



Independent Lubricant Manufacturers Association

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May 23, 2016

Via Electronic Mail: WHMIS_SIMDUT@hc-sc.gc.ca

Mr. Daniel Wolfish
Director, Workplace Hazardous Materials Bureau
Health Canada
269 Laurier Avenue West, 4903E
Ottawa, Ontario
K1A 0K9

Re: Workplace Hazardous Materials Information System 2015's Trade Secret Provisions

Dear Mr. Wolfish:

The Independent Lubricant Manufacturers Association¹ (“ILMA” or “Association”) submits these comments regarding the ongoing implementation of the Globally Harmonized System of Classification and Labelling of Chemicals (“GHS”) in Canada. While the aim of GHS is to provide a uniform hazard classification and communication regime, it has not occurred. Our members’ experiences are that each country’s implementation of GHS, while similar in many respects, presents unique requirements that a chemical manufacturer must comply with in order to do business in that particular country.

ILMA members have spent several years and significant resources with their compliance activities under the U.S. Occupational Safety and Health

¹ ILMA is a U.S.-based trade association with 338 member companies, including a number of Canadian businesses. As a group, ILMA members blend, compound, and sell over 25 percent of the United States’ automotive lubricants and nearly 80 percent of the metalworking fluids. Independent lubricant manufacturers by definition are neither owned nor controlled by companies that explore for or refine crude oil to produce lubricant base stocks or that produce chemical additives. Base oils are purchased from refiners, who also may be competitors in the sale of finished products. ILMA members succeed by processing, producing, and distributing high-quality, often specialized, lubricants.

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Administration's ("OSHA") Hazard Communication Standard that was amended in March 2012 to incorporate GHS provisions ("HCS 2012"). For many of our members, these compliance activities are still ongoing after OSHA's deadlines because of the lack of upstream classification information to incorporate into their Safety Data Sheets ("SDS") and container labels.

ILMA members are concerned with several key differences between OSHA's HCS 2012 and Canada's Workplace Hazardous Materials Information System 2015 ("WHMIS 2015"). There is considerable apprehension about the disparities between HCS 2012 and WHMIS 2015 regarding trade secrets and confidential business information ("CBI"), particularly the WHMIS requirement that chemical manufacturers disclose the exact concentration of each chemical component within a "mixture." What makes individual mixtures unique and work well in a specific application is the small variations within the formula, which is a closely guarded trade secret. ILMA, therefore, requests that Health Canada align its trade secrets provisions in WHMIS 2015 with OSHA's provisions contained within HCS 2012.

HCS 2012 – Trade Secrets

HCS 2012 requires that manufacturers disclose exact percentages, but provides a significantly easier avenue to claim trade secret protection. In many instances, manufacturers can provide a concentration range as opposed to the exact percentage of each individual component. HCS 2012 requires the following:

For Mixtures

In addition to the information required for substances:

(a) The chemical name and concentration (exact percentage) or concentration ranges of all ingredients which are classified as health hazards in accordance with paragraph (d) of §1910.1200 and

(1) are present above their cut-off/concentration limits; or

(2) present a health risk below the cut-off/concentration limits.

(b) The concentration (exact percentage) shall be specified unless a trade secret claim is made in accordance with paragraph (i) of §1910.1200, when there is batch-to-batch variability in the production of a mixture, or for a group of substantially similar mixtures (See A.0.5.1.2) with similar chemical composition.

In these cases, concentration ranges may be used.

For All Chemicals Where a Trade Secret is Claimed

Where a trade secret is claimed in accordance with paragraph (i) of §1910.1200, a statement that the specific chemical identity and/or exact percentage (concentration) of composition has been withheld as a trade secret is required.

