentiality to the extent practicable without impairing the proceeding." Id. § 2613(a)(4). In addition, 40 C.F.R. §2.205(c) (1979) protects information submitted to the EPA as part of a company's comments in support of its confidentiality claim. Therefore, it would be anomalous to require a transcript including confidential information to be made public when the Administrator may refuse to release the original confidential information.

15 U.S.C. § 2605(a) (1976). The TSCA provides that the Administrator must conduct an informal hearing when making these determinations, and must give the affected business the opportunity to present its position orally or by documentary evidence, or both. Id. § 2605(c)(3)(A).

Id. § 2605(b)(2). Hearings under this provision are to be held in accordance with 5 U.S.C. §554, which provides in part: "The agency shall give all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public's interest permit. . . ." 5 U.S.C. § 554(c) (1976) (emphasis added).

This provision does not guarantee an opportunity for a hearing as does 15 U.S.C. § 2605(c)(3)(A) (1976). See note 73 supra. The difference is probably due to the relative immediacy of the subject matter of the hearings being conducted. The determinations to be made under 15 U.S.C. § 2605(a) are prospective. Since manufacture has not yet commenced, there is time to guarantee a hearing before any possible damage could be done to health or the environment. On the other hand, proceedings under §2605(b)(2) to evaluate quality control procedures may be conducted after manufacture and distribution have commenced. In this situation, there may be a much greater need for immediate action. Thus, the Administrator may limit the submission of facts and argument when the public interest requires.

The Administrator may also decide that the use of inadequate quality control procedures has resulted in the distribution of a substance which presents an unreasonable risk to health or the environment. In this case the Administrator may require the manufacturer to

(i) give notice of such risk to processors or distributors . . . and . . . any other person in possession of . . . such substance;
(ii) to give public notice of such risk, and
(iii) to provide such replacement or repurchase of any such substance or mixture as is necessary to adequately protect health or the environment.

tion in connection with these hearings, the presiding officer shall notify the business affected by the proposed disclosure, and allow opportunity for response. Information may only be disclosed if "the EPA office conducting the proceeding determines that the public interest would be served by making the information available to the public." When the decision to release is made on the record, after an opportunity for a hearing, the regulations provide that disclosure to any of the parties of record, where there are protective arrangements, will not affect the confidential treatment the information receives for all other purposes of the Act.

D. Disclosure When Necessary to Protect Health or the Environment

The TSCA permits the Administrator to release confidential information when he "determines [that] it [is] necessary to protect health or the environment against an unreasonable risk of injury . . . ." Presumably this disclosure is to a state health protection or police agency. The notice to the submitting company provided by the Act for this type of disclosure varies with the immediacy of the threat of harm. Where the threat of harm is not immediate, the Administrator must give at least fifteen days written notice prior to the release of the information. In the event of an imminent, unreasonable risk of injury to health or the environment, the Administrator may use such means as he determines will provide at least twenty four hours notice before the disclosure is made.

III. Disclosures of Confidential Information to Parties Outside of the Executive Branch

There are three ways by which parties outside of the executive branch of the government and its contractors may obtain confidential information not included on the inventory. One is through a request by a bona fide manufacturer of a chemical substance identical to one included in the appendix to the inventory. An-

75 40 C.F.R. §§ 2.204(d)(1), .301(g)(2) (1979). Such notice is to be "furnished by certified mail (return receipt requested), by personal delivery, or by other means which allows verification of the fact and date of the receipt." Id. § 2.204(e)(1).
76 Id. § 2.301(g)(2).
77 Id. An example of such an arrangement might be one requiring health enforcement officials to protect the secrecy of information to which they are granted access.
79 Id. § 2613(c)(2)(B)(i).
80 Id.
81 40 C.F.R. § 710.7(g) (1979).
other is through a request pursuant to the Freedom of Information Act.\textsuperscript{82} The third is via a request from a committee of Congress.\textsuperscript{83}

A. Disclosures to Bona Fide Manufacturers

A chemical identity which is submitted to the EPA as confidential will be included in the appendix to the inventory under a generic name to preserve its anonymity.\textsuperscript{84} When submitting such an identity, a company must agree to the release to a requesting bona fide manufacturer of the same chemical substance of the fact that the chemical is included in the appendix.\textsuperscript{85} A company which proposes to manufacture a new chemical would be vitally interested in determining whether its proposed substance was already on the inventory. If the chemical substance is already on the inventory, the EPA does not require the extensive pre-manufacture screening all new chemical substances must undergo under the TSCA.\textsuperscript{86} This will result in a considerable savings in time, money, and resources.\textsuperscript{87}

Since this information may only be disclosed to a bona fide manufacturer of the same substance, when he receives a request from a manufacturer for permission to produce and market a chemical substance which that manufacturer thinks may be included in one of the generic categories in the appendix, the Administrator must make two factual determinations. One is whether the requester has a bona fide intent to market this chemical substance, that is, that he is not merely on a "fishing trip" for information.\textsuperscript{88} The second is whether the proposed substance is virtually identical to the one in the appendix.\textsuperscript{89}

To make these determinations, the Administrator requires submission of a signed statement of intent to manufacture,\textsuperscript{90} a description of research to date,\textsuperscript{91} and specific chemical information that will allow a determination as to whether the new substance

\textsuperscript{84} See part I C supra.
\textsuperscript{85} 40 C.F.R. § 710.7(e)(2)(iv) (1979).
\textsuperscript{87} See notes 2, 7, & 45 supra.
\textsuperscript{88} 40 C.F.R. § 710.7(g)(2) (1979).
\textsuperscript{89} Id. § 710.7(g)(1).
\textsuperscript{90} Id. § 710.7(g)(2). The intent to manufacture must be for a "commercial purpose" in order to stop companies from seeking information about competitors' products with no intent to manufacture them for profit. Id. § 710.7(g)(1).
\textsuperscript{91} Id. § 710.7(g)(2).
is the same as the one listed. 82

If the EPA were to request additional information after it had begun a comparative analysis of the requesting company's chemical, the mere request for more information might tell the company that something very similar was already included in the appendix. To prevent this from happening, the EPA requires that all the necessary comparative information be submitted with the original request. 83 Thus if either the company is found not to have a bona fide intent to manufacture, or the substances are not sufficiently alike, the requesting company will receive no information as to the chemical which is listed under the generic name.

