

## Environmental Protection Agency

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(3) Fails to satisfy one or more of the applicable substantive criteria, and is therefore ineligible for confidential treatment;

(4) Satisfies one or more of the applicable substantive criteria; or

(5) Satisfies one or more of the applicable substantive criteria during a certain period, but will be ineligible for confidential treatment thereafter.

(d) The purpose of a class determination is simply to make known the Agency's position regarding the manner in which information within the class will be treated under one or more of the provisions of this subpart. Accordingly, the notice of opportunity to submit comments referred to in § 2.204(d)(1)(ii) and § 2.205(b), and the list of materials required to be furnished to the EPA legal office under § 2.204(d)(1)(iii), may be modified to reflect the fact that the class determination has made unnecessary the submission of materials pertinent to one or more issues. Moreover, in appropriate cases, action based on the class determination may be taken under § 2.204(b)(1), § 2.204(d), § 2.205(d), or § 2.206. However, the existence of a class determination shall not, of itself, affect any right a business may have to receive any notice under § 2.204(d)(2) or § 2.205(f).

### § 2.208 Substantive criteria for use in confidentiality determinations.

Determinations issued under §§ 2.204 through 2.207 shall hold that business information is entitled to confidential treatment for the benefit of a particular business 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(a) The business has asserted a business confidentiality claim which has not expired by its terms, nor been waived nor withdrawn;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 measures 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's consent by other persons (other than governmental bodies) by use of legitimate means (other than discovery based on a showing of special need in a judicial or quasi-judicial proceeding);

(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's competitive position; or

(2) The information is voluntarily submitted information (see § 2.201(i)), and its disclosure would be likely to impair the Government's ability to obtain necessary information in the future.

### § 2.209 Disclosure in special circumstances.

(a) *General.* Information which, under this subpart, is not available to the public may nonetheless be disclosed to the persons, and in the circumstances, described by paragraphs (b) through (g) of this section. (This section shall not be construed to restrict the disclosure of information which has been determined to be available to the public. However, business information for which a claim of confidentiality has been asserted shall be treated as being entitled to confidential treatment until there has been a determination in accordance with the procedures of this subpart that the information is not entitled to confidential treatment.)

(b) *Disclosure to Congress or the Comptroller General.* (1) Upon receipt of a written request by the Speaker of the House, President of the Senate, chairman of a committee or subcommittee, or the Comptroller General, as appropriate, EPA will disclose business information to either House of Congress, to a committee or subcommittee of Congress, or to the Comptroller General, unless a statute forbids such disclosure.

(2) If the request is for business information claimed as confidential or determined to be confidential, the EPA office processing the request shall provide notice to each affected business of the type of information disclosed and to whom it is disclosed. Notice shall be given at least ten days prior to disclosure, except where it is not possible to provide notice ten days in advance of any date established by the requesting body for responding to the request. Where ten days advance notice cannot

be given, as much advance notice as possible shall be provided. Where notice cannot be given before the date established by the requesting body for responding to the request, notice shall be given as promptly after disclosure as possible. Such notice may be given by notice published in the FEDERAL REGISTER or by letter sent by certified mail, return receipt requested, or telegram. However, if the requesting body asks in writing that no notice under this subsection be given, EPA will give no notice.

(3) At the time EPA discloses the business information, EPA will inform the requesting body of any unresolved business confidentiality claim known to cover the information and of any determination under this subpart that the information is entitled to confidential treatment.

(c) *Disclosure to other Federal agencies.* EPA may disclose business information to another Federal agency if—

(1) EPA receives a written request for disclosures of the information from a duly authorized officer or employee of the other agency or on the initiative of EPA when such disclosure is necessary to enable the other agency to carry out a function on behalf of EPA;

(2) The request, if any, sets forth the official purpose for which the information is needed;

(3) When the information has been claimed as confidential or has been determined to be confidential, the responsible EPA office provides notice to each affected business of the type of information to be disclosed and to whom it is to be disclosed. At the discretion of the office, such 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. However, no notice shall be required when EPA furnishes business information to another Federal agency to perform a function on behalf of EPA, including but not limited to—

(i) Disclosure to the Department of Justice for purposes of investigation or prosecution of civil or criminal viola-

tions of Federal law related to EPA activities;

(ii) Disclosure to the Department of Justice for purposes of representing EPA in any matter; or

(iii) Disclosure to any Federal agency for purposes of performing an EPA statutory function under an inter-agency agreement.

