



## Chemical Safety and Hazard Investigation Board

### Office of General Counsel

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#### Memorandum

To: Board Members

From: Christopher W. Warner

A handwritten signature in black ink, appearing to read "C. W. Warner", is written over the printed name.

Cc: Leadership Team

Subject: Board Action Report – Notation Item 730

Date: December 11, 2009

On December 4, 2009, the Board approved Notation Item 730, thereby authorizing the Chairman to:

- a. Provide to the House Committee on Education and Labor, in the manner and on the schedule agreed to by the Chairman and the Committee, copies of all Board Orders and the Board Action Reports for all notation votes taken from January 1998 to the present;
- b. Notwithstanding any contrary provisions of Board Order 022, provide to the Committee, in a manner and on a schedule agreed to by the Chairman and the Committee, such additional documentation associated with the notation votes as the Committee or its staff may request, or as the Chairman may decide should be affirmatively provided;
- c. Provide the documents described in "a." and "b.," above, to the Committee without personally reviewing every document for applicable privileges or other information sensitivity concerns and without specifically asserting potentially applicable privileges with respect to each document;
- d. Provide general notice to the Committee of sensitive information that may be contained in the documents described in "a." and "b.," above;
- e. Notify the Committee that the CSB response to its document requests does not constitute a public disclosure of sensitive or privileged information or the waiver of any applicable privilege or exemption from public disclosure under applicable laws; and
- f. Take or direct all steps necessary to make public through the CSB web site, in a manner and on a schedule agreed to by the Chairman and the Committee, the following records for each notation item considered by the Board since January 1998 – the text of the item including any document submitted for specific adoption by the Board, the Chairman's transmittal memo for the item, each Member's vote and any written explanation of the vote, and the Board Action Report, but specifically excluding any recommendation response evaluation, the disclosure of which will require an amendment to Board Order 022 – provided that, the Chairman ensures that prior to public disclosure any and all records proposed for disclosure have been reviewed for the presence of sensitive information, including but not limited to the categories listed in paragraph 6 of the notation item, and such sensitive information is found to be absent or is removed from the records.

Comments on the vote submitted by Mr. Bresland and Mr. Wright, respectively, are attached to this memorandum.

Voting Summary – Notation Item 730

Disposition: APPROVED

Disposition date: December 4, 2009

	Approve	Disapprove	Calendar	Not Participating	Date
J. Bresland	X				12/4/2009
W. Wark	X				12/4/2009
W. Wright	X				12/7/2009

Vote Explanation for Notation Item 730 – Chairman Bresland

Mr. Wright provided comments on his vote sheet for Notation Item 730 which require a response for the record. I will place his comments in bold and my response in italics immediately below.

**Mr. Wright: “I would however have preferred to release ALL notation packages, member voting sheets and comment sheets for each notation item vice simply providing Board Action Reports which simply summarize votes cast.”**

*The plan is to provide Board Action Reports and additional voting information in a timely and prudent manner. Once complete, the CSB will likely have more voting information publicly available than any other agency subject to the Sunshine Act. The information under review for release dates back 10 years, and must be reviewed in a thorough manner prior to release to avoid violating the law.*

**Mr. Wright: “I believe these documents can be scanned in notational numerical sequence vice culling them out into various categories prior to release.”**

*The ideal would be to publicly release the voting information in a complete numerical sequence. However, if it will expedite public release, I believe the agency is better served to release what information it can, when it can, even if out of numerical sequence. For example, the agency will probably be able to publicly post voting information on a number of investigation and recommendation matters first. I see no point in delaying publication of such information in order to wait for publication of a complete set in numerical order.*

**Mr. Wright: “I am also unaware of any notation items that contain material that might fall into the exceptions cited in paragraph 6 above - are there any? If so, which items?”**

*You ask if there are any notation items which contain potentially sensitive information. The answer is yes. That is precisely why each voting record needs to be individually reviewed to ensure that there is no inadvertent public disclosure of such information.*

