AMERICAN APPAREL & FOOTWEAR ASSOCIATION

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November 10, 2022

Commissioner Melanie Loyzim
Maine Department of Environmental Protection
State of Maine
17 State House Station
Augusta, ME 04333

RE: H.P. 1113 /L.D. 1503-An Act to Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution Second Concept Draft

Dear Commissioner Loyzim:

On behalf of the American Apparel & Footwear Association (AAFA), I am providing these comments regarding H.P. 1113 /L.D. 1503-An Act to Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution Second Concept Draft.

The American Apparel & Footwear Association (AAFA) is the national trade association representing apparel, footwear and other sewn products companies, and their suppliers, which compete in the global market. Representing more than 1,000 world famous name brands, AAFA is the trusted public policy and political voice of the apparel and footwear industry, its management and shareholders, its more than three million U.S. workers, and its contribution of $470 billion in annual U.S. retail sales. AAFA approaches all of its work through the lens of purpose-driven leadership in a manner that supports each member's ability to build and sustain inclusive and diverse cultures, meet and advance ESG goals, and draw upon the latest technology.

We deploy our association's extensive expertise in trade, brand protection, supply chain management, and manufacturing to help our members navigate the complex regulatory environment, lower costs, and grow their sustainability and product safety efforts. With our members engaged in the production and sale of clothing and footwear, we are on the front lines of product safety. It is our members who design and execute the quality and compliance programs that stitch product safety into every garment and shoe we make. To support our members in this effort, AAFA has taken the lead in educating our industry through alerts, webinars, and conferences on the development, interpretation, and implementation of product safety standards and regulations.

Reporting requirements should be practical, enforceable, and science based. AAFA and our members are proud advocates for regulatory requirements that can effectively protect human health and the environment. Indeed, many of our members routinely exceed regulatory requirements, and many are already in the process of phasing out the use of intentionally added PFAS. However, this is not a simple process and having reviewed the Second Concept Draft, we have many remaining comments and questions about implementation and enforcement of H.P. 1113 /L.D. 1503.

Implementation Date and Extension Requests

H.P. 1113 /L.D. 1503 sets out an effective date of January 1, 2023, but we learned during the October 27 Virtual Stakeholder Meeting that the Department of Environmental Protection (DEP) does not envision final regulations going into effect until April 2023, at the earliest. The delay in rulemaking has caused difficulty for our members to come into compliance. The reporting deadline is currently less than two months away; however, there are no final rules about what must be reported or clear directions about how those notifications are to be provided. As you can see from the comments below, there are still basic, foundational questions that must be answered and understood before this regulation can be reliable implemented or enforced. Thus, we strongly urge DEP to delay enforcement for at least 180 days until after the final regulations are adopted to provide adequate time for affected companies to prepare.

Our members are indeed preparing to provide the information to comply. At the same time, those members continue to face difficulty obtaining information from their suppliers for several reasons, including: (1) A disrupted global supply chain continues to create complexities at every level in the marketplace; (2) Suppliers that will not provide protected intellectual property information to the public domain for competitors to potentially access unless they have legal assurance that their intellectual property is protected.

We understand DEP feels it is constrained by the effective date in the statute, but that under 38 MRSA Section 1614 (3), the DEP may grant an individual company an extension if the DEP determines that more time is needed for that manufacturer to comply with submission requirements. We have submitted a letter to DEP under separate cover requesting extensions of the reporting deadline for our affected members and ask that DEP expeditiously grant those extension requests.

Definition of "Intentionally Added PFAS"

We appreciate DEP's clarification in the Second Concept Draft that "PFAS that is present in the final product as a contaminant" will not be considered to have been intentionally added. However, the Second Concept Draft does not specify how DEP will determine whether PFAS found in a product are a result of contamination or intentional addition. We suggest DEP further amend the definition of "intentionally added PFAS" by providing a Total Organic Fluorine ("TOF") threshold that sets a numerical standard for contamination. Based on conversations with our third-party testing laboratory members, a TOF threshold of 100ppm would be an appropriate threshold to differentiate between environmental contamination and intentional addition of any PFAS. This threshold would also align with thresholds set in other jurisdictions, allowing for harmonization, and facilitating compliance efforts.