Once the verification information is received from the requesting company, the EPA may notify the original submitting company of the request and require them to provide additional information for comparison with the newly proposed substance. 84 If the

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82 The specific information required is:
- an elemental analysis, . . . Either an x-ray diffraction pattern (in the case of inorganic substances) or a mass spectrum (in the case of most other substances) of the particular chemical substance, . . . a sample of the substance in its purest form, if requested, and . . . any additional or alternative spectra, or other data that may be required to resolve uncertainties with respect to the identity of the chemical substance.

Id. This is the same information that a submitting company is required to have available for comparison by the EPA under § 710.7(e)(2). See notes 39-44 supra.

The EPA also needs a list of the purposes for which the chemical substance is to be manufactured, because under § 5 of the TSCA, the Administrator may require additional testing of a substance already included on the inventory if it is to be manufactured for a "significant new use." 15 U.S.C. § 2604(a)(1)(B) (1976). In determining whether it is a "significant new use," the Administrator shall consider
- (A) the projected volume of manufacturing and processing of a chemical substance,
- (B) the extent to which a use changes the type or form of exposure of human beings or the environment to a chemical substance,
- (C) the extent to which a use increases the magnitude and duration of exposure of human beings or the environment to a chemical substance, and
- (D) the reasonably anticipated manner and methods of manufacturing, processing, distribution in commerce, and disposal of a chemical substance.

Id. § 2604(a)(2).

83 40 C.F.R. § 710.7(g)(2) (1979). There was much concern expressed with the originally-proposed regulations, which did not sufficiently protect the fact that the submitting company manufactured a particular substance. It was pointed out that simply by asking for specific verification information from the requesting company, the EPA let the requesting company know what types of comparisons it was making. The uniform reporting requirements seem to be more effective in protecting submitting company secrets.

84 Id. § 710.7(g)(3). It should be noted that this notice is only provided when the EPA is in need of more information with which to compare the newly-proposed chemical. Thus, the notice to the submitting company is incidental to the request for more information. If the EPA has already received this information pursuant to a prior comparative analysis, it will not notify the submitting company of the new request. Additionally, the quantity of information which the EPA requires with the original submission of the chemical substance is designed to eliminate the need for later additional requests. Thus, in most situations, the EPA will not ask for more information, and the original company will have no notice of the comparison being made.
submitting company does not provide this information, its claim of confidentiality will be considered waived by the EPA and the EPA will place the chemical identity on the inventory without further notice to the submitter. If, after comparative analyses have been made, the Administrator decides the identities are not sufficiently similar to presume they are the same, he informs the requesting company that the specific identity is not on the inventory and that the company must go ahead with premarket screening. If the Administrator decides the two identities may be presumed to be the same, he will notify the requesting company that the chemical identity is on the inventory and that premarket screening is not required.

This notification to the requesting company of the chemical identity's presence on the inventory is not considered a disclosure by the EPA and thus no notice is to be given to the original submitting company. The submitter is put in a "Catch-22" situation. He is forced to agree to the release of the fact of inclusion on the inventory at the time he submits his information or else he waives his whole confidentiality claim. At the same time, once he has signed the release agreement, he waives all right to notice of the release to a bona fide manufacturer. In either event, the fact that his trade secret chemical identity exists becomes known by at least one competitor and the market balance on the substance may be expected to change.

It is incongruous that the EPA is required to provide notice to submitting companies in virtually all situations prior to disclosure except this one, which has great potential for severe economic damage. The fact of disclosure of an identical match of chemical identities is purely business information and so outside the primary focus of the TSCA. A better policy which is more in keeping with the cooperative spirit to be fostered between industry and the EPA would at a minimum provide notice of the release to the submitting company. This would prevent the requesting company from having the advantage of knowing that he has a competitor while the original submitter knows nothing of the new manufacturer.

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85 Id. § 710.7(g)(3)(ii). It is highly unlikely that the submitting company will ignore such a request. It is the party with the chief interest in proving differences in the two chemicals.
86 Id. § 710.7(g)(6).
87 Id. § 710.7(g)(5).
88 Id. § 710.7(g)(7). The revelation of the chemical's existence is not seen as a public disclosure by the EPA because the submitting company had signed an agreement permitting such disclosure when it submitted the chemical. Id. § 710.7(e)(2). See notes 85-87 and accompanying text supra.
89 40 C.F.R. § 710.7(e)(2) (1979). See note 98 supra.
90 Id. § 710.7(g)(7).
B. Disclosure Pursuant to a Request for Information Under the Freedom of Information Act

When a company submits information designated as confidential to the EPA, no immediate evaluation is made of that designation. The material is treated as confidential from the time it is received. The confidential designation is usually reviewed upon receipt of a request for the information pursuant to the Freedom of Information Act.

After receiving such a request, the EPA notifies the submitting company of the request and allows the company time to present comments in support of its confidentiality claim. The requesting company is told that the information requested may be confidential, and that further inquiry is necessary before the EPA is able to comply with the request. The request is thus initially denied, pending a final determination by the EPA legal office.

EPA regulations provide a five-fold test for determining whether information deserves confidential treatment. Should

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101 Interview with Steven D. Jellinek, supra note 37. 40 C.F.R. § 2.204(a)(2) (1979), however, permits evaluation of a claim of confidentiality whenever the EPA desires, even though no request for release of the information has been received. This would include the evaluation of specific chemical identities immediately upon receipt by the EPA. See part I C supra.

40 C.F.R. § 2.204(a)(3) (1979) permits the EPA to evaluate a claim of confidentiality when it determines that it is likely the EPA will be asked to disclose the information in the future. The reason given for this is to "increase the time available for preparation and submission of comments . . . and to make easier the task of meeting response deadlines of a request for release of the information is later received under 5 U.S.C. § 552." 40 C.F.R. § 2.204(a)(3) (1979).


The Freedom of Information Act procedure for requesting is frequently used because it is an easy and inexpensive way for companies to discover information about their competitors which the government has in its files. An estimated ninety percent of the FOIA requests received by the EPA are from the competitors of the submitting companies, according to Steven D. Jellinek, Assistant Administrator for Toxic Substances, EPA (address sponsored by the University of Michigan Dept. of Pub. Health (Nov. 2, 1978)).

