In late 1983, the Occupational Safety and Health Administration (OSHA) promulgated its final rule on "hazard communication." This rule establishes for many workers the right to know certain health hazard information held by their employers. Concurrently, the rule imposes on these employers the duty to disclose such privately held information.

The OSHA rule is limited and late, and joins a crowded field. It follows in the wake of several decades of legal developments which have established various rights to know and duties to disclose. Since the latter part of the nineteenth century, state common law for personal injuries has provided for such rights and duties, to protect workers, consumers and community residents. Since the mid-1970s, some 20 states and many communities have enacted a diverse lot of right-to-know laws; and OSHA and the Environmental Protection Agency have enacted several regulations requiring certain disclosures by firms handling hazardous substances. Throughout the twentieth century, the states have enacted a wide variety of laws and rules to provide for other rights of access to company held information.

As a result, we now have a complex mosaic of laws and regulations at three levels of government which structure various access rights and disclosure duties pertaining to privately held hazard information. These developments reflect deeply held societal values and concepts of professional and corporate responsibility. Consider, for example, some of the conclusions of a committee chaired by Dr. Bruce Karhuff of DuPont, which were adopted by the American Occupational Medical Association in 1979:

Employees who are the subject of medical or exposure records should be informed of the existence and contents of these records. Likewise, employees should be informed of the appropriate toxicologic and epidemiologic data which are pertinent to their workplace exposures...Every employee should know the potential hazards involved in each job to which he or she is likely to be assigned.

But to what avail? Do these enactments lead to improvements in the corporate management of health risks? Because they provide information which can be used in legal proceedings as evidence of causation and fault, they aid those who have been exposed and harmed to gain compensation. But do they produce an effective deterrent force, one which leads industry to prevent health risks to workers and the residents of communities where industrial facilities are sited?

Prior to the OSHA rule, the effectiveness of laws and rules was sporadic and highly dependent on the prospect of corporate liability, which in turn was dependent on other forces in society. Since the OSHA rule, the OSHA administrator has stressed its intended preemptive effect. If his view is accepted by the courts, the OSHA rule would invalidate many aspects of the state and local laws and regulations. It is thus important to review the scope and status of right-to-know and duty-to-disclose law in order to assess the role of these doctrines in the management of health risks in the private sector.

State Common Law

By the end of the nineteenth century, it was well established in state common law for personal injuries that industrial firms owed certain duties to disclose or warn workers and community residents of hidden hazards to health and safety. Failure to perform these duties would result in corporate liability for negligence, and the award of compensatory damages to the injured workers or residents:

It is part of the implied contract between the employer and the employee that the latter assume the ordinary risks of the employment, which are apparent, and which he has the opportunity to detect...all men are taken to understand that fire will burn, and water drown. But that there are many facts of science which do not come within the range of ordinary knowledge; and unless the employment teaches them, the employee will not be taken to know them, nor be bound to anticipate the danger therefrom. Thus, where one was employed to remove hot slag from a furnace in close proximity to water, it was held that he should not be presumed to know that if the slag came into contact with the water a dangerous explosion might follow.

Common law principles established "the duty of the master to see that the employee is not induced to work, supposing...the place in which the work is to be done is safe, when in fact it is not safe." To avoid a finding of fault and the attendant liability, an employer could choose among several options, each of which had the potential to prevent health risks to workers: for example, to voluntarily shut down the workplace, to remove the hidden hazards, or to disclose information to the employees at risk.

Employers frequently chose the third option, because they could use it to avoid liability in subsequent litigation by arguing that the informed employees had voluntarily assumed the risk of continued employment on an informed basis. Many courts found this affirmative defense persuasive, despite the fear of job loss and other coercive factors which belied the voluntariness of choosing continued employment. This generated public antagonism and support for a no-fault system for quickly compensating workers injured or diseased by job-related conditions. As a result, each state during the early decades of the twentieth century adopted a Workers' Compensation system. Similar duties were imposed on private firms by the common law to protect community residents and the firm's customers and contractors from a wide variety of hidden hazards. Thus, "a person approaching a railroad crossing with intent to pass it...has a right to expect that the customary signals and warnings will be given on the approach of a train."
Liability was also imposed on firms which introduced dangerous substances into commerce, when their non-disclosure of hidden hazards contributed to subsequent harms. "Thus, one who delivered a carboy which he knew to contain nitric acid to a carrier without informing him of the nature of its contents, was held liable for an injury resulting by reason of the leaking of the acid, to another carrier to whom the carboy had been delivered by the first carrier...in the ordinary course of business." The common law thereby also provided a basis for allocating responsibility among manufacturers and their "downstream" commercial clients.

