



May 22, 2006

SUBMITTED BY FACSIMILE AND ELECTRONIC MAIL.

Ms. Sue Izumi
FOIA Officer
U.S. Department of Labor
Occupational Health and Safety Administration
200 Constitution Avenue, NW
Room N3647
Washington, DC 20210

Re: Objections of SOCMA and Its Members to OSHA Disclosure
As Noticed in the April 21, 2006 Federal Register

Dear Ms. Izumi:

On April 21, 2006, the Synthetic Organic Chemical Manufacturers Association, Inc. (SOCMA) received a letter from OSHA indicating that its members may be impacted by a FOIA request calling for "air and other types of sampling data collected . . . during inspections of all workplaces nationwide since 1979." On that same day, OSHA published a notice of the FOIA request in the *Federal Register* and posted the information on the FOIA page of its website.

The letter to SOCMA requested that SOCMA notify its members of this data request and alert them to the potential "release of confidential commercial or trade secret information that has not previously been disclosed to the public." The intent of this initiative was to generate feedback to OSHA on whether public release of this type of data would disclose information that should otherwise be protected. In the event that SOCMA members objected to the release of the information requested, SOCMA and/or the members were to provide OSHA with a detailed statement of any objection. OSHA requested SOCMA to complete all of these tasks within 30 days of the date of the letter.

Summary Statement of Objections

For the reasons laid out below, SOCMA believes that disclosure of the information requested would be inappropriate and unjustified, would violate obligations to protect confidential business information (CBI) and trade secrets, and is procedurally unfair as the parties whose interests are adversely affected have not had a fair opportunity to protect those interests.

- SOCMA believes that disclosure of the requested information would indeed result in the public release of information that our members have specifically designated as confidential business information (CBI) and that, if released, this information could

- be used by others to gain an unfair competitive advantage over those companies whose data OSHA would release, causing those companies competitive harm.
- Such disclosure would also reveal manufacturers' trade secrets in direct contravention of OSHA's authorizing statute.
 - In addition, SOCMA believes that the steps taken to provide notice to potentially affected parties, i.e., those whose data may be released, are legally and factually insufficient to fulfill OSHA's obligations in this regard, since (1) only 30 days was provided to respond, (2) affected parties lack sufficient details about the information to be disclosed to be able to protect the information affected or take steps to protect their interests, and (3) many parties from whom data was collected will have no actual notice regarding the intended disclosure requested.
 - Many companies, potentially including individual SOCMA members, whose data the FOIA request covers are vulnerable to disclosure of information they had previously designated as CBI without the opportunity to object to such disclosure or any meaningful opportunity to be heard.
 - Small businesses, which constitute over 80 % of SOCMA's members, typically lack the staff, legal personnel or resources to learn about, evaluate and respond to Federal Register notices that provide only generic information about an issue, as was the case with the April 21st Federal Register notice, and fail to provide clear notice about the specific impact that could result or to identify with specificity the parties that could be affected.

SOCMA's Members and Others Companies in the Specialty Chemicals Sector Operate in A Highly Competitive Business Sector

SOCMA is a trade association serving more than 275 companies that have a common interest in the manufacture, distribution and marketing of organic chemical products. The majority of SOCMA's members are small and mid-sized specialty chemical companies that are representative of a much larger number of organic chemical manufacturers throughout the United States. More than 50,000 specialty and custom chemicals are manufactured in the U.S. at a value of about \$60 billion annually. SOCMA members are representative of these facilities, which are typically small businesses with fewer than 75 employees and less than \$100 million in annual sales

CBI protection is extremely important to the economic viability of SOCMA member companies because of the competitive nature of the specialty chemical industry. CBI protection is a significant issue for SOCMA members, as has been recognized and addressed by SOCMA in the context of the various environmental statutes, and SOCMA is concerned that the value of these protections not be diminished or threatened by the disclosure contemplated in the April 21, 2006 Federal Register notice.

SOCMA has been active in addressing CBI issues for many years, routinely examining regulatory activities and other agency initiatives where there is a need to identify and take into account the highly sensitive nature of manufacturing information in the specialty batch chemical sector. SOCMA previously submitted comments on the CBI proposals that EPA issued under the Toxic Substances Control Act, as well as on the now-withdrawn 1994 proposed rule to revise

EPA's generic CBI regulations.¹ Through various workshops, SOCMA has coordinated with the Office of Pollution Prevention and Toxics and other trade associations to educate its members about CBI regulations. Similarly, SOCMA has worked closely with EPA's Office of Solid Waste and Emergency Response regarding the unique nature and attributes of specialty chemical manufacturing operations, the use of toll manufacturing operations, and the contractual arrangement typically used to protect CBI in toll manufacturing arrangements. SOCMA's persistent advocacy efforts in this area reflect its members' longstanding concern regarding the critical importance of the protection of CBI by regulatory agencies.

