

Regulation on the Approval of Exemptions to Chemicals Subject to Safety Information

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On November 9, 2020, the Ministry of Environment (“MOE”) announced “the Regulation on the Approval of Exemptions to Chemicals Subject to Safety Information” (the “Disclosure Exemption Regulation”). The Disclosure Exemption Regulation sets forth (i) the application procedures to request an exemption for disclosure of safety information on chemicals, (ii) review process and decision notice by the Information Provision Deliberation Committee under MOE (the “Committee”), and (iii) objection process against the decision by the Committee. The announcement followed the enactment on December 28, 2018, of Article 35-2 of the Enforcement Rules of the Act on Registration, Evaluation, etc. of Chemicals (“K-REACH”), which will become effective on January 16, 2021. The Disclosure Exemption Regulation will also become effective on January 16, 2021.

Once the Disclosure Exemption Regulation becomes effective, MOE approval will be required to avoid disclosure of chemical safety information that qualifies as a trade secret, such as the composition or content of chemical substances, which generally must be provided by the transferor of chemical substances to the transferee.

[1] It is possible to avoid disclosure of chemical safety information that qualifies as trade secret if MOE approval is obtained

For the distribution of chemical substances or a mixture containing chemical substances registered or reported under K-REACH, the transferor must provide the transferee with certain chemical safety information, including the registration number, name, information on harmfulness, and safe use. If, however, certain chemical safety information qualifies as a trade secret, such information may be exempt from disclosure (Article 29 of K-REACH and Article 35-2 of the Enforcement Rules of the same Act).

Before introduction of Article 35-2 of the K-REACH Enforcement Rules on December 28, 2018, K-REACH required disclosure of all chemical safety information on “harmful chemical substances”. However, for other chemical substances that are not “harmful chemical substances”, disclosure of chemical safety information was not required if the information qualified as a trade secret. For such reasons, there was criticism that the transferor has discretion in

determining whether certain information qualified as trade secrets for chemicals other than harmful chemical substances, preventing sufficient disclosure of chemical safety information.

The new Article 35-2 of the K-REACH Enforcement Rules requires MOE approval to be exempt from disclosing chemical safety information for any chemical substances classified as harmful to health or environment. In addition, if any such substance is classified as a harmful chemical substance or substance that is or is concerned to be carcinogenic, mutagenic or toxic to reproduction of the humans or animals (CMR substances), and is classified as posing physical danger, or harmful to health or environment, and its content exceeds the standard specified under the K-REACH Enforcement Rules, chemical safety information is required to be disclosed.

*Chemical substance classified as posing physical danger, or harmful to health or environment, and its content exceeds the standard specified under the K-REACH Enforcement Rules: Article 10(3) Appendix 7 (Regulation on the Classification of the Chemicals and Content Labeling) of the K-REACH Enforcement Rules.

Therefore, other than for harmful chemical substances or CMR substances classified as posing physical danger, or harmful to health or environment, and its content exceeds the standard specified under the K-REACH Enforcement Rules, **for any chemical substance which is classified as harmful to health or environment, MOE approval is required to avoid disclosure of any composition or contents information that qualifies as a trade secret.**

[2] The Disclosure Exemption Regulation sets forth procedures for the application for approval, review, and objection against the decision by the Committee

The Disclosure Exemption Regulation provides details on the procedures for the application for MOE approval, review process and notice of the Committee decision, and objection against the Committee decision.

At the time an application for MOE approval for exemption is filed, the applicant must file with the MOE the application form, a list of information subject to exemption, a statement explaining the reason for exemption, and supporting documents showing that the relevant information qualifies as trade secret.

Upon the filing of the application for approval, the MOE will request the Committee to review the matter. The Committee, in turn, will decide whether to approve the application, taking into account whether the information on the composition or contents of the chemical substance qualifies as trade secret under Article 2-2 of the Unfair Competition Prevention and Trade Secret Protection Act ("Trade Secret Act"). The Committee must make its decision within 30 days from receipt of the application for approval. Such period may be extended if the Committee requests additional documents.

Once the applicant is informed of the Committee's decision, it may object within 15 days. Upon submission of the objection, the MOE must request the Committee to review the objection without delay. The Committee will review again

whether the information qualifies as a trade secret and make a decision on whether to approve the application for exemption to disclosure.

[3] Conditions to qualify as a trade secret

The disclosure exemption on chemical safety information only applies to information that qualifies as a trade secret under Article 2-2 of the Trade Secret Act.

"Trade secret" means information, including a production method, sales method, or technical or business information otherwise useful (usefulness) for business activities, which is not known publicly (non-public), has independent economic value (economic value), and is managed as a secret (secrecy) (Article 2(2) of the Trade Secret Act). In other words, all the following four elements must be satisfied for an information to be qualified as trade secret: (i) non-public, (ii) economic value, (iii) secrecy, and (iv) usefulness.

1. "Non-public" means that the information generally cannot be obtained from a party other than the information holder because the information is not known to the public or is not otherwise available in any publications or online in Korea or abroad at the time the application for disclosure exemption is filed. The decision will be made taking into account the overall circumstances, including (i) the degree such information is known within the applicant's entity or within the industry, and (ii) the difficulty of obtaining such information.
2. "Economic value" means that there is a valid interest or economic value in possessing and keeping the information secret. This is determined based on an objective analysis of (i) the disposability of the information and whether it would be subject to economic compensation, (ii) the human and physical resources put into and tangible and intangible efforts made to develop the information, and (iii) the competitive advantages the information gives to the information holder.
3. "Secrecy" means that the applicant who holds the trade secret limits the disclosure of the information for the purpose of its business, and the information is kept as a secret to the extent it would be recognized as a secret by the applicant's employee or third parties. Whether an information is kept as secret is determined based on whether (i) the access to the information is limited to certain persons (limitation of access), (ii) to those persons who are allowed access, an obligation is imposed to keep the information secret and not to disclose against the information holder's intent (obligation to take defensive measures), and (iii) measures are taken so that it may be recognized that certain information qualifies as trade secret (specification of secrecy).
4. "Usefulness" means information that is specifically helpful to the overall business activities and is recognized to have a value worth legally protecting, to the extent objectively and socially necessary, including production, sale, research and development activities. However, if the information is publicly known within the industry or in particular, a competitor possesses or may obtain such information without restriction, such information is deemed to have lost its usefulness even if the applicant keeps the information a secret.

The applicant has the burden to prove that the information qualifies as a trade secret. If materials initially submitted are not sufficient to meet such burden of proof, the Committee may request that the applicant submit additional material, which may delay the review process. The application for disclosure exemption may be denied if the applicant fails to

meet its burden of proof.

Should you have any questions regarding the contents of this newsletter, please do not hesitate to contact us. Shin & Kim's Environment Team regularly advises clients on registration and review of chemical substances and various other issues relating to management of chemicals.

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