However, several factors converged to blunt the force of these common law principles. The state Workers' Compensation laws which eliminated the need to prove employer fault also barred tort suits by the injured workers against their employers; and community residents and others injured by hidden hazards who sought to use the common law to gain compensatory damages faced costly and complex evidentiary problems, particularly when technical uncertainty as to the existence of hazards and conflicting expert opinions as to their obviousness were involved, as is commonly the case for chemical exposures. As compensation became difficult or impossible for injured parties to secure, the legal principles lost their deterrent effects, their role as forces for risk prevention waned, and companies engaged in hazardous activities felt little legal or economic compulsion to identify and disclose hazards.

Nevertheless, the common law principles remain in force, and have been frequently and successfully invoked over the years in product liability suits brought by consumers injured by defective products. In recent years, workers suffering from diseases resulting from exposure to asbestos have used these principles and prevailed in lawsuits against Johns Manville and other suppliers of asbestos to their employers. Such "third-party" suits by workers against suppliers are not barred by Workers' Compensation law, and have led to numerous awards of compensatory damages, and of punitive damages in significant amounts when willful non-disclosure by the supplier has been found.

In light of this renaissance of common law for occupational and product-related diseases, and the heavy corporate and insurer liability which has accrued in recent years, many companies are now abandoning non-disclosure as a corporate policy, and are trying to carefully structure new disclosure policies to avoid punitive damages, without inducing "hypochondria" among workers and community residents, unduly limiting "management prerogatives," or disclosing trade secret information. A major stimulus for new disclosure policies has also come from the "downstream" commercial customers of corporate products, which are now demanding more information from their suppliers before purchase, in order to choose safer supplies to protect themselves from future regulatory costs, tort litigation and liability.

The renewed force of the common law has made disclosure an effective cost-containment measure in certain industries; and one can even envision some sort of utopian future in which management realizes that disclosure leads to reduction of health risks and costs, and is therefore consistent with cost containment and an increase in profits for the corporation.

State and Local Legislation

Many states, from Maine to California, have enacted right-to-know laws to provide a generic right of access to hazard information in the possession of private firms, state agencies, universities, and other organizations. Most of these laws confer the right to know on workers, and some also extend the right to citizens and to state and community officials. The laws vary considerably from state to state; and the lack of uniformity is increased by the web of other laws and regulations in each state, which provide additional access rights or disclosure duties, often for specific substances or local circumstances.

Generally, each state law of the "generic right-to-know" variety provides for the following:

- **Identification of hazardous substances**—in the form of a state list of specific substances, or other official listings of hazardous substances for adoption by reference; and/or performance criteria for determining other hazardous substances. A critical variable is the allocation of the burden of identifying hazardous substances—in some cases, it is the duty of state officials; in others, it is an industrial responsibility.

- **Record compilation and retention requirements**—for manufacturers, employers, or both; with requirements for designating the substances and their hazardous attributes, safe handling procedures, and other information. The usual requirement is that the records contain the information needed to complete a standard Material Safety Data Sheet (MSDS) (OSHA form 20) for each substance.

- **Disclosure duties**—for manufacturers or employers, or both; to guarantee that various parties secure the information systematically (e.g., by routine filings with state officials) or on request (e.g., by workers, unions, agency officials); thereby affording such parties rights to know certain hazard information.

- **Other hazard communication requirements**—for manufacturers or employers, or both; including labeling requirements, posting, and worker education and training requirements.

- **Enforcement procedures**—including time frames for compliance, penalties for violations, administrative hearing rights for those alleging corporate non-compliance, and in some cases provision for judicial review.

