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Ms. Monet Vela
Office of Environmental Health Hazard Assessment
P.O. Box 4010
Sacramento, CA 95812

Delivered via email: monet.vela@oehha.ca.gov

RE: [Notice of Proposed Rulemaking to repeal Article 6 and adopt a new Article 6](#): Clear and Reasonable Warnings
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 repeal Article 6 and adopt a new Article 6](#): Clear and Reasonable Warnings in Title 27 of the California Code of Regulations ("Proposed Rule" or "Proposal") (November 27, 2015).

ITW is a Fortune 200 company operating 84 divisions globally, among which are hundreds of California employees in a diverse portfolio of businesses, including automotive aftermarket and emergency roadside service products. We have hundreds of additional business operations such as commercial foodservice equipment and welding around the US making and selling products into California through countless commerce channels.

ITW's April 2015 comments included appreciation for OEHHA staff's accessibility and responsiveness to stakeholder input throughout the previous proceeding, and our experience remains the same which is a remarkable credit to the agency's commitment to reflect all stakeholder views in this proposed public policy change. To that end, ITW continues to believe that the latest proposal could continue to be shaped to provide an effective means of consumer information without excessive manufacturer burden. For the provisions for which there remain opportunities for improvement, we offer the following comments.

Subarticle 1: General

Section 25600 (d)

Under this provision, OEHHA limits the nature of supplemental information that may thwart the letter or intent of proposed consumer chemical exposure warnings. Further in its Initial Statement of Reasons ("ISOR"), the agency provides an example of a warning it deems to "...be intended to reduce the effectiveness of the warnings by essentially contradicting it..."¹ At the same time, the agency clearly recognizes as appropriate that supplemental product information may be provided alongside a chemical warning.¹ It appears the agency may inadvertently spur

¹ Initial Statement of Reasons at p. 12.

confusion with contradictory statements which would inadvertently limit useful communication vehicles that are accessible to consumers.

As OEHHA has made plain previously, neither the agency nor Proposition 65 provisions specifically intend to compel that a product be labeled because of chemical content or exposure. The agency explains that the original Prop 65 statute leaves to manufacturers any product labeling decision for chemical content and/or exposure risk. Rather, Prop 65 requires, and OEHHA enforces, labeling compliance once a product maker has its necessary determinations. Understanding these parameters, ITW hopes OEHHA considers certain ramifications that significant changes will have for the decades-long practice of safe-harbor labeling.

Under current law, manufacturers best maximize their Prop 65 compliance defenses by labeling products in such a way that they can withstand a legal challenge. Manufacturers do so acknowledging the cottage industry of plaintiff litigators and other private sector Prop 65 enforcement entities to pursue manufacturers for any tenuous angle of labeling liability. The current proposal at once creates a more demonstrative declaration of product chemical exposure (changing label language from “product contains” to “product can expose”) while reassuring manufacturers that only when a product *actually* exposes consumers to known carcinogens or reproductive toxicant harm is labeling required.² Manufacturers are rightfully sensitive to consumer perceptions about products; in fact, it is a priority to ensure that our customers have the best information possible about what they purchase. So, as a way to fully communicate the context of Prop 65 changes as proposed, it is foreseeable that manufacturers may contextualize warning label changes to effectively communicate to consumers. However, the proposal seems written - and the ISOR reinforces the impression - to actively discourage manufacturers from this practice for fear of being seen to violate the proposed law’s intent.

A parallel concern is ITW’s understanding that OEHHA may frown on warning placements in *certain* supplemental locations, such as a product’s owner’s manual. We would remind the agency that manufacturers very purposefully package supplemental information with our products as consumer communication vehicles. Often chief among those is a product’s owner’s manual containing, *inter alia*, critical information for consumers about proper product use. These documents, along with standards certifications, warranty and other critical product information, are created specifically to provide complete consumer information – and at a cost.

We would strongly urge OEHHA to consider a way to recognize manufacturers’ affirmative decisions (and attendant risk assumptions) and to afford greater leeway for how warnings can be incorporated into supplemental product information to achieve the agency’s goal of maximized consumer awareness.

Court-ordered settlement and judgment labeling compliance

In its pre-regulatory materials, OEHHA acknowledged the need to accommodate product labeling dictated by legal action. ITW encouraged the agency to consider crafting its provisions to more explicitly deem any such labeling to be in compliance with Prop 65 requirements. The result is the current proposal that allows “a party to a court-ordered settlement or final judgment...for a consumer product or environmental warning...” to be deemed “clear and reasonable” as long as the warning complies with the judgment.³ Moreover, the proposal defines parties as those “directly affected by a mandatory provision of a settlement” that outlines the content or methods for a product’s warning labels.⁴

We applaud this change as a step in the right direction, with two exceptions. As currently written, however, the agency seems to limit “clear and reasonable” label eligibility only labelers who are considered “party” to a

² ISOR at p. 23: “If the warning is being provided with no knowledge of exposure to a listed chemical, then no warning is required and “over-warning” is occurring.”

