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**VIA EMAIL:** SaferProductsWA@ecy.wa.gov

February 2, 2023

Department of Ecology  
State of Washington  
PO Box 47600  
Olympia, WA  
98504-7600

**Re: Proposed Rule - Safer Products Restrictions and Reporting (WAC 173-337)**

Dear Sir or Madam:

The Can Manufacturers Institute (CMI) is the national trade association of the metal can manufacturing industry and its suppliers in the United States (U.S.). The can industry accounts for the annual domestic production of approximately 130.7 billion food, beverage, aerosol, and general line cans; employs more than 28,000 people with plants in 33 states, Puerto Rico, and American Samoa; and generates about \$15.7 billion in direct economic activity.

CMI appreciates the opportunity to provide comments to the Washington Department of Ecology (“Ecology”) on the proposed rule for Safer Products Restrictions and Reporting (WAC 173-337)—in particular the proposed rule language in section 114 on “Bisphenols,” which would impose a restriction on drink can linings and a reporting requirement for food can linings. CMI hopes to contribute to a dialogue that will enhance shared understanding of the safety of can linings in the U.S., current can lining technology, and the most appropriate regulatory framework for ensuring the safety of food packaging materials.

As a general matter, it is not necessary for a state to regulate a food contact product that is already strictly regulated by the U.S. Food and Drug Administration (FDA) under the authority of the Federal Food, Drug, and Cosmetic Act. The FDA regulatory framework assures the safety of food contact materials including food and beverage can linings.

Globally, food packaging regulators employ comprehensive risk assessments to determine safety. A hazard-based assessment process alone (such as the Cradle to Cradle Certified™ process used to develop the proposal) is insufficient to determine the safety of food packaging. CMI welcomes the dissemination and use of certification methodologies as appropriate, but they are voluntary and often commercialized

processes, not risk determinations or de facto regulatory processes. They also tend to change over time. It is not appropriate for a state to promulgate requirements based on such a methodology for food packaging, which is subject to comprehensive risk-based federal requirements.

Now that Ecology has issued a proposed rule that includes the provisions on food and drink can linings, CMI asks Ecology to consider the following two suggestions:

1. **Clarify the applicability of the requirements, focusing on retailers.** Within the respective supply chains, a can liner or can manufacturer does not necessarily know the actual usage of the liner or can for specific food or drink products. Food or drink fillers do not know exactly which products are being sold in Washington. The retailer is the party with the knowledge of what is sold in Washington.

CMI suggests that the appropriate point for application of all obligations is at the retailer, as retailers are responsible for selling the product to the consumer. Retailers can request any necessary assurances and information from suppliers, which they do already for other purposes.

The proposed rule is confusing regarding applicability. Draft WAC 173-337-114(1)(a)(i) and (2)(a)(i) designate the priority consumer products to be “Drink can linings” and “Food can linings.” Proposed provisions at WAC 173-337-114(1)(c)(i) are that no person may manufacture, sell, or distribute a covered product—“drink can lining”—that contains a bisphenol-based epoxy can liner, excluding TMBPF-based epoxy can liners. Proposed provisions at WAC 173-337-114(2)(c) require the manufacturer to provide notice that the priority product—“food can lining”—contains a bisphenol-based epoxy can liner. This circular language obfuscates what entities are subject to the responsibility for the prohibition and the notification—is it the producer of the lining, producer of the unfilled can, producer of the filled can food or drink product, or the retailer? The final rule needs to be clear on who has obligations under the requirements, which should be the retailer.

2. **Consider removing the “detection” presumption, although the proposed rule is an improvement over the previous draft.**

The proposed rule at WAC 173-337-114(1)(c)(ii) and WAC 173-337-114(2)(c)(i) says that Ecology presumes the “detection” of a bisphenol indicates the use of a bisphenol-based epoxy can liner. However, there is no definition of “detection,” the draft rule is silent on detection method, and it is not clear at what point in the product life cycle the “detection” applies (i.e., to a coating, an unfilled can, or a filled can).

CMI notes and appreciates that the proposed rule regulatory language at proposed WAC 173-337-114(1)(c)(iii) and WAC 173-337-114(2)(c)(ii) is much improved compared to the earlier draft that Ecology released. The provisions allow a manufacturer to rebut the presumption that detection of a bisphenol indicates a bisphenol-based epoxy can liner with a statement and supporting

February 2, 2023

Page 3 of 3

evidence that the product does not contain a bisphenol-based epoxy can liner. This is a necessary provision if there is a presumption that any "detection" indicates a bisphenol-based epoxy can liner and should be retained if the detection presumption remains. However, ideally there would not be this presumption. It is not necessary and has the potential to be problematic for interpretation and implementation of the requirements.

CMI has previously provided input to Ecology on this matter, including commenting on the draft regulatory determinations, participating in the webinar meetings on the topic in June and August 2022 and January 2023, and submitting comments on the Preliminary Draft Rule Language (August 24, 2022). In those communications, we offered the following overarching points, which we ask Ecology to take into consideration and reflect in any information it disseminates:

- Bisphenol A (BPA) is almost entirely phased out of domestic production of food cans. Food cans are not a significant source of exposure to BPA in the U.S.
- Can lining applications involve a cured film that does not present significant potential for migration of components to food or beverage, thus preventing potential significant exposure to components of the linings.
- Discussion of the safety of the can needs to take into consideration the overall safety and sustainability profile of the packaging, including the role of cans in ensuring a safe food supply and the superior recycling rate of metal cans.

CMI appreciates full transparency and continued opportunity for stakeholder input, including this opportunity to comment on the proposed rule. Thank you for your consideration of our input. Please do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "David A. ...". The signature is written in a cursive, flowing style.