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Electronic submittal of Comments of Illinois Tool Works Inc. (ITW) re:

Request for Information on Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities [FR vol. 77, No. 62, pp 19357-19360]

Illinois Tool Works Inc. (ITW) is a \$17 billion global manufacturer, headquartered in Glenview, IL, that designs and produces an array of highly engineered components, products and systems for customers around the world. ITW celebrates its centennial as an American manufacturer in 2012, and throughout its existence, has invested heavily both in innovation (19,000 current patents) and in the development and support of voluntary consensus standards in support of that innovation. ITW is a highly diversified and decentralized company, yet our individual business units around the world have consistently supported the participation of individual engineers and other employees in standards development organizations (SDOs) relevant to their products.

We have reviewed the above referenced Request For Information (RFI) and the twenty (20) specific questions for which the Office of Management and Budget (OMB) is seeking input. These comments address those questions where ITW's experiences may add value to the Agency's analysis; but we would like to begin with some overall thoughts on the role of the Federal Government, including OMB, in the global standards arena where manufacturers like ITW can find themselves disadvantaged or shut out of markets, both in the U.S. and abroad.

General Comments on the Role of the Federal Government in the Global Standards Arena

The voluntary consensus standards process that is prevalent throughout U.S. industries has served both industry and the U.S. economy well for many years. It is this voluntary consensus process that allows industries and other stakeholders to come together to address technical issues involving interoperability, standardization, quality control and safety of the products they offer for sale in the marketplace, while also ensuring that the proceedings are open and transparent. The voluntary consensus standards process has also provided the U.S. government with the standards necessary to perform its regulatory and procurement functions, in most instances, without the costs or duplication of government-created standards.

Yet this system is unique in the world, and has frequently been met with suspicion and even hostility by many U.S. trading partners who are much more comfortable with a government-led standards system. As a result, U.S. interests face a constant battle to ensure that U.S. standards, and U.S. products made to those standards, are readily accepted in the global marketplace. Therefore it is critical that the U.S. government be able to defend the voluntary consensus standards process against charges that it is somehow inferior to government-led processes.

In that regard, we believe there is a critical gap in our standards processes that weakens the ability of the U.S. government to defend the system with our trading partners, and that in certain circumstances can allow the U.S. system to be manipulated to the advantage of a small segment of an industry, to the detriment of others in that industry. Fortunately, we also believe this flaw can be addressed with a supplement to the OMB Circular A-119.

Comments of Illinois Tool Works Inc.
May 7, 2012
Page two.

Article 4.1 and Annex 3, Section E of the World Trade Organization Agreement (WTO) on Technical Barriers to Trade requires signatories to ensure that they comply with the *Code of Good Practice for the Preparation, Adoption and Application of Standards*. As stated earlier, the standards-making process in the United States is recognized and accepted as unique; but we are nonetheless obligated to demonstrate compliance with the Agreement, and to assure our trading partners that our system does not and will not produce standards that create Technical Barriers to Trade (TBT).

In order to demonstrate compliance with the National Technology Transfer and Advancement Act (NTTAA), the OMB Circular A-119 requires all federal employees who participate in domestic standards-making processes to report annually on their participation and to identify the specific standards their agencies adopt in lieu of creating government-specific standards. Yet, there is NO mechanism employed by the federal government to demonstrate our compliance with the WTO Agreement. This is a critical oversight which we believe encourages our trading partners to criticize our historical method of creating consensus standards and, from time to time, reject the use of U.S. standards in global commerce.

By way of example, ITW has experienced directly the manipulation of a U.S. standards development committee process leading to a standard created to benefit a single manufacturer and its European Union-patented product to the detriment of U.S. producers. An employee of the Nuclear Regulatory Commission participated on this committee, was present during the committee's proceedings, which included vehement objections by ITW and others against the proposed standard, as well as the filing of and response to appeals at every available level of the SDO. However, when he completed his required NTTAA participation report there was neither a directive requiring him to report the possibility that the standard could be deemed a TBT nor a mechanism for him to do so.

We are aware of other such instances, and while they may not be common, the fact that they can and do exist is a weakness in our system that should be remedied. Accordingly, we recommend that Circular A-119 be amended to require that federal employee participants, as part of their required annual NTTAA reports to NIST, include a statement either verifying, to the best of their knowledge, that the standard they helped produce either meets the *Code of Good Practice* or conversely, that it could be viewed, deemed, construed or cited as a non-tariff trade barrier. Further, we recommend that a certification of compliance with the Annex be published by the Office of the United States Trade Representative in its annual National Trade Estimate Report on Foreign Trade Barriers. We believe these changes would clearly satisfy the requirements of the

WTO Agreement and ensure that all domestic SDOs are fully cognizant of their obligations and those of the U.S. government with regard to the Agreement.