- **Trade secret protections**—which permit corporate non-disclosure or limited disclosure for defined trade secrets under specific circumstances; and which restrict subsequent disclosures of the secrets by state officials, personal physicians, workers, and other recipients of the hazard information.

Other laws and regulations in each state also establish various rights to know. These include state freedom of information and open record acts for access to agency-held information, state employment record laws, and state medical record and licensure laws which impose duties on licensed professionals in occupational medicine.

State Workers' Compensation laws and pre-trial discovery rules also afford access by claimants and litigants to certain records in the possession of private firms, and generally provide Compensation Boards and courts with the power to issue subpoenas for the disclosure of the records needed by the claimants. These opportunities usually become available after exposure and injury and serve primarily as aids in securing compensation. Indirectly, however, they often produce a deterrent effect on corporate risk management and lead to risk prevention measures in industry.

California provides the most fully developed state approach. But it also demonstrates that enacting a statute is only the beginning of a continuum of regulations and other
activities that are essential for a state to grapple with hazard communication. Its generic right-to-know law provides that employers and workers "have a right and a need to know the properties and potential hazards of substances to which they may be exposed...[and] that the rights and duties set forth...apply to all employers who use hazardous substances in this state, to any person who sells a hazardous substance to any employer in this state, and to manufacturers who produce or sell hazardous substances in this state..."14

State officials are ordered to compile lists of hazardous substances from several specified sources, including the Environmental Protection Agency (EPA), the International Agency for Research on Cancer (IARC), and various state agencies. Each firm subject to the law must then compile an MSDS for each hazardous substance, and update the MSDS on an ongoing basis. Most laboratories are excluded, and trade secrets are protectable by decisions to be made by the state's Director of Industrial Relations, but the statute does not set forth any guidance for such decisions.

The California Occupational Safety and Health Standards Board has since promulgated several expansive regulations under the statute. These provide workers with the right to see and copy certain records held by their employer, including their medical and exposure records and those of other workers with similar jobs or work conditions, MSDSs on substances they are exposed to, and various medical surveillance, biological monitoring, and other workplace monitoring data. The regulations require record retention for 30 years, and contain numerous other provisions.15

The state's Hazard Evaluation System and Information Service (HESIS) also provides information on toxics in use; and state agencies have issued relatively definitive reports on various technical subjects, including the identification of carcinogens and the methods of estimating cancer risks.16

Although California provides a broad network of legal requirements, critical gaps are present (e.g., no labeling requirements for containers, nor specific penalty provisions for non-compliance), and the state does not extend access rights to community residents. However, 13 California communities have enacted community right-to-know ordinances to fill this gap.

The community right-to-know ordinances which have blossomed across the nation are even more highly diverse than those of the states. For example, the Pennsauken, New Jersey ordinance deals with chemical and radioactive substances and petroleum products, requires facility plot and storage plans, imposes hazard communication functions on facility owners or operators, requires certain disclosures (MSDSs to local health and fire officials and the town clerk), and site inspection twice a year, provides for citizen access to MSDSs on file with local officials, and prohibits expansion of storage capacity for toxics after April 1, 1982.17

These state and local laws represent exercises of the "powers over the states by the federal Constitution, and constitute responses to societal values regarding the need to know privately held information which pertains to health and safety risks to workers and community residents. But they will be challenged in the courts, either on their face or as they are applied to particular situations.

The challenges will be based on a variety of legal doctrines, ranging from their alleged interference with interstate commerce, to their alleged taking without compensation of private property in trade secrets. Many provisions will be upheld, others deemed invalid. In addition, each law will require enforcement and the commitment of fiscal and human resources on a considerable scale for implementation.

Historically, many such state and local laws, even if legally sound, have failed to achieve their goals because of weak enforcement. Finally, the recent OSHA regulatory action provides a new basis for challenging these state and local efforts—federal preemption.

OSHA Regulation

Since 1970, OSHA has used its authority to regulate various health and safety hazards in private workplaces.18 Two types of OSHA regulations establish rights to know and duties to disclose: rules dealing with specific substances, and generic access to information rules. OSHA rules for specific hazards such as coke oven emissions, asbestos, arsenic, acrylonitrile, cotton dust, noise, and lead each contain separate requirements for record compilation, reporting, and worker access.19 Generic rights of access and duties to disclose are afforded by three OSHA rules: the rule on inspections under the "general duty" clause of the enabling statute, the access to medical and exposure records rule, and the new hazard communication rule.

