INFORMATION BULLETIN

Issue No. 4

This is the fourth in a series of Information Bulletins designed to assist in understanding the *Hazardous Materials Information Review Act* and *Regulations*, and the procedures followed by the Hazardous Materials Information Review Commission. Previous information bulletins were issued on the following topics:

IN THIS ISSUE

> approaches to developing a generic chemical identity for a CBI controlled product or ingredient **(Issue No. 1);**

> responses to frequently-asked questions, including claim withdrawals, change in product ownership and its impact on claims for exemption, and the nature of the bibliography required by Paragraph 8(1)(h) of the Regulations **(Issue No. 2);** and

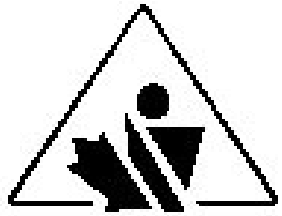
> expiration of a 3-year trade secret exemption and reapplying for a trade secret exemption **(Issue No. 3).**

This Bulletin is intended to provide assistance in understanding the requirements of the relevant legislation, often by listing commonly asked questions and problems experienced with claim applications, and focusses on a number of areas where claimants appear to have difficulty.

BACKGROUND

Established in October 1987, the Hazardous Materials Information Review Commission (HMIRC), created by the *Hazardous Materials Information Review Act*, is part of the federal government's commitment to the implementation of the Workplace Hazardous Materials Information System (WHMIS).

Amendments to the *Hazardous Products Act* (HPA), Part II of the *Canada Labour Code* (CLC) and provincial and territorial occupational safety and health (OSH) legislation require



suppliers of or employers using hazardous products to disclose specific product information on the product material safety data sheet (MSDS) and label.

Since it was recognized that certain product information may be confidential to the supplier of or employer, the Commission was established to provide an independent mechanism to evaluate both the validity of claims for limited exemption from disclosure and the compliance of MSDSs and labels for these products. The Commission is also responsible for convening and supporting independent Appeal Boards to provide a mechanism for appealing decisions and orders.

The *Hazardous Materials Information Review Regulations* (HMIRR) came into force in December 1987 and established the criteria to be used in reviewing claims for exemption. Additions to these Regulations were issued in October 1988, July 1991, and May 1993. They dealt with the fees that must accompany a claim or appeal, the manner of calculating fees, the information to be contained in a claim, the form and manner of filing a claim, the assignment of Registry Numbers, and subsequent claim filings.

In order to facilitate the submission of claims to the Commission, a "Form 1- Claim for Exemption" application form was included in the Regulations and a detailed instructions guide "A Guide to Completing a Claim for Exemption" was developed to assist in the completion of the forms.

SECURITY MEASURES

It should be noted that any information supplied by a claimant to the Commission is privileged and is exempt from all provisions of the *Access to Information Act*.

The Commission has designed and installed security facilities and equipment based upon an evaluation of the physical site by the RCMP Security Services Division and their resulting recommendations.

Access to the alarmed premises is highly restricted and any visitors must be escorted by Commission personnel. Access to the CBI is limited to those officials of the Commission who have a "need to know" in order to carry out the duties of their position. For example Screening Officers are assigned to screen specific claims for exemption and thus are accorded the right of access to the Form 1 - Claim for Exemption and any associated documentation, including CBI. The use of CBI by officials of other government departments is limited by the HMIRA as being for the administration or enforcement of WHMIS related legislation. The Commission will not release CBI to any official of a provincial government unless their legislation governing the access and use of CBI provides the same level of protection as the HMIRA.

PROCEDURES FOR FILING CLAIMS FOR EXEMPTION

Before a Registry Number is issued, claims for exemption are reviewed to ensure that all required documentation has been included. At this time a preliminary review of the claim is performed to examine the CBI and compare it to the MSDS submitted with the claim. This is done in order to assess the completeness of the claim and associated MSDS and determine any problems with the claim (e.g. incorrect product groupings for fee purposes).

The claim is then assigned to a Screening Officer who will review the supporting documentation received from the claimant using the criteria prescribed in the *Hazardous Materials Information Review Regulations* and rule on the validity of the claim.

Alongside this claim review, Commission Evaluators perform a review of the MSDS or label and the CBI to provide compliance advice to the Screening Officers. The Screening Officer also has the statutory mandate to decide whether the MSDS or label complies with the disclosure requirements of the CPR.

In the event of an appeal against the decision or order of a Screening Officer, Appeal Boards will be assigned to specific cases and may be accorded the right of access to Form 1 and associated documentation related to the claim for exemption being appealed.