Definition of "Product component"

In the Second Concept Draft the definition of "product component" has expanded to include packaging; however, it does not provide any further details about what packaging is captured in this definition. As written, it is unclear whether the definition covers only direct packaging of the product or whether packaging such as shipping boxes, purchase order labels, and other shipping-related packaging are included within the scope of the definition.

As with other product components, it remains difficult for brands, retailers, and importers to obtain information protected by intellectual property laws. Brands and retailers have been engaged in efforts to educate their apparel and footwear suppliers about the need to comply with these new regulations. Those conversations are still ongoing and have yet to result in consistent release of information about product formulations which would typically be considered confidential business information (setting

aside for the moment the fact that much of the information brands and retailers are asked report is simply unavailable). These conversations have not even begun to take place with packaging suppliers.

We understand the DEP's desire to collect information about the sources of PFAS in the state of Maine and we ask for similar understanding when we say it is unrealistic to expect each brand or retailer to gather detailed information about the composition of all packaging used to ship or store a product. Again, packaging suppliers are not familiar with these requirements, and the education and conversations necessary to get them to even consider releasing potential confidential business information have not begun. Further, packaging used can vary wildly within product categories and even within product SKUs.

Finally, it is not clear that the legislature envisioned included a product's packaging in the scope of H.P. 1113 /L.D. 1503. The law is designed to capture which products themselves are the source of PFAS in the State of Maine. G that packaging can vary wildly even within a single product sku, depending on the method of transport and the indented recipient, information about any PFAS in the packaging is quite separate from information about PFAS in a particular product.

For all these reasons, we recommend Maine remove packaging from the definition of product components.

Definition of "Manufacturer"
The Second Concept Draft retains a definition of "manufacturer" that is impracticably broad. We request DEP narrow the definition by excluding of "whose brand name is affixed to the product" from the definition. While licensed merchandise may use the licensor's intellectual property (i.e., brand name, logo) on the licensee's products, the licensor does not produce, own, or sell merchandise. Narrowing the definition would avoid requiring a licensor that has no control over the product and appropriately place that responsibility on the licensee.

Separately, with such a broad definition of "manufacturer," brand owners could be held liable for reporting unlicensed products and counterfeit products that use their brand name.

Definition of "Fabric"
The Second Concept Draft has updated the definition of "Fabric" to include leather. We would appreciate DEP explaining whether synthetic leathers are also included within this definition.

Definition of "Fabric Treatment"
We appreciated that DEP clarified during the October 27 stakeholder meeting that "Fabric Treatment" only applies to aftermarket consumer products (product purchased in a container from a hardware store, for example) and does NOT apply to industrial applications. We suggest the addition of, "…or protective treatments applied at the industrial level." to the last sentence in this section to provide that same clarity in the final regulations themselves.

Definition of "Significant change"
We appreciate that the Department took our suggestion to amend the definition of "significant change" to note that significant change occurs when there is a set percentage increase over the current concentration levels in an existing notification. However, the definition still also includes a reference to "the addition or removal" of a specific PFAS. We recommend the department simplify the definition by deleting "or removal" from the first part of the definition.

Again, if the PFAS decreases, unless it decreases to zero, there is no value in repeated reporting. If manufacturers are forward thinking, they should be decreasing the amount of PFAS usage, and the first report will be in the form of a range that explains the maximum amount contained in the product. If the amount is increased, the department should then be notified.

However, we again stress that the reporting requirement should include a reasonable variability of application and testing that could allow for a result as high as a 20 percent variation in test results (the range of content).

Section 3 - Notification

Subsection A

This section does not currently contain an exception to the notification requirement for used products. We thank the DEP for clearly articulating a used product exception in the prohibition of sale clauses under Section 5 and ask that this exception also be extended to the notification obligations under Section 3. Unless this is clarified, brands may have to submit notifications for used products being sold in the State of Maine, including through thrift stores. This will create a significant administrative burden and will at times be practically impossible. We believe including a clear exception for used products will help support the DEP's efforts of reducing waste and will ensure affordable apparel options remain accessible throughout the state of Maine.

We recognize DEP's efforts to ease some of the reporting burden by allowing for covered entities to report by Global Product Classification (GPC) brick category and code. However, there is still little clarity on what constitutes an individual notification. It is unclear whether notifications should be done by GPC Brick and then multiple CAS #s and/or concentration ranges can be associated under each GPC Brick. Or will notifications be by CAS # and then multiple GPC Bricks and/or concentrations will be associated under each CAS #? Or will a GPC Brick plus a given CAS# be one notification?

