



INFORMATION BULLETIN

ISSUE NO. 4

This series of Information Bulletins is designed to assist in understanding the *Hazardous Materials Information Review Act* (HMIRA), the *Hazardous Materials Information Review Regulations* (HMIRR) and the procedures followed by The Hazardous Materials Information Review Commission (HMIRC).

IN THIS ISSUE

- Background information
- Security measures
- Procedures for filing claims
- Common questions and answers

Additional Information Bulletin Issues include:

- approaches to developing a generic chemical identity (GCI) for a confidential business information (CBI) controlled product or ingredient (**Issue No. 1**);
- responses to frequently-asked questions, including questions about claim withdrawals, and about change in product ownership and its impact on claims for exemption (**Issue No. 2**); and
- expiration of a three-year trade-secret exemption and reapplying for a trade-secret exemption (**Issue No. 3**).

This Issue is intended to help claimants understand the requirements of the relevant legislation by addressing common questions and problems with claim forms, and by focusing on a number of areas where claimants appear to have difficulty.

BACKGROUND

Established in October 1987, HMIRC, created by the HMIRA, 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 hazardous products or employers using such products to disclose specific product information on the product's material safety data sheet (MSDS) and label.

Based on the recognition that certain product information may be confidential to a supplier or employer, HMIRC 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. HMIRC is also responsible for convening and supporting independent appeal boards, to provide a mechanism for appealing decisions, undertakings and orders.

The HMIRR came into force in December 1987 and established the criteria to be used in reviewing claims for exemption. Amendments to these Regulations were made in October 1988, July 1991, May 1993, June 2002 and October 2008. The amendments dealt or deals with such matters as: the fees that must accompany a claim or appeal; the manner of calculating fees for both original claims and refiled claims; the information to be included in a claim; the form and manner of filing a claim; and the assignment of registry numbers.

To facilitate the submission of claims, HMIRC has developed a new *Claim for Exemption Form* which reflects the regulatory changes of October 2008. The form itself includes instructions on how to complete it.

SECURITY MEASURES

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

HMIRC has designed and installed security facilities and equipment, based upon an evaluation of the physical site by the RCMP and their resulting recommendations.

Access to the alarmed premises is highly restricted and any visitors must be escorted by HMIRC personnel. Access to the CBI is limited to those HMIRC officials 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 *Claim for Exemption Form* and any associated documentation, including CBI. The HMIRA limits the use of CBI by officials of other government departments to matters pertaining to the administration or enforcement of WHMIS-related legislation. HMIRC will not release information to any official of a provincial government, unless the province’s legislation governing access and use of information 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 in the submission. This review ensures that HMIRC registers only claims which it can review under its mandate.

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 HMIRR—and rule on the validity of the claim.

Alongside this claim review, HMIRC evaluators perform a review of the MSDS or label to provide compliance advice to the screening officer. The screening officer also has the statutory mandate to decide whether the MSDS or label complies with the disclosure requirements of the *Controlled Products Regulations* (CPR). In the event of an appeal against decisions, any undertakings or orders of a screening officer, appeal boards will be assigned to specific cases and may be accorded the right of access to the *Claim for Exemption Form* and other documentation related to the claim for exemption being appealed.

REMINDERS

In the course of HMIRC's pre-registration evaluation of claims, staff have noted a number of areas where claimants appear to have difficulty. Frequently, the work to resolve errors and omissions in forms leads to delays in the issuance of registry numbers and the processing of claims. Here are a few reminders to help claimants avoid such delays:

- 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 for fee purposes, and where this is done, all the product identifiers must be listed in Part II of the *Claim for Exemption Form*.
- 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 the form when the form is sent to HMIRC.
- 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 the 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 GCIs of the trade-secret hazardous ingredients, Chemical Abstracts Service (CAS) registry numbers, real

chemical identities and concentrations are properly identified in Part VII of the form.

- Section 16 of the HPA requires that the GCI of a claimed CBI ingredient be shown on the MSDS. Expressions such as “IDL Substance, Proprietary Information, etc.” are not acceptable for this purpose. GCIs of claimed trade-secret ingredients must be chosen with as much precision as possible without divulging their full chemical identity. See HMIRC’s **Information Bulletin 1** for more detailed information on how to choose a suitable GCI.
- Ensure that claimed trade-secret information is disclosed only in Part VII of the form, 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 the form and place into the sealed envelope containing Part VII (CBI).

COMMON QUESTIONS AND ANSWERS

The following answers to commonly asked questions will assist you in the preparation and filing of a claim for exemption.

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

A1: Under the legislation, an applicant may file for exemption for only the following specific types of information, which would otherwise have to be disclosed:

A supplier, within the meaning of the HPA, may 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 OSH legislation, may 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 be 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 is 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 CPR;

- 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) provide all of the mandatory information required under section 8 of the HMIRR. HMIRC's *Claim for Exemption Form* is designed to facilitate the submission of this information. If you require assistance, please contact our offices at 613-993-4331 and ask to speak to a Client Services Officer.

For further information concerning the administration and enforcement of WHMIS requirements, consult with your provincial WHMIS coordinator or visit the Health Canada WHMIS website at <http://www.hc-sc.gc.ca/ewh-semt/occup-travail/whmis-simdut/index-eng.php>

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 the form.

Q4: Should the GCI appearing in Part VII of the form match the one required to be shown on the MSDS under section 16 of the HPA?

A4: Yes.

Q5: How detailed must the information that I submit be?