(4) EPA notifies the other agency of any unresolved business confidentiality claim covering the information and of any determination under this subpart that the information is entitled to confidential treatment, and that further disclosure of the information may be a violation of 18 U.S.C. 1905; and

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

(i) The other agency has statutory authority both to compel production of the information and to make the proposed disclosure, and the other agency has, prior to disclosure of the information to anyone other than its officers and employees, furnished to each affected business at least the same notice to which the affected business would be entitled under this subpart;

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

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

(d) *Court-ordered disclosure.* EPA may disclose any business information in any manner and to the extent ordered by a Federal court. Where possible, and when not in violation of a specific directive from the court, the EPA office disclosing information claimed as confidential or determined to be confidential shall provide as much advance notice as possible to each affected business of the type of information to be disclosed and to whom it is to be disclosed, unless the affected business has actual notice of the court order. At the discretion of the office, subject to any restrictions by the court, such notice may be given by notice in the FEDERAL REGISTER, letter sent by certified mail return receipt requested, or telegram.

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(e) *Disclosure within EPA.* An EPA office, officer, or employee may disclose any business information to another EPA office, officer, or employee with an official need for the information.

(f) *Disclosure with consent of business.* EPA may disclose any business information to any person if EPA has obtained the prior consent of each affected business to such disclosure.

(g) *Record of disclosures to be maintained.* Each EPA office which discloses information to Congress, a committee or subcommittee of Congress, the Comptroller General, or another Federal agency under the authority of paragraph (b) or (c) of this section, shall maintain a record of the fact of such disclosure for a period of not less than 36 months after such disclosure. Such a record, which may be in the form of a log, shall show the name of the affected businesses, the date of disclosure, the person or body to whom disclosure was made, and a description of the information disclosed.

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40000, Sept. 8, 1978; 50 FR 51661, Dec. 18, 1985]

### **§2.210 Nondisclosure for reasons other than business confidentiality or where disclosure is prohibited by other statute.**

(a) Information which is not entitled to confidential treatment under this subpart shall be made available to the public (using the procedures set forth in §§2.204 and 2.205) if its release is requested under 5 U.S.C. 552, unless EPA determines (under subpart A of this part) that, for reasons other than reasons of business confidentiality, the information is exempt from mandatory disclosure and cannot or should not be made available to the public. Any such determination under subpart A shall be coordinated with actions taken under this subpart for the purpose of avoiding delay in responding to requests under 5 U.S.C. 552.

(b) Notwithstanding any other provision of this subpart, if any statute not cited in this subpart appears to require EPA to give confidential treatment to any business information for reasons of business confidentiality, the matter shall be referred promptly to an EPA legal office for resolution. Pending res-

olution, such information shall be treated as if it were entitled to confidential treatment.

### **§2.211 Safeguarding of business information; penalty for wrongful disclosure.**

(a) No EPA officer or employee may disclose, or use for his or her private gain or advantage, any business information which came into his or her possession, or to which he or she gained access, by virtue of his or her official position or employment, except as authorized by this subpart.

(b) Each EPA officer or employee who has custody or possession of business information shall take appropriate measures to properly safeguard such information and to protect against its improper disclosure.

(c) Violation of paragraph (a) or (b) of this section shall constitute grounds for dismissal, suspension, fine, or other adverse personnel action. Willful violation of paragraph (a) of this section may result in criminal prosecution under 18 U.S.C. 1905 or other applicable statute.

(d) Each contractor or subcontractor with the United States Government, and each employee of such contractor or subcontractor, who is furnished business information by EPA under §2.301(h), §2.302(h), §2.304(h), §2.305(h), §2.306(j), §2.307(h), §2.308(i), or §2.310(h) shall use or disclose that information only as permitted by the contract or subcontract under which the information was furnished. Contractors or subcontractors shall take steps to properly safeguard business information including following any security procedures for handling and safeguarding business information which are contained in any manuals, procedures, regulations, or guidelines provided by EPA. Any violation of this paragraph shall constitute grounds for suspension or debarment of the contractor or subcontractor in question. A willful violation of this paragraph may result in criminal prosecution.

[41 FR 36902, Sept. 1, 1976, as amended at 50 FR 51662, Dec. 18, 1985; 58 FR 461, Jan. 5, 1993]