CBI protection is of critical importance to SOCMA member companies because of the competitive nature of the specialty chemical industry. Extensive research and substantial costs are often associated with the development of new products in the specialty chemical market. On average, the chemical industry invests over \$25 billion dollars annually in research and development (R&D) activities. Chemical companies can spend, on average, about 4 to 5% of total sales annually on R&D activities; many, if not all, specialty chemical companies, with their emphasis on market niches and innovation, tend to spend more. Much of this R&D results in new products or more efficient processes that reduce emissions to the environment. It is the protection of confidential information (particularly chemical identity and process information) that makes the difference between the success and failure of the new products and processes that SOCMA member companies develop. In this regard, SOCMA notes that the need to protect confidential business information in the dyes and pigments sector was recognized as a basis to prevent disclosure in the context of an EPA rulemaking activity, in *Magruder et al. v. U.S. EPA*, Civ. No. 94-5768 (D.N.J.).

SOCMA also notes that while it represents a significant number of companies in the specialty chemical sector, many companies in this competitive sector do not participate in SOCMA. Many small companies lack sufficient resources and staff, are located in areas that are more geographically remote or must prioritize allocation of resources and therefore are unable to participate. SOCMA is concerned that these small companies, some of which may engage in toll or specialty production for larger companies, may not even have any knowledge that confidential business information that may have been obtained from a larger company for toll manufacturing purposes is at risk of disclosure. It is standard industry practice in toll manufacturing operations in the specialty chemical sector for toll manufacturing contracts to impose specific obligations for protection of confidential business information. Information that SOCMA members have sought to protect through these contractual provisions may now be subject to release as a result of a prior compliance inspection at a company with which a SOCMA member previously had a toll manufacturing arrangement.

Members Are Concerned That OSHA Will Compromise CBI, Causing Competitive Harm

In response to the April 21 letter from OSHA, SOCMA included a request for feedback in its weekly electronic newsletter, notified the relevant member committee and included the topic in a presentation at a regional meeting of member company representatives. While the newsletter failed to generate much feedback within the short period before this response was due, the direct

¹ See also Comments of the Synthetic Organic Chem. Mfrs. Ass'n. to EPA, on the Proposed Revisions to the Definition of Solid Waste, Docket No. RCRA-2002-0031 (Feb. 25, 2004).

member outreach via the committee and the regional meeting provoked significant expressions of concern about the potential adverse affects that compliance with the FOIA request could produce.

In particular, SOCMA members are concerned about the potential for their competitors to exploit the data that would be released, which would likely include information on processes and types of chemicals used and extensive data points and notes recorded by OSHA inspectors. The chemical industry is a very competitive one, and information about members' manufacturing processes is a closely guarded secret that is not publicly available. Particularly for the batch and specialty chemical manufacturers that make up SOCMA's membership, protection of this type of information is essential. If this information is made public, it could enable competitors who vie for the same business to determine what products they are making, how they are making them and for whom, which should not be publicly available. In addition, such disclosure would enable competitors to acquire this information at a significantly lower cost than the commercial advantage they would receive from such knowledge. It could also cause members to be in breach of contractual agreements between batch manufacturers and their customers, who require the manufacturers to protect all the details of their production. Therefore, OSHA's response to this FOIA request could cause members significant competitive harm.

All of this information is deemed confidential and CBI protection is specifically requested. But OSHA would undermine such protections if it releases this information to the public. Not only would this have a significant adverse impact on affected companies, it also could do irreparable damage to the relationship between OSHA and the regulated community. Obviously, the request would not impact all SOCMA members, and not all members from whom OSHA collected data would be adversely affected, but enough of them would be that SOCMA considers it incumbent on OSHA to be more aggressive and specific in providing notice to and obtaining responses from potentially impacted entities. More importantly, SOCMA believes that OSHA is obligated to deny the FOIA request as a clear violation of the confidentiality assurances applicable at the time OSHA collected the information.

OSHA's Disclosure of Trade Secrets Would Violate the OSHA Statute

Even outside OSHA's general duty under FOIA not to disclose trade secrets and CBI that would cause competitive harm, the OSHA statute specifically mandates that OSHA will not disclose trade secrets gathered through its inspections. It is illegal for OSHA to divulge any "information reported to or otherwise obtained by" OSHA "in connection with any inspection . . . which contains or which might reveal a trade secret." 29 U.S.C. § 664. A trade secret includes formulas and processes used in the making of trade commodities. *See Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 244 F.3d 144, 150-51 (D.C. Cir. 2001). As described above, OSHA's response to this FOIA request risks divulging information regarding the chemicals or processes that members use to make the commodities they produce, which OSHA obtained through its inspections. As such, it seems clear that OSHA would violate its authorizing statute if it fulfilled the FOIA request.

