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Ms. Monet Vela
OEHHA
P.O. Box 4010
Sacramento, CA 95812

Delivered via email: P65Public.comments@oehha.ca.gov

RE: "Clear and Reasonable Warnings" and "Lead Agency Website" Proposed regulations under California's Proposition 65

Dear Ms. Vela:

Illinois Tool Works Inc. ("ITW") is a U.S. manufacturer of a variety of value-added commercial and industrial-use products, components and systems. ITW greatly appreciates the opportunity to provide comments to proposed regulatory changes as published in the Office of Environmental Health Hazard Assessment's ("OEHHA") Notice of Proposed Rulemaking to Article 6 in the Title 27 of the California Code of Regulations ("Rule") (January 16, 2015).

As a Fortune 200 company operating 89 divisions globally, ITW employs over 300 California residents through a diverse portfolio of businesses, including commercial foodservice equipment, automotive aftermarket and emergency roadside service products and welding equipment. We have hundreds of additional business operations around the US making and selling products into California through countless commerce channels.

In communicating with OEHHA since your March 2014 draft proposal release, our company has found the agency to be accessible and responsive to stakeholder input, which we appreciate. OEHHA appears to want to promulgate a regulatory change that is meaningful without becoming overly burdensome to product makers or consumers. At the same time, the effort is also an attempt to respond to Governor Jerry Brown's objective to reduce predatory litigation that too often stymies economic growth in California. We can agree that ample impediments exist for businesses already without additional burdens on internal resources, inhibited product offerings or otherwise lost economic contributions in the state. So, while we share a desire to ensure that business can thrive and California consumers can benefit, ITW does have some concerns with either the design or unintended consequences of specific provisions under the Rule, as comments below will outline.

I. More confusion, not less

OEHHA states in its Initial Statement of Reasons (ISOR) that "[a] key objective of the proposed regulations is to provide *consistent, understandable warnings* for exposures to listed chemicals while referring interested individuals to the OEHHA website for more detailed, supplemental information (ISOR at p. 3). [Emphasis added.] This being true, ITW would argue that current law requirements accomplish just that and the degree of change in the proposed Rule is unnecessary. Nevertheless, ITW feels that the Rule challenges – if not falls short of – that stated objective in the following ways.

Impact of Proposition 65 language on Federal and Judgment compliance

ITW joined other manufacturing stakeholders during OEHHA's March 25, 2015, public comment meeting to express concern that the Rule creates an unresolved conflict with product label compliance mandated under federal law and/or as a direct result of legal enforcement through court agreements or settlements. OEHHA provides that its decision to remove the "grandfather" provision from its April 2014 draft regulation is in deference to the "non-mandatory, safe harbor approach in the [Rule] and the fact that . . . parties to a settlement or judgment must comply with the provisions of the court's order regardless of whether this regulation states that fact." (ISOR at p. 13).

Clearly, ITW and other stakeholders would expect OEHHA recognizes the Rule's relative position to court orders or other mandates, federal statute or regulations. However if, as stipulated, OEHHA expects manufacturers will readily comply with those mandates, it would be better to explicitly say so in the Rule language. Put another way, we believe that OEHHA can best ensure clarity by expressly deem that federal law compliance and court ordered protocols satisfy the Rule's consumer warning requirements. To do so simply removes any question of whether such requirements comply with the OEHHA Rule, and prevents manufacturers from needlessly pursuing what would be duplicative OEHHA determinations.

"Contains" v. "can expose"

Since the inception of Proposition 65 labeling requirements, manufacturers like ITW have worked to ensure that products sold in California include chemical content warning language that OEHHA now seeks to update. The challenge presented by the proposed language is that it would definitively declare exposure to harmful chemicals will occur without any context. This potential outcome stands contrary to OEHHA's intentions: "[The original] statute clearly states that warnings are required for *knowing and intentional exposures* to listed chemicals." (ISOR at p. 26, emphasis in original). Yet, in countless examples, many products that may show small chemical presence would not meet a test of "known and intentional exposure" outlined as a necessary finding under current law.

For example, myriad products that include stainless steel are not considered inherently harmful because of a small, organic presence of nickel. Moreover, embedded finished good components that may contain trace chemicals – though the component is inaccessible to end-users, such as electronic circuitry in an appliance control panel – clearly demonstrate little-to-no inherent exposure risk to consumers. But, because the proposed Rule affords no ability to contextualize exposure, manufacturers are likely to elect to label these products so as to avoid future legal challenges, thereby creating a misimpression about the true risk of exposure and harm to consumers and defeating OEHHA's intended purposes of preventing overlabeling and ensuring "clear and reasonable" consumer warnings. To address this practical concern, OEHHA's Rule adds a website link to labels "referring interested individuals to the OEHHA website for more detailed, supplemental information (ISOR at p. 3). ITW argues that the Rule does not consider the impact that a declaration such as a product "can expose" consumers to harm will have on buyers. The risk to product manufacturers is that the agency's well-intentioned objective to ensure consumer awareness will actually lead consumers to conclude products are so labeled for a reason. New labels under the Rule will become a *de facto* harm statement rather than merely promoting chemical content transparency.

