November 10, 2022

VIA EMAIL at PFASproducts@maine.gov

Kerri Malinowski Farris
Maine Department of Environmental Protection
17 State House Station
Augusta, Maine 04333-0017

**Re: Comments on Second Rule Concept Draft for Maine PFAS Products Program**

Dear Ms. Farris:

As the association for the consumer-packaged goods (CPG) industry, including makers of food, beverage, personal care, and household products, the Consumer Brands Association[1] advocates for uniform, workable, and durable regulatory frameworks that are informed by risk-based science, promote consumer choice, and build consumer trust across the sectors we represent. State-by state patchwork regulations cause uncertainty to the industry and confusion to consumers, and Consumer Brands supports federal frameworks that ensure efficient interstate commerce. We appreciate the opportunity to again comment on the Maine Department of Environmental Protection's ("DEP's") revised concept draft under the Maine PFAS in Products Program. Our comments are provided below.

**Inclusion of Packaging as a Product Component**

The proposal now contains a revised definition of "product component" that specifically includes packaging. This change is inappropriate as it conflicts with the definition of "product" in the implementing statute, as well as with pertinent definitions in related statutes, and because DEP's proposed rule would render certain language of the implementing statute, 38 M.R.S.A. § 1614(4), meaningless, neither of which is acceptable in statutory interpretation.

During the public stakeholder meeting on October 27, DEP staff were explicit in stating that they do not have the authority to modify statutory definitions, as doing so would directly conflict with the intent of the Legislature, yet that is precisely what is happening with this inappropriately expanded definition of "product component". In 38 M.R.S.A. § 1614(1)(H), "product component" is defined as "an identifiable component of a product…" A product is defined as "an item manufactured, assembled, packaged or otherwise prepared for sale to consumers…" 38 M.R.S.A. § 1614(1)(G). The language indicates the product is the item that is manufactured, which is then packaged, not the item plus the packaging.

[1] The Consumer Brands Association (Consumer Brands) champions the industry whose products Americans depend on every day, representing more than 2,000 iconic brands. From household and personal care products to food and beverage products, the consumer-packaged goods (CPG) industry plays a vital role in powering the U.S. economy, contributing $2 trillion to the U.S. GDP and supporting more than 20 million American jobs.

Supporting the argument that packaging was never intended to be included as a component of a product is the exemption that exists in the implementing statute for packaging and packaging waste, which is subject to existing laws prohibiting the sale of products with packaging containing certain types of chemicals. *See* 32 M.R.S.A. §§ 1731 *et seq.*, and §§ 1741 *et seq.* In those statutes, the language clearly indicates that packages are distinct from products. *See* 32 M.R.S.A. § 1732(4) ("'Package' means a container used in marketing, protecting or handling a product."); *id.* at (2) ("'Distributor' means any person […] that sells a *packaged product* to a retailer in this State….")(emphasis added); 32 M.R.S.A. § 1733(2) ("A manufacturer or distributor may not offer for sale […] any *product in a package* that includes, in the package itself or any packaging components, [certain intentionally introduced chemicals].")(emphasis added); *id.* at (3-C) ("The prohibitions […] do not apply to a manufacturer of a food or beverage product that is contained in a food package or to which a food package is applied…"). In other words, a package is only a product when sold as itself—Section 1733 specifies that neither products packaged in the disallowed packaging, nor the disallowed packaging itself, can be sold in Maine. *See id.* at (1), (2), (3-A), (3-B).