Responses To Questions Posed In The RFI Where ITW Has Relevant Experience

Question: Are Federal agencies generally following the guidance set out in the Circular and providing an adequate explanation of how they considered standards and conformity in the preambles of rulemakings?

In short, no.

Though ITW is not as heavily regulated as are some companies, several of our business units do identify proposed rules applicable to their operations or products and respond with comments when appropriate. We cannot remember an instance where a Notice has included such language. There are several instances where standards are incorporated by reference. However, when conducting research for our reply to this RFI, we came across an article produced by the Coast Guard, separate from any specific rulemaking, that identified the Agency's use of voluntary consensus standards. See, http://www.uscg.mil/proceedings/spring2010/articles/37_Hime_TheValueOfVoluntaryConsensusStandards.pdf

Question: Should OMB provide guidance to agencies on how to consider proposals by stakeholders to allow demonstrations of conformity assessment with another country's standard or the use of an alternate conformity assessment procedure as adequate to fulfilling U.S. requirements?

Yes, and we should insist that our trading partners allow the same. By way of example, following the enactment of the Fastener Quality Act, offshore fastener producers argued that ISO standards were equivalent to U.S. OEM standards/requirements established to prove quality claims. This matter was debated within a working group of the Trans-Atlantic Business Dialogue (TABD), accepted by the stakeholders and ultimately incorporated as statute when the Act was later amended. This agreement was based on a concept set forth in an historic Memorandum of Understanding (MOU) and described generally as, "Tested once, accepted everywhere."

The International Code Council, for example, allows product manufacturers to submit data to receive a Report of Conformity with the published code/standard. The petitioner bears the cost of the petition; works directly with a Council engineer to demonstrate conformity; and a panel comprised of building code officers from around the country review the data and decide whether or not to present a Report of Conformity to the petitioner.

However, we would ask that OMB consider applying this question to federal agencies, inasmuch as it appears there is no consistent practice within or among agencies when petitioned by stakeholders affected by a proposed rule referencing a standard(s). A case in point:

Energy efficiency standards for refrigeration equipment were required in the Energy Policy Act of 2005. As part of its efforts to meet those standards, the producers of commercial refrigeration equipment argued to the Department of Energy (DOE) that it should distinguish between residential and commercial equipment because of differences in design, production volumes, use and other factors. The industry supplied data describing its production and the methods used to test and verify performance, and demonstrating that the industry's testing and verification methods were robust and reliable. After some months, DOE has worked with the industry and after some additional months appears to be on the threshold of accepting these alternate methods.

The U.S. Environmental Protection Agency (U.S. EPA), on the other hand, as part of its implementation of the Energy Star Program, a voluntary program designed to highlight products that are the "best of their class" in terms of energy efficiency, has insisted that only U.S. EPA's methods of sampling, testing, verification and certification will be acceptable. Thus, producers of commercial food equipment whose products must meet the above mandatory standards and who may wish to participate in the Energy Star Program will be required to test products under both methodologies, resulting in duplication and unnecessary costs. In addition, manufacturers of commercial food equipment that is not subject to

minimum federal standards, must use a very specific certification and verification program for purposes of food safety and sanitation. The industry argued to U.S. EPA that this rigorous industry-specific system be used for energy efficiency testing as well. U.S. EPA has not allowed that system in spite of numerous discussions, submittal of data and plant visits to witness a verification audit.

We recommend that OMB provide specific guidance to all federal agencies on accepting industry or sector-specific standards or testing methodologies as alternative methods of compliance when adequate data is supplied demonstrating that the regulatory goals are met.

Question: Are there other issues that OMB might usefully seek to address in a supplement?

- 1. State and Local Adoption of Up-to-Date National Standards:** The October 2011 Report, Federal Engagement in Standards Activities to Address National Priorities, states, “ The NTTAA directs NIST to coordinate Federal, State and local government standards and conformity assessment activities with those of the private sector.” We would posit that this effort is failing to deliver.

The Administration and Congress encourage the private sector to invest resources in creating innovative technology, in part, to create jobs and also to advance the National Export Initiative. However, we have experienced repeatedly the disconnect between the standards and codes created by national SDOs and the translation of those standards and codes either into state and local codes or of the local enforcement of such standards.