Secondly, as you know, manufacturing commitment to sustainable practices often includes using recycled materials and other sustainable practices, making it highly impractical to attest to all material content used for manufactured products. This is why across many product-making industries the use of de minimis chemical content thresholds is a widely-accepted standard practice. OEHHA, however, does not include any allowance for de minimis content in the Rule, which will continue to expose manufacturers to cost-prohibitive internal diligence and legal challenge under Proposition 65. Moreover and as explained above, product labeling would be unnecessary for products with embedded components that, but for improper use of a product, create no risk of actual end-user exposure.

For example, ITW's Food Equipment Group (FEG) manufactures commercial kitchen appliances and equipment designed for use in commercial and institutional settings such as restaurants, schools, hospitals and other large-scale foodservice arenas. FEG includes a corps of professionally trained and certified technicians. In addition to safety and operating instructions, our product manuals and other documents explain that such professionals are the only ones intended to perform service and maintenance on our equipment. As a kitchen appliance would be commonly understood, our equipment is self-contained and designed to allow for limited end-user exposure to a machine's inner workings when used properly. So, even though we label our equipment under current law requirements, our products pose low risk of various potential harms including chemical exposure to consumers by their design; and, they maintain a low level of risk to exposure because only trained professionals interact with closed-off portions of the machinery when under service. Yet again, as written, the Rule conflates content and consumer exposure for many products and leaves potential for confusion.

OEHHA does offer manufacturers the opportunity to request guidance and/or exemption for products on an individual basis. However, this is not a practical solution for companies with a wide variety and scope of product offerings. Pursuing individual product considerations this way not only would be resource-intensive for manufacturers like ITW and those of the agency, but also would greatly negatively impact the consumer marketplace. The sheer product volume alone would pose huge management challenges to agency resources, and the resulting backlog would require product makers to pull products from the market for fear of noncompliance without any protections under current law.

II. Manufacturer compliance burden

OEHHA's Rule Economic Impact Statement asserts that "there will be no significant economic impact related to this proposed regulatory action...[because the proposal does] not impose any mandatory requirements that would significantly increase costs for businesses." (ISOR at p. 44) ITW must vigorously disagree with this assertion by explaining our company structure.

Notwithstanding ITW's corporate construct, our business facilities largely bear the responsibility for their regulatory compliance; ITW has over 200 such sites throughout the US alone whose (most often) few dozen employees are responsible for all aspects of their respective operations. The Rule's proposed changes pose practical obstacles to compliance in the additional recordkeeping, testing diligence, and resource commitments like legal reserves required – per product – for which each ITW business would be responsible. A snapshot of one ITW Performance Polymers & Fluids (PPF) business shows a looming impact on well over 1,000 of its products. Elements this business must consider adapting under OEHHA's Rule includes:

- Chemical data sheet (SDS/MSDS) changes/updates
- Label printing configurations
 - Additional language
 - Formatting
 - Plates for printing
- Label costs for additional ink to accommodate the warning symbol
- Employee hours dedicated to information and logistics management changes

As currently calculated, the costs and lost employee workpower for new rule compliance exceed several hundred thousand dollars for this one business alone. And, again, with California's market size and scope being what it is, it is easy to measure an untenable financial and jobs impact across ITW's product scope.

So, as you can see, while we appreciate that OEHHA feels that minor and overdue Rule language updates are needed, please understand ITW when we argue that small changes are not at all insignificant on complex manufacturing processes.

III. Sell-through inadequate

OEHHA's proposed Rule suggests that the two-year effective date will allow manufacturers to employ either current or proposed safe harbor language, and that even early adoption of the new language will impose only short-term costs that are blunted by amortizing the impact. (ISOR at p. 5) ITW applauds OEHHA for recognizing that public policy changes must afford adequate time for implementation. In this case, the need for a product "sell through" period is not a small one, so we are glad that the agency has responded to stakeholder input on this issue.

As manufacturers know and OEHHA has been quick to appreciate, our suppliers and distributors often influence stream of commerce timing more than we do ourselves. For many ITW products, once manufactured and sold to an initial buyer, product distribution can include multiple stages before reaching end markets – and ITW has virtually no visibility into those streams, nor much chance to influence the direction of one manufactured product over the next. (Like most manufacturers, we tend to make products for distribution and use in a variety of markets as opposed to specifying them for different market destinations)

ITW believes that a better, more effective solution would be to allow the two-year period to apply only to transitioning warning label language, while indefinitely allowing for the sale of products manufactured prior to the Rule's adoption date. Done this way, the Rule can effectively manage those products foreseen for manufacture and sale *as this rule takes effect*, as opposed to attempting to impact products being made today since the Rule is not yet finalized. All stakeholders can have more transparency and understanding of regulated products using this protocol.

IV. Conclusion

ITW thanks the OEHHA leadership and staff for the opportunity to participate in this rulemaking. As before, we look forward to continuing to work on this most important regulatory proceeding.

Regards,


Kevin Washington
Government Affairs
Illinois Tool Works Inc.