

Protection of Confidential Business Information

Issue

Industry has historically benefited from EPA's deference to industry's broad confidentiality claims for information submitted under FIFRA and TSCA. However, the Agency is now questioning the validity of such claims, and is reassessing their scope as it continues to implement the Obama Administration's general transparency policy. In December 2009, EPA initiated rulemaking to significantly increase disclosure of the identities of inert ingredients in pesticide products. The Agency asserted that "[t]he current lack of information about inert ingredients interferes with the fair and efficient functioning of the market by adversely affecting consumers' ability to exercise individual choice...." In January 2010, EPA announced a "new general practice" of no longer allowing CBI claims for chemical names in substantial risk information reported under TSCA §8(e) if those names are on the TSCA Inventory. EPA followed up this action in June 2010 with a companion "general practice" that addresses the confidentiality of chemical identities related to all health and safety studies or data submitted under other sections of TSCA, stating that "EPA believes that Congress generally intended for the public to be able to know the identities of chemical substances for which health and safety studies have been submitted." The Agency's new position is that "as a general matter, disclosure of a chemical identity does not disclose [protected] process information except where the identity explicitly contains process information" (e.g., polymer names that include reactant monomers). EPA expects to begin review of both new and existing TSCA CBI claims on August 25, 2010, and in June 4, 2010 letters to certain trade associations, Steve Owens, Assistant Administrator for the Office of Chemical Safety and Pollution Prevention, asked industry (1) "to reduce the voluminous claims of [CBI] made under TSCA by making them only "when absolutely necessary," and (2) to review prior confidentiality claims "and withdraw any CBI claims that are unwarranted and/or unnecessary, including CBI claims that might once have been appropriate but are no longer needed." As these EPA actions and statements demonstrate, the Agency intends to scrutinize CBI claims vigorously, particularly those involving chemical identities, and will no longer wait for specific FOIA requests before assessing the validity of confidentiality claims. Thus, CBI claimants should anticipate having to substantiate FIFRA and TSCA CBI claims at the time information is submitted to EPA.