A5: Screening officers rely upon the information provided by claimants to make a decision on the validity of the claim. (See Part IV of the *Claim for Exemption Form*). Therefore, when claimants submit the information required under paragraphs 8(1)(h) to 8(1)(k) of the HMIRR, they are expected to provide as much detail as possible. Under subsection 14(1) of the HMIRA, a screening officer may request a claimant to submit additional information to permit him/her to properly evaluate the claim and rule on its validity.

Q6: When providing information in support of a claim, is it permissible to include, for example, controlled product sales data that relates primarily to my firm's parent company outside of Canada?

A6: 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 product 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 into account when making a decision.

Q7: Do claimants have to provide both an estimate of the material financial loss to HMIRC that would result from disclosure of the information **and** an estimate of the

material financial gain to the claimant's competitors that would result from disclosure of the information?

A7: No. The *Claim for Exemption Form* offers a choice of estimating **either** the claimant's material financial loss **or** a competitor's material financial gain. Any explanation of how this estimate was calculated (e.g. gross sales, net sales, contribution margin, etc.) must clearly relate to the option which the claimant has chosen. All information provided to HMIRC, including financial estimates, is treated as privileged.

Q8: Is the claimant required to submit **both** the relevant MSDS and labels with the claim?

A8: The MSDS is always required to be submitted, as it would normally have to disclose the CBI relevant to the claim. Labels are required to be included with the claim, only when employers are claiming for the name of a controlled product and/or its supplier.

Q9: How much is the fee for submitting a claim for exemption to HMIRC?

A9: The fee structure for claims for exemption differentiates fees based on the number of claims submitted at one time and on whether each claim is an "original claim" or a "refiled claim". The following fees apply to each submission and are based on the number of claims of each type (original or refiled) submitted at one time.

Original Claims

\$1,800 for each original claim up to 15 original claims in one submission (1-15);

\$400 for each of the next 10 original claims in one submission (16-25);

\$200 for each additional claim submitted above 25 original claims in one submission.

Refiled Claims

\$1,440 for each refiled claim up to 15 refiled claims in one submission (1-15);

\$320 for each of the next 10 refiled claims in one submission (16-25);

\$160 for each refiled claim submitted above 25 refiled claims in one submission.

A 50% reduction for a small business which meets certain criteria is available. Please consult the HMIRR to obtain more information.

Q10: How and when are registry numbers assigned?

A10: All claims are reviewed initially for completeness and validation of fees paid, including characterization 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 (e.g., missing MSDSs, incomplete form, insufficient payment of fees, etc.)

Q11: How long is my exemption period?

A11: When a registry number has been assigned to the claim, it may 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 three years, beginning on the date that the screening officer decides that the claim is valid.

Q12: What if an appeal is filed against the screening officer's decisions?

A12: If an appeal is filed against the *Decisions of the Screening Officer*, the three-year exemption period begins on the date of the resolution of the appeal. During appeal proceedings, the claimant maintains the right to sell, import or use the controlled product.

Q13: 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?

A13: 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.

Q14: Is the fee required to be paid in Canadian dollars?

A14: Yes. Payment can be made either by cheque, money order or credit card (Visa, MasterCard or American Express). Cheques or money orders should be made payable to the **Receiver General for Canada**. Sending cheques or money orders to HMIRC in currency other than Canadian dollars may cause a delay in the issuance of the registry number.

Q15: In filing a claim for exemption with HMIRC, how can I best ensure the secure transmission of my CBI?

A15: When filing a claim, you 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. HMIRC encourages the use of couriers for the delivery of claims.
- CBI and product formulation data should always be placed in sealed envelopes which have been appropriately labelled.
- Regular mail, electronic mail (e-mail) or facsimile are **NOT** appropriate means of transmitting CBI to HMIRC. However, Section 9 of the HMIRR has recently been amended to provide a legal framework for electronic transmission of claims in the future, providing HMIRC has the necessary facilities for accepting the secure transmission of claims by that means. HMIRC is conducting research into options for implementing the necessary facilities to allow secure electronic transmission.

Q16: There are a number of items that must be included with my claim for exemption. What are they?

A16: Use the following checklist 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** exactly the product identifiers listed in Parts III and VII of the *Claim for Exemption Form*.

Claimed CBI:

- The envelope containing the claimed CBI **MUST** be sealed to ensure confidentiality.
- CBI shown on Part VII of the claim should **match** with the products listed in Part III of the *Claim for Exemption Form*.
- 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 the *Claim for Exemption Form*.
- The GCI of the claimed CBI ingredients should be listed in Part VII of the form as well as on the MSDS. These generic chemical identities **must match**.

Controlled Product Formula:

- It is advisable to provide data on the **product's total formulation** 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 percent concentration of each “non-hazardous” ingredient present in the controlled product at a percent 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” ingredients account for virtually 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 GCI (i.e. one generic name followed by “and additives” is not acceptable). Note that it is acceptable to use the same GCI for more than one CBI ingredient if appropriate. Should you have two or more CBI ingredients with the same GCI, you have a choice of options:
 - You may either number the GCI, such as alkylamine 1, alkylamine 2, etc., if one or more of the ingredients with the same GCI are referred to on the MSDS in the discussion of hazards or toxicity; or
 - if there is no reference on the MSDS to any particular ingredient which shares the same GCI, then you may pluralize the GCI; for example, alkylamines (3), indicating that there are three alkylamines in the product.

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

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