



March 29, 2021

Ms. Monet Vela
Office of Environmental Health Hazard Assessment
1001 I Street, 23rd Floor
Sacramento, California 95812

RE: Proposed Amendments to Title 27, California Code of Regulations Article 6 Clear and Reasonable Warnings: Short-Form Warnings for Consumer Product Exposures

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. We greatly appreciate the opportunity to provide comments to proposed regulatory changes as published in the Office of Environmental Health Hazard Assessment’s (“OEHHA”) Proposed Amendments to Title 27, California Code of Regulations Article 6 Clear and Reasonable Warnings: Short-Form Warnings for Consumer Product Exposures (“Proposed Rule” or “Proposal”) (January 8, 2021).

ITW is a Fortune 200 company operating 84 divisions globally. Almost 400 California employees represent a diverse manufacturing facility portfolio across the state, ranging from automotive aftermarket and emergency roadside service products to durable goods such as commercial appliances and welding equipment. We have hundreds of additional U.S. facilities manufacturing market-leading commercial construction and testing equipment divisions, as well as specialty products, that sell into the California market through an array of commerce channels.

In previous years’ Article 6 Clear and Reasonable Warnings proceedings, ITW joined dozens of stakeholders and expressed specific concerns with respect to some provisions, but also appreciation for OEHHA staff’s accessibility and responsiveness to stakeholder input to work toward the best possible result. We recognize - once again - OEHHA’s continued stakeholder engagement aimed at crafting useful public policy;¹ with the introduction of the latest OEHHA proposal, we remain hopeful for a similar responsiveness from the agency.

However, we also wonder, after the years of stakeholder engagement that culminated in the 2016 revisions, why OEHHA would seek to literally reverse the otherwise thoughtful, hard constructed result that will be ineffectual for consumer protections but facilitate additional regulatory burdens, compliance costs and litigation risks to businesses in the California market. All told, while the OEHHA proposal is

¹ Comments submitted by ITW, January 25, 2016

limited in its scope of change, it will result in widely shared negative business impacts across supply and vendor chains, which will unavoidably be felt by end-using consumers.

To that end, ITW responds to the proposed amendments with the following comments.

Section 25601(b). Safe Harbor Clear and Reasonable Warnings - Methods and Content.

ITW believes the revision striking Section 25603(c) should be stricken, restoring the effective language back to current law as written. As such, the need for proposed changes to Sections 25603(b) and (c) would be vitiated.

25602. Consumer Product Exposure Warnings - Methods of Transmission.

We do not see a need to add the word “product” to clarify the pertinent label referenced in Subsections (a)(3) and (a)(4), but could work with OEHHA to better understand its reasoning for suggesting the change.

However, Subsection (a)(4) further outlines size parameters for product and font on which a short-form warning must be printed in order to be compliant. ITW’s first concern is that the product dimensions selected of “5 square inches or less” are wholly unsubstantiated and unworkable, in addition to being arbitrary.

Products with packaging of such small size will already have very limited room for any product information, including branding and identification information about the product. For products requiring additional language as required by law, such as transportation or environmental markings, or consent agreement dicta, OEHHA’s proposal would insist on imposing a legal compliance conflict without making accommodation. In addition, manufactured products must comply with the size restriction universally notwithstanding any differences in packaging materials that may preclude effective display of a Proposition 65 label even if it otherwise fits the 5 square inch measurements. For example, a product package comprised of forms of paper and plastic may meet the size definition outlined in the proposal, yet one of the necessary packaging materials may not facilitate such labeling being affixed. None of these consequences is considered in OEHHA’s proposal, nor can be they be. That is the inherent limitation of an arbitrary “one size fits all” proposal, which is largely what makes it unworkable.