Under the "general duty" clause and OSHA regulation, workers have the right to request OSHA inspection, and to be notified of any imminent dangers of death or serious physical harm discovered by the inspector.20 The effectiveness of this rule is dependent on worker initiative, OSHA inspection, and the extent to which proprietary claims limit disclosures. It is usually invoked after some exposure has occurred, and thus has a somewhat limited role in risk prevention.

The rule on employee access to medical and exposure records establishes generic access rights to such records kept by those employers whose workers are exposed to toxic substances or harmful physical agents.21 But the rule does not, itself, require the compilation of such records, and therefore is dependent on record keeping that is either voluntarily undertaken by such employers or required by other OSHA rules, such as those for the specific hazards discussed above.

It permits current and former employees to examine their complete medical files, except for contents pertaining to health insurance, medical diagnoses of terminal illness, psychiatric information, and a few other matters. Unions and OSHA are afforded access under certain limiting conditions designed to protect the privacy interests of the workers. Exposure records are also available to current and former workers, and those being newly assigned to work with toxics. These records include company information pertaining to both environmental and biological monitoring, MSDSs, and certain other information which identifies the toxics and harmful physical agents found in the workplace. Unions, "designated representatives," and OSHA are also afforded access to these exposure records. Employers may withhold certain types of trade secret information, and are permitted to use written agreements with employees to restrict personal economic use of any trade secrets, or any disclosures to competing firms. Finally, the records must be retained for specified periods of time.

This important rule has proven useful to worker and union efforts at self-protection,22 OSHA assessment of health hazards, and worker claims for compensation. It has therefore promoted both the compensation and prevention facets of health risk management in industry. But its effectiveness is dependent on worker initiative, trade secret restrictions, and the extent to which such records are kept voluntarily or as required by other OSHA regulations. Although limited in
scope to the employment relationship, the information involved has proven useful to community residents and, in some cases, to corporate management in controversies over community health risks. Thus far, the rule has survived various political and legal challenges.23

Finally, there is OSHA's new hazard communication rule.24 It establishes that employees in the broad manufacturing sector of American industry have the right to know information about the chemical hazards in their workplaces; and that the manufacturers and importers of hazardous chemicals, and their industrial customers who use the chemicals in the manufacturing sector of industry, have various disclosure duties. Several prior versions of this rule were opposed by the President's Office of Management and Budget, but support for the rule by unions and large sectors of industry overcame this opposition.25

The rule initially provides that manufacturers (and importers) of chemicals provide their industrial customers, "downstream" firms in the manufacturing sector of industry which purchase the chemicals, with labeled containers and an MSDS for each purchased chemical which has been determined to be hazardous. It then requires that all firms in the manufacturing sector, "downstream" customers and chemical manufacturers themselves, provide information to their workers who will be exposed to the chemicals. The information consists of a written hazard communication program, labels on containers, MSDSs, posters, other information, and training. This does not extend to workers in firms that are not within the manufacturing sector (e.g., construction, commercial services, transportation, etc.) or to community residents; but these parties will probably be able to secure some of the information provided manufacturing employees through various means, even though they are not covered by the rule.

The duties and rights pertain only to chemicals deemed hazardous, because they are either: 1) among the over 600 substances designated by the rule,26 or 2) meet the performance criteria set forth in the rule and its appendices.27 However, hazardous wastes, foods, drugs, pesticides, and certain other items are excluded; and the disclosure duty is limited to hazardous chemicals known "to be present in the workplace in such a manner that employees may be exposed under normal conditions of use or in a foreseeable emergency."

Thus, the burden of developing and passing along basic information (e.g., MSDSs) on each hazardous chemical is imposed on the manufacturer (or the importer) of the chemical. All downstream customers, as employers, can choose to rely on this information and use it as the basis for communicating with their employees. Various exemptions and limitations are provided for laboratory employers, for chemical "mixtures," for portable containers and piping systems, and for trade secret information.