103 40 C.F.R. § 2.204(d) (1979). The "comments" solicited in this procedure are in addition to the verification of the confidentiality claim required to accompany the original submission of the data. The comments provide an opportunity for the submitting company to reinforce its confidentiality claim, and to bring its supporting information up to date. It is, of course, in the company's interest to provide this supporting information, but even if it did not, the EPA would probably have sufficient data with which to evaluate the confidentiality claim.

104 Id.

105 Information is entitled to confidential treatment . . . if—

(a) The business has asserted a business confidentiality claim which has not expired by its terms, nor been waived nor withdrawn;

(b) The business has satisfactorily shown that it has taken reasonable mea-
the EPA legal office determine that the information is entitled to confidential treatment, it issues a final denial to the company requesting that information. If that company then sues the EPA, the submitting company will be notified of the suit within ten days of the complaint. The EPA permits free intervention by the submitting company. Indeed, it is in the company’s interest to cooperate with the EPA. If, however, the EPA legal office decides that the information is not entitled to confidential treatment, notice of that decision is furnished to the submitting company. The regulations make it clear that the purpose of this

sures to protect the confidentiality of the information, and that it intends to continue to take such measures;

(c) The information is not, and has not been, reasonably obtainable without the business’ consent by other persons (other than governmental bodies) by use of legitimate means; . . .

(d) No statute specifically requires disclosure of the information; and

(e) Either—

(1) The business has satisfactorily shown that disclosure of the information is likely to cause substantial harm to the business’ competitive position; or

(2) The information is voluntarily submitted . . . and its disclosure would be likely to impair the Government’s ability to obtain necessary information in the future.

Id. § 2.208 (1979).

An example of a statute which requires disclosure per subsection (d) is 15 U.S.C. § 2613(b) (1976), which does not permit the withholding of any health or safety study under a confidential business designation. See notes 22-23 and accompanying text supra.

Subsection (e) incorporates the test established in National Parks & Conservation Ass’n v. Morton, 498 F.2d 765 (D.C. Cir. 1974), for protection of commercial or confidential information. See notes 31-32 and accompanying text supra. “Voluntarily submitted” information is defined in the regulations as information “(1) [t]he submission of which EPA had no statutory or contractual authority to require; and (2) [t]he submission of which was not prescribed by statute or regulation as a condition of obtaining some benefit . . . under a regulatory program of general applicability . . . ." 40 C.F.R. § 2.201(i) (1979).


Id. § 2.214(b)(1).

Id. § 2.214(b)(3). It is interesting to note that the regulations discuss this intervention as a duty of the submitting company rather than a privilege. “EPA will defend its final confidentiality determination, but EPA expects the affected business to cooperate to the fullest extent possible in this defense.” Id. § 2.214(c). This section must be intended to deter frivolous claims of confidentiality: if a company knows it will have to back up its claim in court, perhaps it will think more carefully about the information it tries to keep secret. Moreover, it would make little sense for a company to provide all the information required by the EPA to verify its confidentiality claim, and then turn its back on a suit by an FOIA requester. Perhaps the EPA is simply making cooperation a condition of its assistance.

The submitting company is the party with the true interest in maintaining the confidentiality of trade secrets. Since this information is required to be submitted by the TSCA, the EPA has no grounds to believe disclosure will make it more difficult to obtain compliance with reporting rules in the future.

There is a conflict between the TSCA itself and the regulations as to how much time must be given in the notice period. TSCA states, “[i]f the release of such data is to be
notice is to give the affected company time to seek judicial review
of the agency's determination.\footnote{111}

The FOIA does not confer jurisdiction upon courts to review an
agency’s decision to release information;\footnote{112} instead, such “reverse­
FOIA” suits have been based on general federal question jurisdic­
tion.\footnote{113} These suits have generally been premised on one of two
theories:\footnote{114} an implied right of action based upon specific non-

made pursuant to a request made under section 552(a) of Title 5, . . . [t]he Administra­
tor may not release such data until the expiration of 30 days after the manufacturer . . .
has received the notice . . . . . .” 15 U.S.C. § 2613(c)(2)(A) (1976). In contrast to this, 40
C.F.R. § 2.205(f)(2) (1979) states, “[w]ith respect to EPA’s implementation of the deter­
nmination [to deny a business confidentiality claim], the notice shall state that . . . EPA
will make the information available to the public on the tenth working day after the date
of the business’s receipt of the written notice . . . . . .” There are two ways for the affected
business to extend the ten day notice period. One is to commence an action in a federal
court for “judicial review of the determination, and to obtain preliminary injunctive relief
against disclosure.” 40 C.F.R. § 2.205(f)(2) (1979). The other is to request an extension of
the deadline. \textit{Id.} § 2.205(f)(3). This extension, however, will only be granted with the
consent of the party making the FOIA request for the information. \textit{Id.} \textit{Id.}

In any action dealing with the question of notice, the provisions of the TSCA would
govern, and the longer notice period would be required.\footnote{111} 40 C.F.R. § 2.205(f)(2) (1979). The notice required under this section must state that
the EPA will make the information available on the tenth working day after the receipt
of the notice, unless it has been notified that the affected business has filed suit in a
federal court to obtain a judicial review of the confidentiality determination. Even if such
an action has been commenced, the EPA may still make the information available once
the court has denied a motion for a preliminary injunction, or if it appears that the
company is not taking measures to obtain a speedy resolution of the issue. \textit{Id.} \textit{Id.}

\footnote{113} Chrysler Corp. v. Brown, 441 U.S. 281 (1979). The FOIA confers jurisdiction to review
de novo only an agency decision to withhold information exempt under the Act. 5 U.S.C.
§ 552(a)(4)(B) (1976). This is in keeping with the overall purpose of the FOIA to provide
public access to governmental decision-making information.


\footnote{114} A third theory is that the FOIA exemptions from mandatory disclosure create an
implied right to enjoin disclosure. Note, Administrative Disclosure of Private Business
Records Under the Freedom of Information Act: An Analysis of Alternative Methods of
Review, 28 \textit{Syracuse L. Rev.} 923, 926 (1977). This implied cause of action has two basic
problems. One is that it conflicts with the primary policy of FOIA, that of full disclosure
and easy access to information. The other is that it is premised on the assumption that
the exemptions listed in 5 U.S.C. § 552(b) are mandatory rather than discretionary. The
legislative history and judicial interpretations of FOIA suggest that in drafting FOIA,
Congress recognized the confidential business concerns involved, but it chose not to pro­
vide an absolute protection for them.