Secondly, OEHHA substantiates its size restriction practicality based on hypothetical renderings of modified short-form warnings.² The printed renderings are rectangular and represented to measure 5 inches wide by 1 inch tall (although further qualified to be approximately measured). As shown, the renderings’ warnings are printed in 8-point font and purport to show how a warning can sufficiently display on a product. But further to our observation above, the renderings fail to account for the variety of product and packaging size and material differences that would make the Appendix B examples not applicable to products.

ITW would next suggest that proposed changes to Subsections (b) and (c) should be stricken so as to ensure language consistency through various media associated with a manufactured product. Warnings provided on-product should match internet and catalog language as would other product information that is available to consumers.

² Article 6 Clear and Reasonable Warnings Regulations, Initial State of Reasons, Appendix B (2021).

25603. Consumer Product Exposure Warnings - Content.

Finally, the one-year effective date proposed in Subsection (d), as well as Section 25603 (d), is inadequate and inconsistent with past agency practice. Even the 2016 rule adoption provided an effective date in 2018, to allow product supply chains ample time to adapt to the new requirements. We fail to comprehend how OEHHA could consider a different timeframe for the latest proposed changes. As the agency is already well aware, supply chains have only remained complex during the intervening time. Moreover, many supply chain challenges currently exist as all sectors struggle to recover from a global pandemic. Such real-time challenges predate the outset of the proposed rule, which further complicates understanding the timing for the proposed changes generally.

Background/Problem to be Addressed by the Proposed Rulemaking

At bottom, ITW believes OEHHA does not meet its own test of justifying the proposed rule change, and that the proposed change is wholly inconsistent with OEHHA's written and oral representations leading up to, and since, the 2016 regulatory update.

In materials for the current proposed rule, OEHHA maintains that it is acting now, as not doing so will allow "use of the short-form warning [to] continue to be inconsistent with the intent of the Act and OEHHA's intent in adopting the 2016 regulations..."³ Yet, OEHHA published 2019 guidance to the exact contrary⁴. So, it is difficult to see how the agency can purport to stem an "unforeseen" concern when it expressed its intent to provide consumer clarity and business certainty by allowing for short-form warnings.

We further feel that the agency's position further disregards the ensuing time and resources that manufacturers like ITW have dedicated to complying with the 2016 update and even relied on recent, subsequent agency assurances that our labeling practices were fit to purpose.

Conclusion

ITW again thanks the OEHHA leadership and staff for the opportunity to participate in this rulemaking. As before, we appreciate the staff's openness to stakeholder input as the agency seeks to uphold its responsibilities. However, we feel that OEHHA's latest proposed changes miss the mark on a variety of fronts as outlined above.

We would further recall that the 2016 update was initiated by then-Governor Jerry Brown. He recognized and relished the opportunity to provide consumer information while acknowledging that the law undergirding Proposition 65 facilitated far too much litigation to allow businesses to meet consumer needs sufficiently and fairly in California. When announcing the Proposition 65 update, Brown said that

³ Initial Statement of Reasons (2021 ISOR), p. 4.

⁴ OEHHA's Proposition 65 Clear and Reasonable Warnings Questions and Answers for Businesses, Revised May 2019, available at: <https://oehha.ca.gov/media/downloads/cnr/art6businessqa.pdf>

“Proposition 65 is a good law that’s helped many people, but it’s being abused by unscrupulous lawyers,”⁵ ITW reiterates Brown’s concern that is at the heart of striking balance between providing goods and services and consumer information. We welcome being able to manufacture and participate in California’s consumer market, which is why we actively provided input during the rulemaking leading up to the 2016 amendments.

ITW echoes the view of the coalition of stakeholders who respectfully suggest that OEHHA consider rescinding its latest intended changes that would undo a collective effort and introduce further confusion statewide. We look forward to working with OEHHA as your consideration continues.

Regards,

/S/

Kevin Washington
Government Affairs

⁵ Governor Brown Proposes to Reform Proposition 65 **Press Release, May 7, 2013, available at:**
<https://www.ca.gov/archive/gov39/2013/05/07/news18026/index.html>