REMINDERS

In the course of the Commission's pre-registration evaluation of claims received to date, a number of areas have been noted where claimants appear to have difficulty. In such cases, issuance of Registry Numbers and processing of claims have been delayed while errors, omissions, etc. were resolved. Here are a few reminders:

> Before you consider filing a claim, make sure that the product in question is a "controlled product" within the meaning of the HPA and the *Controlled Product Regulations* (CPR). Prepare the MSDS or label in accordance with WHMIS requirements.

> Ensure that each controlled product with a unique formulation has a unique product identifier (e.g. trade name, brand name, etc.). Different package sizes for the same controlled product do not require different product identifiers. If a controlled product has more than one product identifier, a separate claim must be filed for each one. Claims may be grouped in such instances for fee purposes, and where this is done, all the product identifiers must be listed in Part II of Form 1.

> Familiarize yourself with the claim validity criteria found in Section 3 of the HMIRR.

> Ensure that **all** necessary MSDSs (and for certain employer claims, labels) accompany Form 1 when it is sent to the Commission.

> Ensure your submission includes an MSDS for each controlled product. A generic MSDS which lists all of the controlled products covered by it, is permitted by CPR.

> Remember if you have an emergency telephone number, the CPR requires that it be listed on all MSDSs.

> Ensure that the product identifier, together with the generic chemical identity of the trade secret hazardous ingredients, Chemical Abstracts Services (CAS) Registry Numbers, real chemical identities and concentrations are properly identified in Part VII of Form 1.

> Section 16 of the HPA requires that the generic chemical identity of a claimed CBI ingredient be shown on the MSDS. Expressions such as "IDL Substance, Proprietary Information, etc." are not acceptable for this purpose. Generic chemical identities of claimed trade secret ingredients must be chosen with as much precision as possible without divulging their full chemical identity.

> Ensure that claimed trade secret information is disclosed **only** in Part VII of Form 1, never in Part II.

> Should you consider any of the information contained in Parts I to VI to be of a confidential nature, remove from Form 1 and place into the sealed envelope containing Part VII (CBI).

> Check the number of products and unique hazardous ingredients when calculating the fee for a group of claims, to ensure the fee is properly calculated.

COMMON QUESTIONS AND ANSWERS

The following are answers to commonly asked questions that will assist you in the preparation and filing of a complete and accurate Form 1 - Claim for Exemption.

Q1: What kind of information may be claimed as CBI?

A1: Under the legislation, an applicant can file for exemption only for the following specific types of information, which would otherwise have to be disclosed:
A supplier, within the meaning of HPA, can claim for:

a) the chemical identity of any ingredient in a controlled product;
b) the concentration of any ingredient in a controlled product;
c) the name of any toxicological study that identifies any ingredient of a controlled product.

An employer, within the meaning of the CLC or provincial territorial legislation (OSH) can claim for:

a) the same three information types as the supplier;
b) the chemical, common, generic, trade, or brand name of a controlled product;
c) information that could be used to identify a supplier of a controlled product.

All other mandatory information such as hazards, preventive measures, first aid, etc. cannot claimed as CBI, and must be disclosed.

Q2: How do I prepare for filing a claim?

A2: The sequence of events prior to completing a claim are to:

1) determine whether you are considered a supplier or employer under the HPA, CLC or OSH acts;
2) determine if you have controlled product(s) as defined by the *Controlled Products Regulations*;
3) classify your products and prepare the required MSDS/labels;
4) determine if the information on one or more of the hazardous ingredients is considered trade secret or proprietary (chemical identity, concentration, supplier); then
5) complete Form I using the Guide and if you require assistance please call our Client Services Officer at (613) 993-4718.

For further information concerning the administration and enforcement of WHMIS requirements, consult with your provincial WHMIS coordinator.

Q3: Do I have to indicate the concentration of CBI ingredients?

A3: If the concentration of an ingredient is being claimed as CBI, the concentration must then be shown in Part VII of Form 1.

Q4: Should the generic chemical identity appearing in Part VII match the one required to be shown on the MSDS under Section 16 of the HPA?

A4: Yes.

Q5: How do I determine which "Claimant Category" to check off in Part I?

A5: Claimants should ensure that the category chosen is consistent with the nature of the controlled product that is the subject of the claim. For example, a Canadian manufacturer who imports the controlled product in question for resale would check off claimant type "importer" and not "manufacturer" or "employer".

Q6: How detailed must the responses be in Part IV?

A6: When responding to all questions in Part IV, claimants are expected to provide as much detailed information as possible, since these responses will form much of the basis on which a decision is made concerning the validity of the claim. For grouped claims, the information in Sections 1, 2, 6, 7, 8 and 9 of Part IV may be summarized for the group if the information related to each Section is applicable to each claim. The economic financial information in Section 3, 4 and 5 must be disclosed in relation to each individual controlled product in the claim group. All information provided is treated as privileged.