\footnote{112} Chrysler Corp. v. Brown, 441 U.S. 281, 292-93 (1979). “Both the plain language of § 552(b)
and the Congressional reports and debates suggest that no more was intended than a
discretionary exception to the general mandatory duty of disclosure.” \textit{Chrysler Corp. v.
Schlesinger, 565 F.2d 1172, 1185 (3d Cir. 1977).}

If the exemptions are determined to be discretionary, as a majority of courts and com­
mentators have found, this implied cause of action theory must fail. Clement, \textit{The Rights}
disclosure statutes,115 and a right to review disclosure decisions based upon section 10 of the Administrative Procedure Act.116

When an action is brought under a specific non-disclosure statute which furnishes a standard of judicial review, that standard is applied.117 Actions brought under the Administrative Procedure Act (APA) are governed by section 706, the “scope of review” provision.118 The Third Circuit Court of Appeals designed the

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115 The Trade Secrets Act, 18 U.S.C. § 1905 (1976), is the statute upon which most “reverse-FOIA” plaintiffs have placed principle reliance. The Supreme Court’s recent decision in Chrysler Corp. v. Brown, 441 U.S. 281 (1979), however, has made it clear that there is no private right of action to enjoin disclosure in violation of this statute.

116 5 U.S.C. §§ 701(a)(1)-(2) (1976). This may be the only theory remaining to plaintiffs seeking to enjoin disclosure of confidential information after Chrysler Corp. v. Brown, 441 U.S. 281 (1979). In that case, after rejecting Chrysler’s contention that the Trade Secrets Act afforded a private right of action, the Court said, “a private right of action under § 1905 is not ‘necessary to make effective the congressional purpose,’ J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964), for we find that review of the decision to disclose Chrysler’s employment data is available under the APA.” Id. at 317.

For a discussion of actions brought under this section, see Clements, supra note 114, at 626; Note, Reverse-Freedom of Information Act Suits: Confidential Information in Search of Protection, 70 NW. U.L. REV. 995, 1006 (1976); Note, Protection From Government Disclosure—The Reverse-FOIA Suit, supra note 114, at 348.

117 Clement, supra note 114, at 628.

118 This provision reads:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The review court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, finding, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determination, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of

prejudicial error.

following analysis for reviewing reverse-FOIA cases brought under the APA. The court must determine whether any specific non-disclosure statute is applicable. If so, then the agency decision to release is outside the scope of its authority and the disclosure should be enjoined. If there is no non-disclosure statute applicable, the court must determine by what authority the agency intends to release the information. If the agency says the information is not within an FOIA exemption, the court must determine whether the agency applied the proper legal standard for applicability of the FOIA exemptions. Where information is within an exemption, but the agency says that disclosure is desirable and permissible, the court has to make a two step analysis. It must determine whether the agency applied the proper legal standard for application of FOIA exemptions, and if so, the court must determine whether the agency considered the proper factors in determining that disclosure was permitted under its own disclosure regulations. If an agency record is too incomplete to make this analysis, "the remedy is not a trial de novo, but a remand to the agency for an additional record or explanation for its decision."

This review of an agency decision to release information exempt under FOIA is much more limited than the de novo review of an agency decision to withhold information. Limited review is in keeping with the full disclosure purpose of the FOIA. Permitting de novo review of decisions to grant FOIA requests would significantly increase the time involved before those requests could be granted, and would also increase the requester's costs. These are particularly compelling interests under the TSCA since one of its main purposes is to provide the public with easy access

118 Chrysler Corp. v. Schlesinger, 565 F.2d 1172, 1192 (3d Cir. 1977). The Third Circuit Court of Appeals again applied this analysis in GTE Sylvania, Inc. v. Consumer Prod. Safety Comm'n, 598 F.2d 790, 800 (1979). But see Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971), where the Supreme Court stated "[d]e novo review . . . is authorized by § 706(2)(F) in . . . two circumstances. First, such de novo review is authorized when the . . . agency factfinding procedures are inadequate. And, there may be independent judicial factfinding when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action."

120 One commentator has suggested shifting the presumption in favor of disclosure that is present in a regular FOIA proceeding to a presumption favoring non-disclosure in a reverse-FOIA proceeding. This would put the burden on the agency to show that there is adequate justification for disclosure. This suggestion assumes that by including the exemptions, Congress intended to provide at least some protection for confidential information despite the fact that it did not make the exemptions mandatory. Note, Administrative Disclosure of Private Business Records Under the Freedom of Information Act: An Analysis of Alternative Methods of Review, supra note 114, at 970-71.

121 For an interesting analysis of the benefits of limited review of agency decisions to disclose exempt FOIA information, see Clement, supra note 114, at 636-37.
to chemical data. This procedure is also fair to the submitting businesses in light of the input they have in the original status determination by way of the substantiation they submit in support of their claim of confidentiality. It is reasonable for Congress and the EPA to expect businesses to make their best efforts to comply with the agency at the initial stage, rather than waiting to seek a full hearing *de novo* upon receiving an unfavorable decision.

C. Disclosure to Congressional Committees

The TSCA provides for very broad disclosure to Congress. It gives congressional committees access to all information reported to or otherwise obtained by the Administrator.\(^\text{122}\) This is probably a recognition of Congress' broad investigatory powers implied from its legislative function; the provision is not necessary, however, to give Congress the right to subpoena confidential information.\(^\text{123}\) The Supreme Court recognized the necessity of a broad congressional right to obtain information in *Eastland v. United States Servicemen's Fund,*\(^\text{124}\) where it declared "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change."\(^\text{125}\) There are limits to what information Congress may request, but these are few in number and quite narrow. For example, Congress may not interfere with the guarantees of the Bill of Rights in conducting an investigation.\(^\text{126}\) Nor may Congress inquire into purely private matters which are unrelated to the subject matter of the legislation.\(^\text{127}\) Outside of these limita-


\(^{123}\) See Rosenthal & Grossman, *Congressional Access to Confidential Information Collected by Federal Agencies,* 15 Harv. J. Legis. 74 (1977). The authors maintain that even in the absence of an express grant of access, Congress would have the constitutional authority to subpoena information. Since "it is questionable whether Congress could explicitly waive or impede its power to investigate, it is clear that a waiver should not be presumed from statutory silence." Id. at 88. Thus, in statutes such as the Federal Trade Commission Act, 15 U.S.C. § 45(f) (1976), where Congress has not exempted itself from confidentiality provisions, the courts have still held that Congress' constitutional power to investigate permits it such access. *Ashland Oil v. FTC,* 409 F. Supp. 297 (D.D.C.), aff'd, 548 F.2d 977 (D.C. Cir. 1976).