*As explained in paragraph 6 of Notation Item 730, notation voting records within the scope of the Committee's requests may contain confidential, privileged, or otherwise sensitive information, including, but not limited to, the following:*

- *Trade secrets or confidential business information (CBI) within the scope of 18 U.S.C. § 1905, or information marked as trade secret or CBI;*
- *Critical infrastructure information pursuant to 6 U.S.C. § 133;*
- *Information that constitutes Chemical-terrorism Vulnerability Information pursuant to 6 C.F.R. § 27.400;*
- *Information that constitutes Sensitive Security Information pursuant to 49 C.F.R. Part 1520;*

- Information protected by legal privileges, including, but not limited to, the attorney-client privilege or the deliberative process component of executive privilege;
- Sensitive but unclassified information pertaining to CSB investigative techniques and operational security;
- Information not required to be disclosed under the Sunshine Act; and
- Information obtained from Privacy Act Systems of Records, and other Personally Identifiable Information.

*The Committee's request itself recognizes that notation voting records can contain sensitive information inappropriate for public disclosure. The Committee's November 10, 2009, letter states, "Matters that would otherwise not be subject to Sunshine Act disclosure requirements, such as those related solely to personnel practices, need not be disclosed . . . ." Committee staff have also agreed that the CSB should exercise care to ensure that certain kinds of information, which the staff acknowledged is legitimately sensitive, are not included among the records published on the CSB web site.*

*For example, the Board Orders on IT Security and the Continuity of Operations Plan – both of which have been the subject of and attached to notation items – contain sensitive details about CSB information security measures and emergency contingency planning. Public disclosure of these Orders, which would be exempt from disclosure in response to a FOIA request, could compromise the CSB's security and operational capabilities. There are also some 288 Board votes on recommendation status changes. These all contain staff memoranda which are exempt from disclosure as deliberative process information under the Freedom of Information Act. Moreover, Board Order 022 specifically states that these memoranda "are internal working document[s] of the CSB" and are not "to be given to anyone outside of the Board." You have voted on over a hundred of these items. Other items also contain material specifically stamped confidential. Finally, other items contain information which appears to be confidential business information—even if not specifically stamped as such. You have voted on a number of these items also.*

*Finally, I should note that the CSB has been asked to make public a vast amount of information which many agencies do not. If all Sunshine Act agencies were asked to embark on a similar process of discretionary disclosure for records covering a 10 year period, I would hope that they would do so in a prudent manner-- especially because inadvertent disclosure of certain information could violate a law of the United States. The task for the CSB is not different. I believe that the publication of additional information on Board votes is in the public interest and should proceed in a timely and prudent manner.*

**Mr. Wright: "I believe we will be better served by immediately providing public access to these documents and focusing our time and resources on developing an FY 2010 budget which has yet to be approved for the agency."**

*As noted above, providing immediate public access without proper review would violate standing Board Order 022 and risk violation of certain laws, including the Trade Secrets Act, which is a criminal statute. Thus, I believe it is improper for the Board to violate its own standing Orders or to risk violation of law when there is a more prudent path. It is important to improve Board operations by making additional voting information public in a timely manner. However, this task cannot be done in an imprudent manner. The voting records which the Board wishes to share were accumulated over a 10 year period. I do not think it is unreasonable for the agency to spend time reviewing the information to ensure that pertinent laws and Board Orders are not violated.*

*The staff engaged in reviewing and posting notation items is distinct from those developing the FY 2010 budget. The two priorities are not in conflict. Each will be given priority attention.*



John Bresland  
December 7, 2009

Notation No.: 730  
Subject: Authorization of Response to Congressional Committee

- c. Notify the Committee that the CSB response to its document requests does not constitute a public disclosure of sensitive or privileged information or the waiver of any applicable privilege or exemption from public disclosure under applicable laws;
- f. Take or direct all steps necessary to make public through the CSB web site, in a manner and on a schedule agreed to by the Chairman and the Committee, the following records for each notation item considered by the Board since January 1998 – the text of the item including any document submitted for specific adoption by the Board, the Chairman's transmittal memo for the item, each Member's vote and any written explanation of the vote, and the Board Action Report, but specifically excluding any recommendation response evaluation, the disclosure of which will require an amendment to Board Order 022 – provided that, the Chairman ensures that prior to public disclosure any and all records proposed for disclosure have been reviewed for the presence of sensitive information, including but not limited to the categories listed in paragraph 6 of this item, and such sensitive information is found to be absent or is removed from the records.