Trade secrets are defined more broadly than in many state right-to-know laws, as "any confidential...information...that is used in an employer's business, and that gives the employer an opportunity to obtain an advantage over competitors who do not know or use it." The rule provides that "the specific chemical identity, including the chemical name and other specific identification of a hazardous chemical" can be withheld from the MSDS if the trade secret claim is supportable, other information concerning the properties and effects of the substance is provided, and other criteria for such withholding are met. Treating physicians and other health professionals are provided the opportunity for access to such trade secrets under specified conditions, but are closely restricted in their use of the information and subject to penalties for violation of the restrictions. The requirements are time phased so that chemical manufacturers comply with the labeling and MSDS requirements by November 25, 1985, and employers with the worker communication requirements by May 25, 1986.

Despite various objections to its limitations (e.g., protects too few employees), compromises (e.g., too much protection of trade secrets), and potential undesirable effects (e.g., possible new basis for arguing "assumption of risk" to avoid tort liability), the rule is of considerable importance for purposes of improving the management of health risks in the private sector.

First, it directly addresses the prevention aspect of corporate risk management, since it intervenes in the earliest stages of the risk generation process, unlike the other access rules which are most useful after exposure to hazards.

Second, the nature of the intervention is such that it sets several forces in motion to improve management decisions. These include worker and union self-help measures, such as collective bargaining and litigation which can now be undertaken on a more informed basis; market forces engendered by better informed downstream customers who will seek the safer chemicals to contain their own costs of regulatory compliance and liability for injuries to workers and community residents; other economic forces such as those arising from new insurance rates for manufacturers, which can now be based more soundly on their differential risks, by insurance companies; and the development of more coherent information systems in industry which can be of considerable ongoing benefit to workers, community residents, and management itself in working to prevent risks.

Third, it reafirms first principles, those of the common law which were developed to force the identification and disclosure of hidden hazards. This is of symbolic value in the sense that societal notions of responsibility found in common law are affirmed by regulation for a change, rather than eroded by regulation as is often the case with numerical standards for industrial activity which are often set by agencies such as EPA on the basis of cost-benefit analysis, which ignores responsibility. But the effects are likely to be more than symbolic, since the disclosures required by the rule will be useful as evidence in tort litigation for establishing judicial standards of reasonableness and responsibility in disputes involving industrial risks of various types—many of which lie beyond the scope of the rule.

But this rosy forecast must acknowledge one cloud of uncertainty—the potential preemptive effect of the federal rule on state laws, some of which are more stringent or health-protective in design. The rule provides that it is intended "to preempt any state law pertaining to this subject"; and that "any state which desires to assume responsibility in this area may only do so under the provisions of s.18 [of the OSHAAct]," which requires OSHA approval of any such state effort.28

The OSHA Administrator has strongly supported preemption, arguing that a multiplicity of state laws will not be effective and will burden business unduly. He has "indicated that OSHA would not assert preemption over any state rules pending the effective date of the federal standard" (Nov. 25, 1985), but that others may bring action against such state laws, perhaps before the effective date, to contest their validity.29

The Act is inconclusive on this matter of OSHA preemption of state law. On the one hand, section 18 cited by the rule states that "Nothing in this Act shall prevent any state
agency or court from asserting jurisdiction under state law over any occupational safety or health issue with respect to which no standard is in effect under section 6; but where such a federal standard is in effect, OSHA action is required to validate any state standards on the same subject matter. OSHA approval is to be based on various assessments of state administrative capability and the following key findings: that the state laws and rules are “at least as effective” as the OSHA federal standards and, to the same extent, “when applicable to products in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce.”

On the other hand, section 4(b)(4) of the Act provides that “Nothing in this Act shall be construed to supersede or in any manner affect any workmen’s compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.”

In Shimp v. N.J. Bell Telephone Co., the New Jersey Superior Court held that the OSHAct did not preempt “concurrent state power to act either legislatively or judicially under the common law with respect to occupational safety”; and in W. Va. Manufacturer’s Association v. W. Virginia, the federal courts held that the OSHAct did not preempt certain notice requirements of the state’s right-to-know law. These cases were decided before enactment of the new rule, and future challenges to state laws which have not been approved by OSHA, but which deal with the same subject matter as the federal rule, will raise some new issues.