³ Notice of Proposed Rulemaking (Proposed Rule) at p. 4 (Section 25600(f))

⁴ ISOR at p. 13.

settlement or judgment.⁵ OEHHA further explains that non-parties must petition the agency in order to be granted similar protections afforded under Prop 65's "clear and reasonable" safe harbor provisions.⁶ ITW's concern hinges on consideration of whether a product maker can currently – or in the future – be considered party to a legal action simply by introducing an impacted, competing product into the marketplace; we contend that such an introduction very much deems a manufacturer as subject to the settlement or judgment's provisions and, therefore, should be allowed coverage under this provision even if they were not originally active in that market sector during the legal action that resulted in settlement or a judgment. So, we would encourage OEHHA to amend slightly its current proposal to reflect such label (and, thus, manufacturer) eligibility.

Second, we observe that the *proposed rule text* does not explicitly or implicitly provide that non-parties may petition for equal Prop 65 safe harbor protection. However, the ISOR expressly allows such petitions on the basis of legal action party status. We argue that the language as written can facilitate unintended consequences. For example, if OEHHA provides for disparate safe harbor protections under Section 25600(c), it could provide a competitive disadvantage argument for manufacturers who are not considered direct parties to the governing legal action, which seems contrary to the aims OEHHA seeks to achieve. Thus, ITW believes that OEHHA would be well-served to (1) afford equal coverage to manufacturers of "like" or competing products under the provisions of Section 25600(c) as those manufacturers and products that were direct parties to a court-ordered settlement or judgment; and (2) include such impacted manufacturers without the need for a separate agency petition..

Subarticle 2: Safe Harbor Methods and Content

"Contains" v. "can expose"

ITW, in what are now our pre-regulatory comments expressed concern about the proposed warning language change from "contains" to "can expose."⁷ In OEHHA's latest proposal, however, the language change goes on to include specifically naming a listed chemical and identifying its concern as a carcinogen or reproductive toxicant.⁸ The agency goes on to contextualize its purpose as targeting tangible exposure risk. The ISOR explains that the current Prop 65 "statute clearly states that warnings are required for *knowing and intentional exposures* to listed chemicals. **Warnings are not required where a product simply "contains" a listed chemical but may not actually have the potential to cause an exposure.**"⁹ [bold/underscore emphases added] ITW sees this explanation as a significant and positive development for all stakeholders; it specifically allows manufacturers an opportunity to label with more certainty when considering the makeup of more complex products and whether, as finished goods, the products pose exposure risks.

We do see, however, that this potential burden reduction could also be a burden shift that still burdens manufacturers. Product makers invest significant resources in designs, engineering, sourcing materials and components and other diligence for our products. The nature of supply chains can greatly challenge any manufacturer's ability to represent product content with absolute certitude regardless of its level of diligence – and especially if a chemical exposure warning is required for any listed chemical presence regardless of the amount. It also has the potential to open manufacturers to even the slightest accusations of exposure once a chemical's content is acknowledged. Indeed, despite OEHHA's best policymaking efforts, no amount of manufacturer diligence can effectively stem plaintiff legal accusations of chemical content. And even when this Prop 65 regulation finalized, ITW expects such lawsuit activity to remain aggressive.

As OEHHA seems to have taken good effort to do, the agency appears to want to help manufacturers effectively label products and heighten consumer awareness about their chemical content. If true, it remains a mystery to

⁵ Proposed Rule at p. 4 (Sec. 25600 (c)).

⁶ ISOR at p. 14.

⁷ Proposed Rule at p. 9 (Section 25603(a)(2)(A-C)).

⁸ Ibid.

⁹ ISOR at p. 29.

ITW why OEHHA would not allow the proposal to be bolstered by including a *de minimis* chemical content standard along the lines of the REACH protocol. Further to OEHHA's consumer protection objectives, it would appear OEHHA is already well-aware of this dynamic through its consumer study conducted by the University of California-Davis, which concludes that the mere presence of a chemical is not necessarily off-putting to consumers, as "Proposition 65 is a right-to-know law."¹⁰ The principal purpose of the law is to warn consumers about exposure risk. The REACH protocol promotes similar objectives. Thus, notwithstanding a minimal level of chemical content, using an internationally recognized standard of what would be considered to be minimal would help to promote greater certainty about whether there is an actual exposure potential from a given product. To this end and in the name of promoting the broadest certainty possible, ITW encourages OEHHA, once again, to consider adding a REACH protocol-based *de minimis* standard for trace chemical content to its proposed rule changes.

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,

/S/

Kevin Washington
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Illinois Tool Works Inc.

¹⁰ ISOR at p. 24