OSHA May Not Disclose Information It May Use in an Enforcement Investigation or Proceeding

Notwithstanding SOCMA's and our members' concerns regarding members' trade secrets and CBI, there is additional concern regarding the disclosure of information that OSHA may use in an enforcement investigation or proceeding. OSHA cannot disclose under FOIA information it gathered from facilities in its inspections that it may use as part of an enforcement investigation or proceeding. 5 U.S.C. § 552(b)(4). While SOCMA has no reason to believe that any of its members are currently under investigation for OSHA violations, historically some OSHA inspections have lead to compliance concerns. Disclosure could diminish OSHA's ability to prosecute enforcement actions or a facility's ability to defend such actions. Unless OSHA is willing to represent that none of the information it has collected through inspections to date will be used in any enforcement investigation or proceeding, it is likely the wide breadth of information requested would include information prohibited from disclosure.

OSHA's Notice To Affected Companies is Legally and Practically Insufficient

In addition to the specific problems raised by SOCMA members who SOCMA made aware of this FOIA request, SOCMA does not believe OSHA has met its legal obligations to provide adequate notice before publicly disclosing this type of information. Department of Labor regulations require OSHA to "provide a business submitter with notice of a FOIA request whenever" the DOL "has reason to believe that disclosure of the information could reasonably be expected to cause substantial competitive harm." 29 C.F.R. § 70.26(d)(2)(ii); *see also* 29 C.F.R. § 70.26(h) (notification of lawsuit). While those regulations allow notification to be accomplished "by posting and publishing the notice in a place reasonably calculated to accomplish notification," that written notice must "either describe the nature of the confidential commercial information requested or provide copies of the relevant records or portions thereof." 29 C.F.R. § 70.26(c), (i).

SOCMA believes that OSHA's notice through trade associations, its FOIA website and the Federal Register is not sufficient, because it is not reasonably calculated to accomplish notification of all submitters. Many submitters are small- and medium-sized companies that do not have the resources that are required for those companies to receive actual notice under OSHA's current notice distribution. These small businesses do not have personnel dedicated to constant monitoring of the Federal Register for FOIA notices. Nor do they have employees who can troll the OSHA website to find a FOIA notice not even included on OSHA's homepage, but buried deep within the OSHA website. Nor do they have general counsel on staff to help them interpret whether the FOIA request would apply to their information or the reasons why this OSHA should not fulfill this FOIA request. Nor do they have indefinite storage space or information systems to store inspection results going back to 1979 to determine what information OSHA intends to disclose. And even if notification through SOCMA were sufficient, many small businesses in the chemical industry are not part of trade associations like SOCMA. Accordingly, these small businesses have not received actual notice of or a fair opportunity to respond to OSHA's threatened disclosure of their information.

Additionally, given the magnitude of the FOIA request and insufficient distribution of notice, a response period of thirty days is far from reasonable. In its comments on rulemakings and other interactions with OSHA, SOCMA has consistently and strongly advocated for the protection from disclosure of sensitive business information. Here, SOCMA would have gathered more

information and taken more efforts to ensure that its members' trade secrets and confidential business information remain protected had OSHA allotted sufficient time for such activities.

Further, the notice fails to describe the nature of the confidential commercial information in any level of detail that a submitter would need to reasonably identify the information being disclosed. Without specifics about what data inspectors collected, including the time, place and results of each test, it is impossible for SOCMA members to know exactly what information would be released. As a result, SOCMA believes the notice OSHA provided is inadequate and fails to meet the minimum obligations established by DOL regulations.

Conclusion: OSHA Should Not Disclose the Information Requested

SOCMA urges OSHA to deny the FOIA request as a direct threat to the confidentiality of protected trade secrets and other information that members designated as CBI when first collected, the release of which could impose a competitive harm on affected facilities and violate OSHA's authorizing statute. Disclosure could also jeopardize ongoing enforcement investigations or proceedings for both parties. In addition, SOCMA believes OSHA has an obligation to reach out directly to potentially impacted companies to ensure that as many of those companies as possible are alerted to this threat to their trade secrets and CBI and to promote a more comprehensive response to the initial notice.

Sincerely,

Joseph G. Acker
President

cc: Kevin Ropp (by facsimile: (202) 693-1635)