The implementing law at issue in Title 38 specifically exempts the aforementioned products, i.e. the packaged products as well as packaging sold as a product, as those products are already subject to Chapters 26-A and 26-B in Title 32. *See* 38 M.R.S.A. § 1614(4)(B). DEP staff stated during the October 27 public meeting, however, that because it has conducted no rulemaking to prohibit the sale of certain products under Chapter 26-A or list certain chemicals under Chapter 26-B, no products are yet subject to those laws, and therefore, no products are exempt from the provisions of 38 M.R.S.A. § 1614. This approach is confounding and unlawful. Under the DEP's analysis, the only products that would be exempted under Section 1614(4)(B) for being subject to Chapter 26-A are those that are already banned from sale by rule. There would, of course, be no need to exempt from notification or even sale a product that already could not be sold. This sort of outcome is illustrative of why the DEP's present interpretation of the statute is incorrect. Once 38 M.R.S.A. § 1614 is read to distinguish products from packaging (unless the packaging is sold alone as a product), as is done elsewhere in Maine law, the provisions for exemptions and the interaction with Chapters 26-A and 26-B retain their logical sense. The Legislature used the language of exempting all products subject to Chapters 26-A and 26-B, because they intended to exempt packaging in general, which was already regulated, from the new statutory scheme. If they had intended to be very specific about needlessly exempting from additional regulation those products that were already banned, they would have drafted a specific exemption for those products affected by the sales prohibition provisions of Section 1733, which they did not do. The more general language was intended to create a more general exemption for the large category of material already regulated by DEP. The Legislature clearly intended to address products and packaging through two separate and distinct regulatory pathways. The DEP's rulemaking should reflect that reality and expressly confirm that Title 38 exempts packaged products as well as packaging sold as a product, which are already subject to Chapters 26-A and 26-B in Title 32.

**Applicability of the Federal Preemption Exemption**

The concept draft rule notes in Section 4(A)(1) that a product is exempt from the requirements of this regulation when a federal law or regulation controls the presence of PFAS in the product in a manner that preempts state authority. During the public stakeholder meeting on October 27, DEP staff noted that there are no applicable federal laws or regulations related to PFAS that would be relevant to this exemption. Consumer Brands strongly disagrees with this interpretation, particularly in regard to the regulation of drugs, medical devices, and food additives by the U.S. Food and Drug Administration (FDA) and pesticide products regulated by the U.S. Environmental Protection Agency (EPA). Under the Federal Food Drug and Cosmetic Act (FFDCA), FDA requires such products and ingredients to undergo multiple phases of review for their efficacy and

safety before they may be introduced into the marketplace with the agency's approval. FDA furthermore ensures the quality of drugs, medical devices, and food additives through enforceable Good Manufacturing Practice (GMP) regulations, which maintain minimum requirements for the processes, facilities, and safety controls used in their production. Similarly, EPA's regulation of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) controls the distribution, sale, and use of pesticides used in the U.S., which must undergo a rigorous registration and safety review process. These federal frameworks in essence "control the presence" of the active chemical ingredient in the regulated products, which may in certain cases be a perfluorinated molecule. Consumer Brands strongly recommends that DEP reevaluate the applicability of the statutory exemption with regard to these categories of products, which currently adhere to significant regulatory evaluation and control requirements under federal legal authorities.

**Definition of Manufacturer**

The concept draft notes that the manufacturer is considered the entity that produces a product, or whose brand name is affixed to the product, or the importer or the first domestic distributor of the product, depending on various circumstances. The draft further notes that certain online retail platforms may allow for purchase of products directly from a manufacturer or importer, but does not fully clarify the responsibility of the retailer in such scenarios. Consumer Brands recommends that DEP clarify how manufacturer is defined when products may be distributed directly from the retail platform to the consumer without the knowledge of the manufacturer, who in frequent circumstances offers its products on a wholesale basis to the retailer without knowing how they will be further distributed across every state and locality.

**Reporting of PFAS Concentration Ranges**

Consumer Brands encourages DEP to provide more information and guidance in the proposal regarding the reporting of PFAS concentration ranges. The more precise the quantity of each PFAS reported in the product, the more difficult it will be for companies to obtain that information, as chemical concentration can be considered proprietary information that suppliers do not wish to disclose. Providing practicable concentration ranges will help protect confidential business information, improve the feasibility of testing for PFAS, and decrease the amount of time needed to provide notification. Furthermore, DEP should allow companies to specify whether it is a specific component of the product (such as its packaging) that contains PFAS or if it is related to the overall finished product that is sold and should allow companies to quantify on the basis of weight or concentration. The statute does not specify the numerical basis regarding the amount of PFAS in the product and allowing both concentration or weight as a means of reporting would provide added flexibility and consumer understanding of the amount of PFAS in relation to the scale of the product.