Q7: When providing information in support of the claim, is it permissible to include, for example, controlled products sales data that relates primarily to my firm's parent company outside of Canada?

A7: Claimants are required to provide economic information such as sales data relating strictly to the entity which files the claim. However, the claimant is then free to append additional applicable data pertaining to sales of the controlled products by its parent company or affiliated companies in other parts of the world. Clear linkages between the claimant and these related entities must be established. For example, while the negative economic consequences of the disclosure of CBI might extend beyond a Canadian firm to its foreign parent company, such assertions will not be considered unless the nature of the CBI/controlled product business outside of Canada is clearly described in the claim. As this information is supplementary, the Screening Officer may or may not take this information intro account when making a decision.

Q8: In Section 4(1) 0f Part IV of Form 1, do I have to answer both questions, that is: a) estimate the material financial loss to the claimant that would result from disclosure of the information and, b) estimate the material financial gain to the claimant's competitors that would result from disclosure of the information?

A8: No. Paragraph 8.(1)(e) of the HMIRR offers a choice of estimating either the claimant's material financial loss or a competitor's material financial gain. The explanation of how this estimate was calculated must clearly relate to the option which the claimant has chosen (e.g. gross sales, net sales, contribution margin, etc).

Q9: Is the claimant required to submit both the relevant MSDS and label with the claim?

A9: The MSDS is always required to be submitted as it would normally have to disclose the CBI relevant to the claim. Labels are only required to be included with the claim when employers are claiming for the name of a controlled product and/or its supplier.

Q10: How much is the fee associated with submitting a claim for exemption to the Commission?

A10: The base fee for a single product claim is $2000, plus $400 for each ingredient required to be disclosed under WHMIS legislation, whether or not the ingredient is claimed as CBI. Grouping of claims for fee purposes is allowed, subject to specific criteria. This is explained in detail in the Guide and examples are provided.

It should be noted that there is a 50% fee reduction for small businesses.
It is a good idea to double check fee calculations, particularly if a group of claims is being submitted.

Q11: How and when are Registry Numbers assigned?

A11: All claims are reviewed initially for completeness and validation of fees paid, including grouping of claims. Claimants will normally receive a Registry Number and the official "Date of filing" within seven (7) days after receipt of their submission unless the claim documentation is incomplete (i.e. missing MSDSs, incomplete form, insufficient payment of fees, etc.)

Q12: How long is my exemption period?

A12: When a Registry Number has been assigned to the claim, it can be used immediately for purposes of selling, importing or usage of the controlled product in question. In due course, the claim will be reviewed by a Screening Officer and a decision made on the validity of the claim. The exemption period will then continue for another 3 years, beginning on the date that the Screening Officer decides that the claim is valid.

Q13: What if an appeal is filed against the Screening Officer's decision?

A13: If an appeal is filed against the decision of the Screening Officer, the 3-year exemption period begins on the date that the Appeal Board made its decision on the appeal. During appeal proceedings, the claimant maintains the right to sell, import or use the controlled product.

Q14: If the Screening Officer finds that the MSDS for the controlled product in my claim does not comply with the WHMIS requirements, does that mean that my exemption will be terminated?

A14: No. The decision as to whether the claim is valid is not affected by the decision on the compliance of the MSDS for the controlled product in that claim.

Q15: Subparagraphs 4(1)(b)(i) and (ii) of the HMIRR outline criteria to be applied in grouping controlled products for fee purposes in a single claim application. Could you clarify this?

A15: There are four methods by which claims for exemption may be grouped for fee purposes.

GROUP 1 [HMIRR Subparagraph 4(1)(b)(i)]:
When there are two or more controlled products and they are covered by only **one generic MSDS**. Each product identifier listed in Form 1 **must** appear on the generic MSDS.

GROUP 2 [HMIRR Clause 4(1)(b)(ii)(A)]:
When two or more controlled products belong to the same WHMIS hazard class(es) and each product has its own MSDS, they may be grouped if all the CBI ingredients are found in all of the products in the group.

GROUP 3 [HMIRR Clause 4(1)(b)(ii)(B)]:
When two or more controlled products belong to the same WHMIS hazard class(es) and each product has its own MSDS, they may be grouped if all the CBI ingredients are known by the same generic name and impart the same functional characteristics to each of the products in the group listed in Form 1.

GROUP 4 [HMIRR Clause 4(1)(b)(ii)(C)]:
When there are two or more controlled products belonging to the same WHMIS hazard class(es) and each product has its own MSDS, they may be grouped if all products have the same generic name and the same function in respect of a specific, common end use. For detailed information and examples, please refer to the Guide.

Q16: Is the fee required to be paid in Canadian dollars?