\(^{124}\) 421 U.S. 491 (1975).

\(^{125}\) Id. at 504 (citing McGrain v. Dougherty, 273 U.S. 135, 175 (1927)).


\(^{127}\) Quinn v. United States, 349 U.S. 155, 161 (1955). In *Shelton v. United States,* 404 F.2d 1292, 1297 (D.C. Cir. 1968), the court stated:

In deciding whether the purpose is within the legislative function, the mere assertion of a need to consider "remedial legislation" may not alone justify an investigation accompanied with compulsory process; but when the purpose as-
In reviewing the propriety of congressional subpoenas, the courts have been extremely hesitant to refuse the congressional requests for information. Fearing interference with the legislative function, courts have limited review to two questions. One is whether the investigation is within the constitutional power of Congress. The other is whether the information sought is germane to the investigation. It is clear that almost all congressional requests for information will result in affirmative answers to both questions so that a company challenging Congress' right to confidential information will rarely succeed.

Assuming that Congress will have access to confidential information, the next question concerns the protections to be afforded the information once Congress has it. The House Rules provide for committee meetings to be closed to the public, but only when "disclosure of testimony . . . would endanger the national security or would violate any law or rule of the House of Representatives." It is unlikely that discussion of TSCA confidential information will be considered vital to national security or a violation of a House Rule.

It has been suggested that any agency having confidential information requested by Congress give the submitting company ten days notice prior to disclosure whenever possible. This would permit the company to present its claims for continued confidentiality to the committee and, when appropriate, to the courts. While the TSCA makes no mention of notice prior to disclosure, the regulations do provide for at least ten days notice.

asserted is supported by references to specific problems which in the past have been or which in the future could be the subjects of appropriate legislation, then we cannot say a committee of Congress exceeds its broad power when it seeks information in such areas.

129 See Berger, Congressional Subpoenas to Executive Officials, 75 Colum. L. Rev. 865 (1975).
130 Rosenthal & Grossman, supra note 123, at 100.
131 House Rules XI(2)(g)(2), (2)(k)(5)(A), and (k)(7), reprinted in H.R. Rep. No. 94-663, 94th Cong., 1st Sess. 430, 435-36 (1977). These rules provide procedures for receiving information in executive session, but would offer only very limited protection to TSCA confidential information.
132 Rosenthal & Grossman, supra note 123, at 106-08.
133 40 C.F.R. § 2.209(b) (1979). Such notice was originally to be published in the Federal Register or to be by letter. The EPA, however, apparently decided that the Federal Register was an inappropriate method of giving notice to the affected business. In a letter dated Nov. 9, 1978, the Assistant Administrator said that notice will be provided via certified mail or telegram, and the Federal Register will not be relied upon to give notice. 43 Fed. Reg. 53,817 (1978). See notes 56-59 and accompanying text supra.
The court in *Polaroid v. Costle*\(^{134}\) raised the question of whether notice prior to disclosure to Congress is constitutionally required. Recently, the court in *Exxon v. FTC*\(^{135}\) held that such notice is not constitutionally required, and suggested that a notice requirement might in fact cause other constitutional problems. "To impose a mandatory notice period would skirt dangerously close to being at least the temporary 'equivalent to an order quashing [the official request or subpoena] which is generally an impermissible frustration of the congressional power to investigate.'"\(^{138}\) The main concern of the *Exxon* court was the interference with congressional investigations, but the court also considered the company's claim of a violation of due process. The court held that there was no violation since disclosure to Congress does not constitute public disclosure.\(^{137}\) Without disclosure, the court said, there is no deprivation of property, and hence no violation of due process.\(^{138}\)

While the *Exxon* court acknowledged the value of the information to the submitting company, the only protection it recognized for the confidentiality was the integrity of the congressmen. "The courts must presume that the committees of Congress will exercise their powers responsibly and with due regard for the rights of the affected parties."\(^{139}\) This is an attractive idea, but it is clear that for policy reasons more substantive procedures ought to be

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\(^{134}\) No. 78-1133-S (D. Mass., filed May 23, 1978). See notes 49-55 and accompanying text *supra*. The *Polaroid* court directed both the EPA and Polaroid to submit briefs on the issue of the constitutionality of the TSCA's disclosure provisions. Polaroid, however, dropped its suit after the EPA promulgated regulations providing notice to the submitting company prior to disclosure of confidential information. 9 Envir. Resp. Rsp. (ELI) 1302 (1978). Thus the *Polaroid* court was prevented from discussing or reaching a conclusion on the issue.

\(^{135}\) 589 F.2d 582 (D.C. Cir. 1978).

\(^{136}\) Id. at 588 (citing United States v. Amer. Tel. & Tel. Co., 551 F.2d 384, 388 (D.C. Cir. 1976)).

\(^{137}\) Id. at 589 (citing Ashland Oil v. FTC, 548 F.2d 977 (D.C. Cir. 1976)).

\(^{138}\) Id. at 589. See notes 56-59 and accompanying text *supra*.

\(^{139}\) 589 F.2d at 589. "We reaffirm our rationale in *Ashland Oil* that absent a showing that it is 'evident' that Congress intends to make trade secrets divulged to it by the F.T.C. publicly available, the Commission may, upon proper demand, release such secrets to the Congress without the necessity of prior notice to the parties involved . . . ." Id.
developed. The EPA must be able to guarantee the safety of the information it requires if industry compliance with the TSCA is to be achieved. It is also unfair and inconsistent to allow one branch of the government to disclose information which another branch acquired through a promise of confidentiality. Since members of the House and Senate are immune from civil and criminal liability under the speech and debate clause of the Constitution, some kind of procedure for guaranteeing security of confidential material is needed.

A step in this direction was made in 1973 when the Senate passed the Congressional Right to Information Act which would have provided protection for "trade secrets or confidential commercial or financial information." The proposed legislation would have appointed the House and Senate Select Committees on Standards and Conduct to hold investigations of wrongful disclosures and recommend "appropriate action such as censure or removal from office or position." Chances of a public disclosure of this information would be greatly limited if the individual members were subject to such liability.