We caution that the exact structure of the reporting will significantly impact the number of reports that need to be submitted. This last option would require an enormous number of reports – well more than would be required to meaningfully assess the sources of PFAS in the state of Maine. Additionally, the associated fees would also be immense.

We understand there is a note following 3(1)(d) stating that companies may claim confidential business information at the time of reporting. It is unclear from the way that the notification section is drafted whether the ability to claim confidential business information extends to other sections of the reporting requirement. Given that estimated sales volumes are confidential business information, we would also ask DEP to make explicit in the final regulations that such information can be claimed as confidential.

DEP is constrained by the language in the statue, but we must reiterate that the expectation that companies report the precise PFAS found in products by CAS # in their products is unworkable. CAS #s for each of the 9,000+ PFAS are not available – a fact we expect DEP will run into when eventually trying to import CAS #s into the online reporting portal.

Additionally, test methods identifying all the individual PFAS are not commercially available; we understand from our third-party testing laboratory members that not more than 100 of the many thousands of PFAS can be individually identified in consumer products through currently available test methods. The draft mentions using commercially available analytical methods for determining PFAS

in a product; however, the reference to the EPA methods does not contain methods for testing consumer products. It only references environmental media test methods. We again urge the adoption of a TOF threshold, where products with a TOF below 100ppm are considered merely contaminated and excluded from reporting.

Subsection B

Given that the reporting portal will not be online for some time, we would suggest that the DEP create a fillable Word, Excel, PDF, or similar template and provide clear instructions for reporting and paying the associated fees while the portal is being built out.

Subsection C

Again, as we are unaware of the test methods DEP would like us to use, we would appreciate DEP furnishing a definition of a "substantially similar amount" or establishing an acceptable concentration range. Again, we would suggest adopting acceptable TOF concentration ranges, and that products with a TOF of less than 100ppm should be considered merely contaminated and excluded from reporting.

Subsection D

Updates to the system should only be required annually if something has changed. This will reduce the number of requests for changes DEP will need to field and limit what the system must manage as well.

Section 4 - Exemptions

We again respectfully request an exception for personal protective clothing/professional uniforms that require oil, viral, and chemical repellency until there is a proven, successful commercial non- PFAS option available, not made with PTFE polymers or with polymer finishes that have trace amounts of PFAS residues, that ALSO meets the critical health and safety performance requirements necessary for protecting the workers needing these products. Our members have found that currently there is no replacement for polymers made with fully fluorinated carbon atoms PFAS for oil, viral and chemical repellency. Such stable barrier products are critical components in protective clothing that protects first responders against fire, bloodborne pathogens, hazardous chemicals and terrorist attacks involving chemical and biological agents such as Sarin gas or mustard gas. Additionally, our members are unable to find chemical companies that have proven non-PFAS oil and chemical repellent products.

There also needs to be considerations for products made of recycled content. A product that once contained high levels of PFAS might be recycled into new products and additional PFAS may not be added. This product may still test high for fluorine content even though PFAS was not intentionally added at the manufacturer level. It was already present from recycled content. We urge DEP to add products that utilize recycled content and have not intentionally added PFAS post-recycling to the exemption list.

Section 8 - Certificate of Compliance

Instead of "reason to believe that" we again ask the Department to change the wording to "substantial information". In addition, 30 days does not provide sufficient time for the consumer product manufacturer to work through their supply chain to identify the specific product component that might be causing the issue and get it tested with a test report required by the DEP. We suggest DEP provide at least 120 days.

We also suggest removal of the requirement of downstream notification. If the company cannot provide the certificate, the company is restricted from business in the state of Maine and DEP should instead consider posting that failure to comply on the same website where contents are reported.

Conclusion

We appreciate the opportunity to submit comments and we believe there are opportunities for further collaboration. We look forward to continuing to work with the Maine legislature on the regulation of substances in consumer products for the benefit of consumer product safety and public health. In the meantime, our members continue to design and execute the quality and compliance programs that emphasize product safety for every individual who steps into our apparel and footwear products.

Thank you for your time and consideration in this matter. Please contact Chelsea Murtha of my staff at cmurtha@aafaglobal.org if you have any questions or would like additional information.

Sincerely,

Stephen Lamar
President & CEO
American Apparel & Footwear Association