I APPROVE this notation item AS PRESENTED. (with comments below)

I CALENDAR this notation item for discussion at a Board meeting.  
 Some of my concerns are discussed below or on the attached memorandum.

I DISAPPROVE this notation item.  
 A dissent is attached.  
 I will not file a dissent.

I am NOT PARTICIPATING.

Note: An urgent notation item is either adopted or disapproved when the affirmative or negative votes of a majority of the participating members are received by the Office of General Counsel.

Date: 7 Dec 2009

Member: 

I voted yes on this item as I believe in transparency for this agency; and believe this reflects the agreement reached with the congressional committee requesting the data. I would however have preferred to release ALL notation packages, member voting sheets and comment sheets for each notation item vice simply providing Board Action Reports which simply summarize votes cast. I believe these documents can be scanned in notation numerical sequence vice culling them out into various categories prior to release. I am also unaware of any notation items that contain material that might fall into the exceptions cited in paragraph 6 above - are there any? If so, which items? I believe we will be better served by immediately providing public access to these documents and focusing our time and resources on developing a FY 2010 budget which has yet to be approved for the agency.



## Chemical Safety and Hazard Investigation Board

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### Memorandum

To: Board Members

From: John Bresland *J. Bresland*

Subject: Notation Item 730

Date: December 4, 2009

Attached for your review and vote is Notation Item 730. If approved, this item would authorize the Chairman to take a series of actions necessary to appropriately respond to a recent request from the Committee on Education and Labor of the U.S. House of Representatives for disclosure to the Committee, and ultimately to the public, of Board notation voting records. The details of the request, and the issues involved in responding to it, are described in the item. Based upon my review of the matter, and feedback received from Committee staff, I believe that the approach outlined in the item is the most viable one for responding to the Committee in an appropriate and reasonably timely manner under the circumstances. I intend to vote in favor of this item and I ask that you do the same.

You may direct any questions about this item to Chris Kirkpatrick. Please return your completed vote sheets to Chris Kirkpatrick as soon as possible. Thank you for your attention to this item.



## Chemical Safety and Hazard Investigation Board

**John S. Bresland**  
Chairman

**William B. Wark**  
Board Member

**William E. Wright**  
Board Member

### CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD MEMBER VOTING RECORD

**Notation No.:** 730

**Voting Period:** Urgent Notation Item, December 4 – December 11, 2009, but votes are requested as soon as possible.

**Subject:** Authorization of Response to Congressional Committee

Whereas,

1. The House Committee on Education and Labor has requested, by letter dated November 10, 2009, that the CSB provide to the Committee copies of all Board Orders and the Board Action Reports for all notation votes taken from January 1998 to the present;
2. The Committee is amenable to accept transmittals of the Board Orders and Board Action Reports in two batches – the first batch, consisting of Board Action Reports for votes on investigation products and recommendations matters, is to be delivered by December 9, 2009, and the second batch, consisting of the Board Orders and the Board Action Reports for all other votes, is to be delivered by December 18, 2009;
3. Committee staff have further informed the CSB that, based upon their review of the Board Action Reports, they may subsequently request copies of additional documentation associated with certain notation votes, such as Member Voting Records; the Chairman's transmittal memos; and materials included in the notation package, including staff memos, draft investigation products, and correspondence and company documents related to recommendations;
4. The Committee's November 10<sup>th</sup> letter also requested that the CSB make public through the agency web site all notation voting records – including for each notation item, the text of the item, each Member's vote and any written explanation of the vote, and the Board Action Report, as well as staff memos describing the matter under consideration; Board Orders; and correspondence related to Board recommendations;
5. The Board seeks to respond appropriately to the Committee's requests in a manner that demonstrates good faith and a commitment to transparency, while also being consistent with the Board's obligation to protect sensitive information in the CSB's records;