If Congress does not adopt such legislation, it seems the least that can be done for protecting confidential information is to establish safeguards for the physical security of the information while in the possession of congressional committees. This would prevent inadvertent disclosure of the information, even if the danger of "leaks" is still present. One commentator has suggested that physical security may be more important than legislation governing "leaks" because "confidential business or trade secret information has rarely, if ever, been leaked." In the end, it is only fair for Congress to impose some restrictions and regulations on itself to ensure compliance with the legislation it has so carefully drafted.

140 U.S. Const. art. I, §6, cl. 1.
143 Id.
144 Rosenthal & Grossman, supra note 123, at 114 (citing Subcomm. on Oversight and Investigation, House Comm. on Interstate and Foreign Commerce, The Ashland Litigation: A Case Study in Judicial Delay of a Congressional Investigation, 95th Cong., 1st Sess. 46 (Comm. Print 1977)).
IV. ILLEGAL DISCLOSURES

A. Measures Taken Within the EPA to Guarantee Safety of Confidential Information

To provide EPA employees with guidelines and procedures for dealing with confidential information, the EPA published the TSCA Confidential Business Information Manual. The Manual describes the responsibilities of employees who have access to confidential information and provides security requirements for EPA computer centers, contractors, and other federal agencies.

Under these guidelines, as few employees as possible are to have access to confidential information. For an employee to gain access to confidential information, he or she must be recommended to the Assistant Administrator. The Assistant Administrator evaluates the request for access on the basis of operational need. If the request is approved, the application is sent to the Security and Inspection Division (SID) which will investigate the person’s background. Upon clearance by the SID, the employee’s name is placed on the list of persons authorized for access.

Once approved for access, each employee must sign a confidentiality agreement. In this agreement, the employee promises not to disclose any confidential information to which he or she will have access. In addition, the employee acknowledges the criminal penalties to which he or she will be subject for wrongful disclosure under the TSCA. Officers of other federal agencies must sign a virtually identical confidentiality agreement.

For purposes of the criminal penalty provisions of TSCA, contractors of the United States and their employees are considered

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145 This manual [hereinafter referred to as TSCA MANUAL] was published in July, 1978.
146 The manual also contains specific working guidelines for computer security, and sets out requirements to be enforced by the Security and Inspection Division (SID) to guarantee the security of each facility using confidential information.
147 TSCA MANUAL at 14. If there is an urgent need for an employee to have access and a full security check has not been performed, the Assistant Administrator may request a waiver of the check from SID. SID will obtain a name check from the FBI and the Civil Service Commission while starting an investigation of its own. If the name checks reveal nothing that would prevent the employee’s access, the employee will be granted such access.
148 TSCA MANUAL at 39 (Appendix IV). This confidentiality agreement also acknowledges the criminal penalties under 18 U.S.C. § 1001 (1976) to which the employee will be subject for making any false statement or concealing any material fact in the agreement. 18 U.S.C. § 1001 provides up to a $10,000 fine or up to five years imprisonment or both for a false statement made to a United States department or agency.
149 TSCA MANUAL at 53 (Appendix XIV).
to be employees of the United States.\textsuperscript{150} Hence, they are subject to the same criminal punishments to which EPA and other federal employees are subject for unauthorized disclosures. Each of the contractor’s employees must sign a special confidentiality agreement promising not to make unauthorized disclosure and acknowledging the punishments which may be received for making such disclosure.\textsuperscript{151}

Upon termination, each employee of the U.S. must sign another confidentiality agreement.\textsuperscript{152} In this agreement the employee states that he or she has returned all copies of any TSCA confidential information to the appropriate officer, and promises not to disclose any confidential information after termination. Once again the employee acknowledges the criminal penalties provided for disclosure and false statements to a government agency.\textsuperscript{153}

\textbf{B. Criminal Penalty for Persons Illegally Disclosing}

The TSCA provides a fine of up to $5,000, imprisonment for not more than a year, or both for the willful disclosure of confidential business information by an employee of the United States who has access to that information by virtue of his or her employment.\textsuperscript{154} The federal employee disclosure of confidential informa-


\textsuperscript{151} TSCA Manual at 52 (Appendix XIII). This agreement contains the following clause:

\begin{quote}
I understand that under section 14(d) of TSCA . . . I am liable for a possible fine of up to $5,000 and/or imprisonment for up to one year if I willfully disclose TSCA Confidential Business Information to any person not authorized to receive it. In addition, I understand that I may be subject to disciplinary action for violation of this agreement up to and including dismissal.
\end{quote}

\textit{Id.} at 52.

It is noteworthy that this agreement does not acknowledge the punishment under 18 U.S.C. §1001 for willfully making a false or fraudulent statement in any matter within the jurisdiction of any department or agency of the United States. It is unlikely, however, that this omission will shield a contractor’s employee from liability under that statute. The courts have found five elements essential in sustaining a conviction under § 1001 which would seem to be met by any misstatement by a contractor’s employee. These elements are: “(1) a statement, (2) falsity, (3) materiality, (4) specific intent, and (5) agency jurisdiction.” United States v. Lange, 528 F.2d 1280, 1287 (5th Cir. 1976). See also United States v. Smith, 523 F.2d 771, 773-74 (5th Cir. 1975).

\textsuperscript{152} TSCA Manual at 40 (Appendix V).

\textsuperscript{153} Id. There is no similar termination agreement provided expressly for the employees of U.S. contractors listed in the manual. It is unclear whether this was a conscious omission or an oversight on the part of the EPA in drawing up its manual. It should not, however, present a problem for the security of information submitted to the EPA to which contractors will have access; the pre-access agreement is enough to insure confidentiality in that it shows the employee has been informed of the criminal penalties for disclosure.

tion statute is 18 U.S.C. § 1905, but the TSCA specifically states that that section does not apply to TSCA information disclosures. The main reason Congress chose to write a new provision for disclosure of trade secrets under the TSCA was that the definition of confidential information in section 1905 is too broad to support TSCA's purposes.

There are two main differences between section 14 of the TSCA and section 1905. The TSCA provides a much narrower definition of the information that may be designated as confidential than does section 1905. The TSCA, however, provides for a $5,000 fine as opposed to the $1,000 fine under section 1905. The legislative history includes much discussion of the issue of trade secret definition, but there was virtually no mention of the change in the criminal fine. Presumably, the higher fine is a recognition of the importance of the data to the submitting company and an attempt by Congress to further deter disclosure.