The specific trade secrets provision of HCS 2012 is set forth in 29 CFR § 1910.1200 (i). This section mandates that:

1910.1200(i)(1)

The chemical manufacturer, importer, or employer may withhold the specific chemical identity, including the chemical name, other specific identification of a hazardous chemical, or the exact percentage (concentration) of the substance in a mixture, from the safety data sheet, provided that:

1910.1200(i)(1)(i)

The claim that the information withheld is a trade secret can be supported;

1910.1200(i)(1)(ii)

Information contained in the safety data sheet concerning the properties and effects of the hazardous chemical is disclosed;

1910.1200(i)(1)(iii)

The safety data sheet indicates that the specific chemical identity and/or percentage of composition is being withheld as a trade secret; and,

1910.1200(i)(1)(iv)

The specific chemical identity and percentage is made available to health professionals, employees, and designated representatives in accordance with the applicable provisions of this paragraph (i).

While OSHA's HCS 2012 requires disclosure of the exact concentration of chemicals in a mixture, it also provides a straight forward, cost-effective mechanism to claim that information as a trade secret, thereby allowing downstream blenders, such as ILMA members, to safeguard their proprietary information while simultaneously providing adequate warnings to the users of the product.

WHMIS 2015 – Trade Secrets

While WHMIS 2015 provides for trade secrets exemptions, the process and costs associated with trade secret claims are significantly more onerous than under HCS 2012. Health Canada requires the following from its July 31, 2015 document, "Guidance – Disclosure of Ingredient Concentrations and Concentration Ranges on Safety Data Sheets" at § 3.3 *Disclosing an Ingredient Concentration or Concentration Range*:

Under both the HPR (WHMIS 2015) and HCS 2012:

- The true concentration of an ingredient must be disclosed when the ingredient is present in the mixture at a fixed concentration
- When an ingredient is not always present at the same concentration, then the true concentration range of the ingredient in the mixture must be disclosed.

When disclosing a true concentration range, the following conditions would apply (these do not apply to trade secrets as discussed below):

- The ingredient must be present in the mixture at a range of concentrations
- The range must accurately reflect the concentration variation
- The hazard classification must accurately reflect the hazard associated with the mixture

Further, the costs associated with the process are significant. A chemical manufacturer must pay \$1,800 for each claim and \$1,440 for any re-filed claim.² Additionally, any manufacturer who wishes to appeal a Health Canada decision regarding a trade secret claim must remit \$2,000 with its statement of appeal. These costs are significant for businesses and present an impediment to participating in the Canadian marketplace. ILMA members want to be active market participants, but they must weigh this objective against protecting their company's most valuable commodity – that is, their formulations -- as CBI.

U.S.-Canada Cooperation Council

The U.S.-Canada Cooperation Council (“Council”) just concluded its stakeholder meetings in Washington, D.C. to discuss opportunities for Canada and the U.S. to cooperate and collaborate to align both regulatory systems. The Council’s current Work Plan for Work Place Chemicals notes, “The objective is to ensure that the requirements in Canada and the U.S. for hazard classification and communication can and will be met now and in the future, to the greatest extent possible, with one label and one safety data sheet that would be acceptable in both countries . . .” In keeping with that objective, Health Canada should align its trade secret provisions in WHMIS 2015 with HCS 2012.

² The amounts are in Canadian Dollars.

Mr. Wolfish
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Conclusion

ILMA shares Health Canada's goal to communicate appropriately and effectively the potential hazards that a chemical mixture may present. However, the Association fails to understand how a user is better or more effectively warned if the precise concentration of a chemical mixture is revealed. If a warning is required, it will be provided. A user is no less or no more equipped to understand the warnings of a mixture and conduct themselves appropriately when using it simply because the exact chemical concentration is known. Accordingly, the Association respectfully requests that Health Canada align its trade secrets provisions contained in WHMIS 2015 with those in HCS 2012.

Sincerely,

A handwritten signature in black ink that reads "Holly Alfano". The signature is written in a cursive, flowing style.

Holly Alfano
Chief Executive Officer

cc: ILMA SHERA Committee
ILMA Board of Directors
Dr. John K. Howell
Jeffrey L. Leiter, Esq.
Daniel T. Bryant, Esq.