A16: **YES**. Payment should be made either by cheque or money order, in Canadian funds, to **The Receiver General for Canada**. Cheques or money orders sent to the Commission in currency other than Canadian will be returned causing a delay in the issuance of the Registry Number and subsequent processing of your claim.

Q17: Can a claim for a controlled product which is about to be sold or imported be added to a previously submitted single or multiple claim group? If so, what fees are applicable?

A17: The answer is yes provided it meets the following criteria:

1. the claimant has an existing single or group of claims filed with the Commission for which an exemption is either pending or has been found to be valid;
2. the controlled product was developed or acquired by the claimant after the existing claim or claims had been filed with the Commission;
3. the new controlled product is in the same hazard classes as the existing claim; and
4. the controlled product can be added to the existing claim(s) using one of the grouping criteria. (See page 5 and 6 of the Guide for grouping criteria or consult with Client Services of the Commission) Question 15 of this bulletin also addresses the grouping issue.

Fee determination for these filings depends on whether written notice has been given that the review has begun. (See page 13 to 15 of the Guide or consult with Client Services of the Commission). The 50% reduction for small businesses in respect to fees is also applicable.

Q18: In filing a claim for exemption with the Commission, how can I, best ensure the secure transmission of my CBI?

A18: When filing a claim, one should follow a few simple rules in order to ensure the secure transmission of the CBI.

> Section 9 of the HMIRR specifically directs claimants to send in their claims by registered mail, or have them delivered in person. The Commission encourages the use of courier for the delivery of the claim.

> CBI and product formulation data should always be placed in sealed envelopes which have been appropriately labelled.

> Regular mail, E-mail or FAX lines are **NOT** appropriate means of transmitting CBI to the Commission.

> If several claims are sent in one package, ensure that the CBI sealed envelopes and the related claim form envelopes are appropriately marked in order to facilitate the matching of the information once it is received at the Commission.

Q19: There are a number of items that must be included with my claim for exemption. What are they?

A19: Use the following check-list to ensure that your claim package is complete.

MSDSs:

- The relevant MSDS must accompany each product that you are claiming.
- The controlled product identifiers on the MSDSs must match the product identifiers listed in Parts II and VII of Form I.

Claim Groups:

- All controlled products in a group of claims MUST be in the same WHMIS hazard class(es), with the exception of a grouping based on a generic MSDS.

Hazard classification:

- Products which burn or blister the skin, should be Class E - corrosive materials and not as a skin under Class D2b. Only those products which are not corrosive, but which cause skin irritation and inflammation/edema to the skin should be included in Class D2b.

Claimed CBI:

- The envelope containing the claim CBI MUST be sealed to ensure confidentiality.
- CBI shown on Part VII with the claim should match the products listed in Part II of Form 1.
- CAS numbers or chemical names of the CBI ingredients should NOT appear on the MSDS supplied with the claim but be provided on Part VII of Form I.
- Information in support of the claim should appear on Part IV NOT on Part VII of Form 1. Part IV information may however be included with Part VII in the sealed envelope.
- The generic chemical identity of the claimed CBI ingredients should be listed in Column 3 of Part VII of Form 1 as well as on the MSDS. These generic chemical identities must match.

Bibliography:

- Include a bibliography that provides a full reference to each of the source materials used or consulted by you to prepare the MSDS (and label, where applicable) that relate to the controlled product. In addition if any of the information on the MSDS is based on unpublished toxicological studies, copies of such studies should be supplied. This will ensure that the information used to prepare the MSDS will be included in the Commission's compliance review.

Controlled Product Formula:

- It would be advantageous if data on the product's total formulation were provided at the time of your claim filing. The Screening Officer will request the total formulation at a later date if it is not supplied at this time. This includes the precise chemical identity, CAS Registry Number and per cent concentration of each "non-hazardous" ingredient present in the controlled product at a per cent concentration of 0.1 or greater, which has not been disclosed on the MSDS accompanying the claim being filed. This information assists the Screening Officer in the MSDS review which entails a verification that all hazardous ingredients in the controlled product have been disclosed on the MSDS. When submitting this data, every effort should be made to **ensure that the percent concentrations of the hazardous plus "non-hazardous" ingredient concentrations virtually account for the total formulation of the product**. Product formulation data should be placed in the same sealed envelope as the claimed CBI.

Other reminders:

- "Proprietary Secret" is not an acceptable means of complying with Section 16 of the HPA - the generic chemical identity must be shown.
- All claimed CBI ingredients must be identified individually by their generic chemical identity (i.e. one generic name followed by "and additives" is not acceptable).

For further information about these issues or other topics, please call or write to:

Hazardous Materials Information Review Commission
200 Kent Street, Suite 9000
Ottawa, Ontario K1A 0M1
Telephone (613) 993-4331 Facsimile (613) 993-4686
hmirc.ccrmd@hc-sc.gc.ca

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