C. Remedies for Damages

Once an unauthorized disclosure has been made there are several options open to the affected company. The company may decide to sue the United States government, the contractor, if one was involved, the disclosing employee personally, or all three. The company might believe, however, that the publicity resulting from a suit would be worse than any limited disclosure that has been made, and refrain from taking any action. This section deals with the problems the affected company will have in pressing a

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155 That provision states that any employee of the U.S. who discloses any information coming to him in the course of his employment, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.


157 See supra note 155.

158 The higher fine might also be a congressional reaction to inflation, although there is no mention of this in the legislative history.
claim for damage to its competitive position.

1. Actions against the U.S. government—Under the doctrine of sovereign immunity, the United States government may not be sued unless it has consented to such suit by an express waiver of its immunity.\footnote{United States v. Orleans, 425 U.S. 807 (1976).} The Federal Tort Claims Act (FTCA)\footnote{28 U.S.C. §§ 2671-2680 (1976).} provides such a waiver by acknowledging liability "relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances."\footnote{Id. § 2674 (1976).}

Under the FTCA it is clear that a business affected by the wrongful disclosure of a government officer or employee can bring a suit against the government. Such a suit would be based on the traditional theory of respondeat superior. Any recovery in an action against the government is limited to actual pecuniary damages. No interest prior to judgment or punitive damages may be assessed against the United States.\footnote{Id.}

A far more difficult case for the affected business to bring against the government is one involving a wrongful disclosure by an employee of a contractor of the United States. The FTCA specifically excludes any contractor of the United States from the definition of a federal agency,\footnote{Id. § 2671 provides "the term—'Federal agency' includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States."} and the courts have consistently held that the U.S. is not liable for the torts of its independent contractors.\footnote{United States v. Orleans, 425 U.S. 807 (1976); Logue v. United States, 412 U.S. 521 (1973); Perez v. United States, 444 F. Supp. 623 (D.P.R. 1978).}

One exception to this rule makes the United States liable where it has retained a significant amount of control over the day-to-day operations of its contractor.\footnote{See cases cited in note 165 supra.} In very few cases have the courts found the federal government to have kept such control.\footnote{One case where the government was judged to have kept such control is United States v. Becker, 378 F.2d 319 (9th Cir. 1967), holding that an independent firefighter flying a plane for the Forest Service who was subject to the regulations of the Forest Service, and receiving close supervision and control in flight, was a government employee for purposes of the FTCA. See also Witt v. United States, 462 F.2d 1261 (2d Cir. 1972).} The TSCA contractor situation is much like that presented in Logue v. United States.\footnote{412 U.S. 521 (1973).} There the Supreme Court held that employees of a county jail housing federal prisoners pursuant to a contract with the Federal Bureau of Prisons were not federal
employees. Despite the fact that the jail had to comply with the Bureau's rules and regulations, and although the United States had a right to inspect the facilities, the government was not authorized by the contract to physically supervise the jail employees. Federal standards had to be met, but the government could not direct the operations. This lack of immediate supervisory authority prevented the jails' employees from being government employees.169

The EPA-contractor relationship is similar in that the EPA will be able to demand compliance with security regulations,170 but nothing in its contracts permits it to supervise the ongoing operations of the contractors. For these reasons it is unlikely that the affected business will be able to successfully establish a link making the government liable for disclosure by a contractor's employee.171

2. Actions against the contractor—Claims directly against the contractor are the most likely route to recovery for the affected business.172 These claims are guaranteed by a clause in every contract between the EPA and its contractors which states: "The Contractor agrees that these contract conditions concerning the use and disclosure of confidential information are included for the benefit of, and shall be enforceable by, both EPA and any affected business having a proprietary interest in the information."173

It is unclear from this clause whether the EPA intended for the affected business to have policing power as well as damage relief.174 The right to keep an eye on the security of the contractor's

169 Id.
170 TSCA MANUAL at 27-32. It is unlikely that requiring the employees to sign confidentiality statements and making periodic security inspections will provide the day-to-day supervision the courts now require for the imposition of liability on the government.
171 The TSCA considers any contractor of the United States and his employees to be employees of the United States for the limited purpose of the applicability of the criminal penalty for wrongful disclosure. 15 U.S.C. § 2613(d)(2) (1976). It is unlikely that this would be held to be a congressional waiver of immunity for purposes of the Federal Tort Claims Act. If Congress had wanted to open the United States up to this kind of liability, it would have left out the limiting phrase "[f]or purposes of paragraph (1), . . . ." Id.
172 While the affected company may win a judgment against the contractor, however, in many cases this judgment may be impossible to collect. The contractors of the EPA will sometimes be large chemical research companies with enough assets to pay a large damage claim. The contractors are, however, just as likely to be small companies or college students and professors who will be virtually judgment-proof. Interview with Steven D. Jellinek, supra note 37.
173 TSCA MANUAL at 42.
174 The legislative history, regulations, and TSCA MANUAL are all silent on the subject of security enforcement by the affected business. 15 U.S.C. § 2613(a) (1976) and 40 C.F.R. § 2.211 (1979) deal with enforcement of the Act, but only in terms of regulation by the EPA.
operation and thus to object to an insecure system before disclosure is made would be a significant one for the protection of the submitting company. The submitting company has the real interest in protecting the secrecy of the information, and could probably do a better job of policing the contractor than the government is able to do. Balanced against this, however, is the contractor's interest in being left to complete his work without being continually watched and possibly harrassed by the submitting company. The contractor might also have to contend with defending suits for injunctions based on weak grounds, which would also interfere with its smooth operations. At present, it seems the EPA would be the party best suited to enforce the Act because it has powerful interests on both sides. On the one hand, it needs to guarantee security to receive the continued support of industry, without whose cooperation the Act would fail; on the other hand, it needs to give the contractors enough room to complete their work.\footnote{175}

An alternative to EPA policing of contractors would be for the EPA to establish a bonding requirement for all contractors. This would serve two purposes. First, the bonding company would have a stake in ensuring that confidential information is protected and thus could be expected to police contractor security procedures; this would provide a second source for policing of contractor security.\footnote{176} Second, the bonding company would guarantee recovery of a damage claim when the contractor itself is judgment-proof.\footnote{177} This guarantee would be beneficial in two respects. First, it would ease some of the fears that submitting companies have about both security and recovery of damages. It would also make the EPA more likely to use the services of small independent contractors, which might be less expensive than doing the work itself or using the larger companies. In any case, the more satisfied the industry is with EPA precautions, the greater the degree of cooperation there will be in implementing the TSCA. The more flexibility the EPA has in implementing the TSCA, the less expensive that implementation is likely to be.