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Subject: Authorization of Response to Congressional Committee

6. The Board recognizes, and wishes to make the Committee aware, that some of the records within the scope of the Committee's requests may contain confidential, privileged, or otherwise sensitive information, including, but not limited to, the following:
  - Trade secrets or confidential business information (CBI) within the scope of 18 U.S.C. § 1905, or information marked as trade secret or CBI;
  - Critical infrastructure information pursuant to 6 U.S.C. § 133;
  - Information that constitutes Chemical-terrorism Vulnerability Information pursuant to 6 C.F.R. § 27.400;
  - Information that constitutes Sensitive Security Information pursuant to 49 C.F.R. Part 1520;
  - Information protected by legal privileges, including, but not limited to, the attorney-client privilege or the deliberative process component of executive privilege;
  - Sensitive but unclassified information pertaining to CSB investigative techniques and operational security;
  - Information not required to be disclosed under the Sunshine Act; and
  - Information obtained from Privacy Act Systems of Records, and other Personally Identifiable Information.
7. Board Order 022 prescribes that recommendation response evaluations, which are within the scope of records requested by the Committee, are "internal working document[s] of the CSB, which [are] not to be given to anyone outside of the Board;"
8. Board Order 019 provides that the Board retains oversight of CSB records management; and
9. Board Order 028 authorizes the Chairperson to respond to all inquiries from Congress, but reserves to the Board approval of statements to Congress on behalf of the Board.

Therefore, the Board hereby votes to authorize the Chairman to:

- a. Provide to the Committee, in the manner and on the schedule agreed to by the Chairman and the Committee, copies of all Board Orders and the Board Action Reports for all notation votes taken from January 1998 to the present;
- b. Notwithstanding any contrary provisions of Board Order 022, provide to the Committee, in a manner and on a schedule agreed to by the Chairman and the Committee, such additional documentation associated with the notation votes as the Committee or its staff may request, or as the Chairman may decide should be affirmatively provided;
- c. Provide the documents described in "a." and "b.," above, to the Committee without personally reviewing every document for applicable privileges or other information sensitivity concerns and without specifically asserting potentially applicable privileges with respect to each document;
- d. Provide general notice to the Committee of sensitive information that may be contained in the documents described in "a." and "b.," above;

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Subject: Authorization of Response to Congressional Committee

- e. Notify the Committee that the CSB response to its document requests does not constitute a public disclosure of sensitive or privileged information or the waiver of any applicable privilege or exemption from public disclosure under applicable laws;
- f. Take or direct all steps necessary to make public through the CSB web site, in a manner and on a schedule agreed to by the Chairman and the Committee, the following records for each notation item considered by the Board since January 1998 – the text of the item including any document submitted for specific adoption by the Board, the Chairman’s transmittal memo for the item, each Member’s vote and any written explanation of the vote, and the Board Action Report, but specifically excluding any recommendation response evaluation, the disclosure of which will require an amendment to Board Order 022 – provided that, the Chairman ensures that prior to public disclosure any and all records proposed for disclosure have been reviewed for the presence of sensitive information, including but not limited to the categories listed in paragraph 6 of this item, and such sensitive information is found to be absent or is removed from the records.

\_\_\_\_\_ I **APPROVE** this notation item **AS PRESENTED**.

\_\_\_\_\_ I **CALENDAR** this notation item for discussion at a Board meeting.

\_\_\_\_\_ *Some of my concerns are discussed below or on the attached memorandum.*

\_\_\_\_\_ I **DISAPPROVE** this notation item.

\_\_\_\_\_ *A dissent is attached.*

\_\_\_\_\_ *I will not file a dissent.*

\_\_\_\_\_ I am **NOT PARTICIPATING**.

Note: An urgent notation item is either adopted or disapproved when the affirmative or negative votes of a majority of the participating members are received by the Office of General Counsel.

Date: \_\_\_\_\_

Member: \_\_\_\_\_