One ITW business has devoted considerable resources to the development of a new generation of commercial kitchen equipment intended to prepare food more efficiently, curb the consumption of energy and natural resources, emit less Volatile Organic Compounds (VOCs), consume fewer Chlorofluorocarbons and Hydrochlorofluorocarbons and better manage organic waste. These products meet the latest industry standards for performance and safety, and yet, time after time, sales of these products are lost due to a hodgepodge of locally written codes and disparate enforcement that prohibit their installation or operation, often based on outdated or inappropriate requirements. It is true that specific geographical or other conditions may exist that support local modification of a national standard to ensure the health and safety of the local population. However, when no such conditions exist, we are left with barriers to new and innovative products based on outdated requirements and no means for appealing such decisions.

We recommend that NIST devote some resources to the quantification of this issue and to make recommendations for alleviating unnecessary barriers to the introduction of new technologies that are in accordance with national standards.

- 2. Effect of Copyrighted Materials/Costs on Incorporation By Reference and State/Local Adoption:** OMB asks if copyright protection afforded to SDOs and the inclusion of said standards in regulation creates burdens for the regulated community. While that is less of a problem for many of ITW's businesses, a number of our units could be described as SMEs and less able, individually, to afford to purchase relevant standards.

As noted above, the translation of national standards into state and local codes is not uniform. For example, the State of Tennessee reports it has not nor does it intend to adopt the 2009 Food Code. Further unknown is whether the State intends to adopt the 2013 version of the Food Code when it

becomes final in 2014. We do not know if the State's decision (like that of many other local governments) is a result of the costs attendant to the purchase of copyrighted materials or for other reasons; but at some point a national standard is rendered useless if its adoption is not universal.

- 3. "The HALO Effect":** Codes are sometimes comprised of several standards emanating from separate, albeit aligned SDOs. The International Building Code is one example. The danger here is that the individual standards emanating from the separate SDOs may not be true consensus standards, but may provide substantial economic benefit to the SDO and the code body from the sale of the copyrighted material, while simultaneously serving as a TBT.

We have had the experience where a proponent of a code update, based on the adoption of one recently developed standard, stated to the ICC that the standard was "an ANSI standard."

In fact, the standard had never been offered to ANSI for adoption as an American National Standard (ANS). It is true that the SDO that created the standard was itself an accredited ANSI organization (that is, its standards development process had been accredited as meeting the ANSI requirements for development of voluntary consensus standards); but the proponent made a claim that was supportive (some say critical) to the incorporation of the standard into the Code; but which was not true. In fact, the standard in question was the subject of much industry acrimony and opponents to its creation, including ITW, protested to the full extent of the SDO's appeals process on the basis that the process used to create it had violated the SDO's (and ANSI's) requirements for openness and transparency and it therefore could not be considered a "consensus" standard.

When those appeals were denied, opponents attempted to appeal to ANSI on the grounds that the SDO had not adhered to its ANSI-accredited process. However, because the SDO specifically decided not to offer the standard to ANSI to become an ANS, the appellants were unable to access ANSI's appeal process. This incident ultimately resulted in a lawsuit and an investigation by the Department of Commerce Deputy Assistant Secretary for Europe; but the standard in question remains in effect. In the end, it is our view that the financial benefits resulting from the sale of the standard in copyrighted materials published both by the SDO and the code body provided an undue incentive to have the standard accepted.

Over time, ANSI has discovered that this was not an isolated incident. In fact, such claims are made often enough that ANSI has devised a name for the practice: the HALO Effect. To our knowledge, the conditions resulting in this phenomenon have not been reformed by ANSI. This creates another potential problem for the U.S. government, since it relies heavily on ANSI for assurance that the U.S. voluntary consensus standards system is performing as expected.

- 4. The Role of the Regulator As a Member of a Committee Comprised, in part, of the Regulated:** With the enactment of the NTTAA, a federal agency that proposes to create its own standard must prove that available voluntary consensus standards do not meet the agency's needs. Accordingly, federal agencies are encouraged to participate fully in SDOs in order to provide input as part of the voluntary consensus process. However, we have observed cases in which federal employees of regulatory agencies participating in SDOs attempt to drive standards in a direction that supports the agency's agenda, sometimes to the detriment of innovation. While we support the right of federal employees to express their opinions as part of a standard-setting procedure, care should be taken to

Comments of Illinois Tool Works Inc.
May 7, 2012
Page six.

ensure that their status as “regulator” does not dampen the participation of others who may ultimately be the “regulated”.

To protect against that possibility, we would commend OMB to work with NIST to create a trial mechanism for committee members from any SDO, who believe that a federal employee is attempting to exert undue influence on the process, to report the circumstances for investigation. If such grievances are substantiated, OMB, via the Circular or other device, should devise and initiate remedial efforts with both the individual and/or the sponsoring agency.