3. Actions against the disclosing employee—In addition to the criminal penalties under the TSCA, the employee who discloses

\footnote{175}{The EPA's policing of contractor security is presently conducted by the Security and Inspection Division. The EPA has a rigorous set of security standards which the contractor must meet before being given access to the confidential information, with special rules for computer use. In addition, SID may be requested by the Administrator to conduct inspections during the performance of the contract, and SID may make scheduled or unscheduled inspections on its own initiative. TSCA MANUAL at 26-33.}

\footnote{176}{Id.}

\footnote{177}{See note 172 supra.}
is subject to claims from two sources. First, he or she may be sued by the affected business for the harm he has done to the company's competitive position. Normally, this will be an unlikely route to recovery for the affected business, and thus will not be treated in detail here.\textsuperscript{178}

Another potential source of litigation is from the United States government itself, which may sue for breach of the confidentiality agreement. Recently, in \textit{United States v. Snepp},\textsuperscript{179} the United States sued a former employee who had published classified C.I.A. information in a book. The court allowed the United States to claim the proceeds from the sale of the book,\textsuperscript{180} and enjoined the defendant from further disclosure of confidential information.\textsuperscript{181} That case may be distinguishable in that the defendant was profiting from his breach of faith with the government,

\hspace{1em} \textsuperscript{178} It would be a rare employee with assets sufficient to cover a judgment for the value of a disclosed trade secret.


\hspace{1em} \textsuperscript{180} In imposing a constructive trust on the book's proceeds in favor of the United States, the court stated "One may speculate that ordinary criminal sanctions might suffice to prevent unauthorized disclosure of such information, but the risk of harm from disclosure is so great and maintenance of the confidentiality of the information so necessary that greater and more positive assurance is warranted." 456 F. Supp. at 182. The Court of Appeals for the Fourth Circuit reversed this decision holding that the government's sole remedy was recovery of compensatory and punitive damages. 595 F.2d 926 (4th Cir. 1979). In affirming the District Court's decision, the Supreme Court said:

\hspace{1em} The decision of the Court of Appeals denies the Government the most appropriate remedy for Snepp's acknowledged wrong. Indeed, as a practical matter, the decision may well leave the Government with no reliable deterrent against similar breaches of security. No one disputes that the actual damages attributable to a publication such as Snepp's generally are unquantifiable. Nominal damages are a hollow alternative, certain to deter no one. The punitive damages recoverable after a jury trial are speculative and unusual. Even if recovered, they may bear no relation to either the Government's irreparable loss or Snepp's unjust gain. 

\hspace{1em} A constructive trust, on the other hand, protects both the Government and the former agent from unwarranted risks. This remedy is the natural and customary consequence of a breach of trust.

\hspace{1em} The immediate threat to the United States is obviously lower with an unlawful disclosure of confidential TSCA information than with the CIA security information involved in \textit{Snepp}. In light of the necessity for industry compliance and the importance of the TSCA, however, the courts may impose a constructive trust on an employee profiting from his wrongdoing.

\hspace{1em} \textsuperscript{181} In holding that the United States suffered more than incidental damages, the court said, "[t]his action involves a substantial wrong to the United States and to the public's interest in the effective functioning of its government." 456 F. Supp. at 181, \textit{aff'd}, 48 U.S.L.W. 3528 (1980).

\hspace{1em} Although \textit{Snepp} involved national security, and thus presented a greater threat to the nation than disclosure of TSCA secrets, the two situations are analogous in that both involve disclosure of information which the government has deemed worthy of protection; although the government may have narrower remedies available to it in the latter context, it should still be able to enforce its legitimate interest in confidentiality of TSCA information.
whereas it is not as likely that an EPA employee will have easily identifiable income from disclosure. It is, nevertheless, another sanction available to the government to ensure compliance with its regulations.

CONCLUSION

While the TSCA as administered by the EPA provides significant protection for confidential information, there are several changes which can be made to improve the system. One of the most important aspects of the EPA's program is the provision of notice to the submitting company prior to the disclosure of confidential information either to government contractors, Congress, or other federal agencies. While this notice may or may not be constitutionally-mandated, it is vital for achieving industry compliance. Considerations of fairness seem to require the EPA to maintain its procedures for giving such notice even in the face of increasing administrative burdens. For these same reasons, a submitting company should be notified when a secret chemical identity's inclusion in the inventory appendix is divulged to a bona fide manufacturer of the same substance.

Consideration should be given to the discrepancy between the Act and the EPA's regulations as to the amount of notice the EPA will give prior to disclosure of confidential information pursuant to an FOIA request. The Act provides for thirty days notice to the affected company, and this may not be limited to the ten working days provided by the regulations.

Congress should be encouraged to design regulations for its committees for dealing with agency-supplied confidential information. The proposed Congressional Right to Information Act of 1973 demonstrated that Congress is aware of the need for such legislation and would be a good starting point for this effort. In addition, it seems that the very least Congress can do is to develop operating standards to ensure the physical security of confidential information. This would show congressional respect and concern for the importance of the information it has asked industry to provide.

With its procedures for ensuring security of confidential information in the hands of government contractors, the EPA has provided significant protection. One addition to this security system might be a bonding requirement for contractors, both to provide an additional watchdog over the contractor and to guarantee payment in the event of disclosure by the contractor or his employee. This would help close the gap left in the EPA's system which makes contractors liable for disclosure, but which provides
no guarantee that the affected business can actually recover on a damage claim.

In designing this much-needed legislation for today's increasingly industrialized society, Congress has struck a fair balance between the public's need for information, and the industry's right to preserve confidentiality. The EPA's program for the implementation of the TSCA demonstrates both a high degree of respect for the concerns of the chemical industry, and an effort to minimize the burdens the EPA must impose. It is vital to the success of the TSCA that the EPA and the chemical industry continue to view their relationship as one of cooperation.

—Paula R. Latovick