How will the courts deal with the anticipated numerous suits challenging state and local right-to-know laws, other state access laws, and even state common law over the next several years? The federal rule differs from many state and local right-to-know laws in several respects:

- Its scope of coverage (e.g., manufacturing sector employees) is more limited;
- Its definitions of hazardous chemicals are different;
- Its allocation of hazard identification and disclosure burdens, and responsibilities for dealing with trade secrets (and definitions of trade secrets) differ;
- Its performance-oriented requirements for industry are at odds with the approaches of several states.

In addition, particular circumstances may also compel certain state and local approaches which differ from that of the federal rule (e.g., fire and explosion hazards in areas where industry is densely concentrated). State and local provisions to protect community residents through hazard communication, which may be integrally related to the state worker protection provisions, are not dealt with by the OSHA rule. And the legislative history of the OSHAct reveals that state’s rights proponents in Congress essentially prevailed in controversies over the drafting of several of its provisions relevant to the federal preemption issue.

But OSHA, on the basis of section 18 of the Act, has ruled that a state plan “shall not include standards for products distributed or used in interstate commerce which are different from federal standards for such products unless such standards are required by compelling local conditions and do not unduly burden interstate commerce.” Its comprehensive set of regulations for reviewing, approving, rejecting, and funding state plans has been in effect for several years. The diverse state and local laws are of variable quality and, based on historical experience, probably will provide less protection and enforcement in many states than would the OSHA regulation. Industry in interstate commerce—and their workers—are likely to face a baffling, costly, and potentially unworkable and inefficient set of overlapping requirements by the various states and communities.

A court faced with a case in which the validity of a state or local law is challenged, because it deals with a subject covered by the new federal rule but has not been OSHA-approved, has several options. First, it can find no federal preemption of such state or local law, on the basis of section 4 of the Act, discussed earlier, and legislative history; and on the basis of US Supreme Court decisions which, for example, have invalidated certain federal labor-related laws when they “directly displaced the ability of the states to structure their integral operations in areas of traditional state government functions,” under the tenth amendment of the federal Constitution. Such a court could also find in the “new federalism” philosophy of the Reagan Administration, and in the structure of OSHA regulations for approval of state plans, additional policy and legal support for upholding state law.

If no preemption is found, it would be left to OSHA, industry, or other opponents of state or local law to challenge each particular law on some other basis: for example, one could argue that a particular state law is invalid because it involves a taking of private property in trade secrets, violates the federal supremacy doctrine because it is in direct conflict with federal law, and unduly interferes with interstate commerce.

A second option for the court would be to find total preemption on the basis of section 18 of the Act, thereby upholding the full OSHA program for approving state laws, and forcing the state to seek OSHA approval if it hopes to carry out its own right-to-know effort. After the likely OSHA denial of those right-to-know elements of the state plan which differ from the federal rule, the state could seek judicial review of the OSHA determination. On judicial review, the court would probably be faced with arguments that OSHA’s denial was based on its erroneous findings that the state law was not justified by compelling local conditions, or that it unduly burdened interstate commerce. The OSHA Act provides that the court, on judicial review, shall affirm the OSHA decision unless it is “not supported by substantial evidence.”

A third option for the court would be to find partial preemption, and hold invalid only those elements of the state law which addressed exactly the same chemical products, for example, or the same firms or employees as the federal rule. This would force either OSHA-State coexistence, with each having its own separate and enforceable provisions on right-to-know; or state application for OSHA approval of the preempted provisions, OSHA’s likely denial, and then judicial review of the OSHA denial under the substantial evidence test. The coexistence outcome would lead to more litigation because the applicability of coexisting federal and state laws to dynamic conditions in chemicals commerce would lead to numerous controversies. The latter outcome would most likely entail judicial review of OSHA findings that local conditions do not justify the state law, and that the state law unduly burdens interstate commerce.

The dismal prospect of such future litigation could be avoided if several steps are taken soon. OSHA could clarify that its rule has no intended preemptive effect on state common law and certain other state laws (e.g., access to employment records); and narrowly identify those aspects of state generic right-to-know statutes which conflict with the
federal rule (e.g., state requirements pertaining to disclosure duties in the manufacturing sector only). It could then begin negotiation with state officials on these conflicting provisions to develop memoranda of understanding as to how they will be applied in a manner which does not obstruct the federal rule or unduly burden interstate commerce, and these memoranda could become part of OSHA-approved state plans.

This approach, although laden with problems, would still appear to be more useful in reaching an integrated and effective national system than the litigation approach. It is our one opportunity to close finally the circle of laws and regulations on right-to-know in the foreseeable future, and assure that the prevention of health risks to workers will become a more effectively conducted function of corporate management.

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NOTES AND REFERENCES
5. Id., pp 414-415.
8. Id., p 230.
9. See, for example, Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (U.S. Ct. App., 5th Cir., 1973), in which the court established a “manufacturer’s status as expert” with duties to “keep abreast of scientific knowledge … [and] to test and inspect his product.”
11. See generally, Industry Response to Health Risk, Rpt. 811, The Conference Board, NY, NY, 1981. Among numerous reports of recent corporate disclosures, see, for example, Shell Oil Reports Excess Deaths at Two Locations. Current Report: OSH Reporter, Bureau of National Affairs, Oct. 6, 1983; p 421. For some general guidance on developing disclosure policies, see Loss Prevention and Control, s.841, Bureau of National Affairs. For some of the more significant disclosure duties imposed by the Environmental Protection Agency, see 15 USC s.1607.
12. States with a generic right-to-know law include, at last count, the following: Alaska, California, Connecticut, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New York, Ohio, Oregon, Rhode Island, Virginia, Washington, West Virginia, and Wisconsin. Bills are currently being considered in Florida, Illinois, Maryland, Nebraska, and Pennsylvania.
13. For example, various listings and registries officially designated by the National Institute for Occupational Safety and Health, the Environmental Protection Agency, the Agency for Research on Cancer, etc.
15. California General Industry Safety Orders (GISOs), including GISO 3204 and 3194. See also Cal. Labor Code s.6408, which requires employer notification of employees who have been, or are being, exposed to harmful substances in excess of limits set by California’s Occupational Safety and Health Agency.
17. Pennsauken NJ: Ordinance No. 82-1982.
18. Authority provided by the Occupational Safety and Health Act of 1970, 29 USC s.651, et seq.
19. See 29 CFR Part 1910, etc.
20. General duty clause at 29 USC s.654, regulations at 29 CFR 1903.
21. See 29 CFR Part 1910.40 and 42 CFR 85.3(b)(5) for additional access rules of more limited scope.
22. For example, by collective bargaining on health and safety protection.
23. OSHA, under Thorne Auchiher’s leadership, has proposed that the scope of the rule be reduced to a limited list of toxic substances, Federal Register July 13, 1983;47:70420. Suits challenging the validity of the rule, by the Louisiana Chemical Association, have thus far failed: 550 F. Supp. 1136 (W.D. La. 1982); 657 F.2d 777 (5th Cir. 1981).
26. Substances designated are those subject to OSHA regulations in 29 CFR Part 1910, and those listed by the American Conference of Governmental Industrial Hygienists in the latest edition of Threshold Limit Values for Chemical Substances and Physical Agents in the Work Environment.
27. See 29 CFR Part 1910.1200 and Appendix A thereto, which set forth criteria which pertain to carcinogenicity, corrosivity, toxicity, combustibility, reactivity, explosive attributes, etc.
30. 29 USC s.667(a). A threshold legal issue will undoubtedly be whether the new OSHA rule is a s.6 rule. See cases cited in footnote 23 above.
31. Id., s.667(c). Also see 29 CFR Part 1900 for OSHA regulations on state approvals.
32. 29 USC s.633(b)(4).
35. See discussion in Rothstein M: Occupational Safety and Health Law, 2d Ed., West Publ, 1983, Ch. 3.
36. 29 CFR Part 1902.31(c)(2).
37. See 72 L. Ed. 2d 956 for discussion of National League of Cities v. Usery, etc. A finding of no preemption could also be based on judicial determination that the new OSHA rules is not a s.6 rule. See footnote 30 above.
38. 29 USC s.667(g).