**Reporting of Confidential Business Information**

The second concept draft now provides that Confidential Business Information (CBI) claims may be made at the time of reporting and will be managed under the Uniform Trade Secrets Act. While this inclusion is appreciated, Consumer Brands is concerned that the proposal does not make acknowledgment of federal claims approved under the Toxic Substances Control Act (TSCA). The U.S. Environmental Protection Agency (EPA) maintains rigorous and uniform requirements for the assertion and maintenance of chemical CBI claims, including robust substantiation procedures. Other state laws including the California Cleaning Product Right to Know Act of 2017 recognize that ingredients included in the TSCA Confidential Inventory merit CBI protection.[2] The

[2] *See*, https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB258.

DEP should similarly acknowledge in its proposed regulation that TSCA CBI claims that are approved under federal legal and regulatory authorities should be granted protection.

DEP should also add further clarity in the regulation regarding how CBI claims will be managed. The proposal needs additional information regarding how manufacturers would provide the reporting information to the agency before knowing it will be granted protection from public disclosure; how CBI provisions will apply to individual data elements such as where CBI claims are permitted or where upfront CBI substantiation is required to support a claim; in what circumstances CBI data elements may be withheld or provided in a generic/sanitized manner; and how the information will be ultimately secured and protected from disclosure.

**Reporting of Product Sales Information**

The second concept draft now includes a notification element for companies to report estimated sales volume in Maine or nationally for the full calendar year following the year in which the product is being reported. Consumer Brands is concerned by this inclusion, as product sales volumes are proprietary information and commercially competitive in nature. DEP should ensure that that this information is granted CBI protection and not be included in the public database being developed. The agency should also consider grouping reported products into generalized categories in manner that would blind the information and prevent attribution of sales volume information to specific companies and diminish the risks of any anticompetitive behavior from the public release of the information.

**Reporting of Global Product Classification Brick Codes Versus UPC Codes**

The concept draft now proposes using Global Product Classification (GPC) brick codes for reporting, rather than the UPC codes that were proposed in the first draft. Consumer Brands recommends that DEP retain the use of UPC codes as an alternative option for reporting, as they are more stable and reliable than GPC codes. If the agency uses GPC codes in the regulation, companies will need to regularly check on whether a brick has changed and, if it does so, they would potentially need to update this information through the notification system, even if the related products have not materially changed, adding additional time and cost burdens. Additionally, not all products may fall into or be easily distinguished within a brick, creating additional complications regarding how to effectively report information to the state.

**Scope of Product Reporting**

The concept draft should clarify whether companies are expected to report the product lines that contain PFAS chemistries, or whether every stock keeping unit (SKU) used to identify and track inventories must be reported. Consumer Brands recommends the former approach, which is simpler to administer and for companies to provide notification of.

**Updates to Product Notifications**

The concept draft still does not specify that information updated through the reporting website will supersede previous information, and that when a manufacturer reports that PFAS is removed from a product, the previous information will no longer appear on DEP's reporting website. DEP should incentivize companies to reformulate their products by allowing their product information to no longer be listed in the public database once they are no longer subject to the PFAS program requirements.

**Currently Unavoidable Uses**

Consumer Brands appreciates that the second concept draft now includes definitions to add clarity regarding how the Department will consider currently unavoidable uses. DEP has noted that designating products or product categories as currently unavoidable uses is a separate major

substantive rulemaking process that it anticipates undertaking in 2023. We strongly encourage the agency to facilitate robust stakeholder engagement throughout this process to ensure that critical and lifesaving products are not withdrawn from the state marketplace in anticipation of the 2030 prohibition date, and that clear and efficient procedures are established to allow entities to petition DEP on the efficacy of a currently unavoidable product use.

* * *

Consumer Brands appreciates the opportunity to provide its feedback and recommendations on the draft regulation, and we look forward to working with DEP to ensure that Maine consumers can continue to obtain the products essential to their health and wellbeing. Thank you for your attention to our comments.

Sincerely,

Jared Rothstein
Director, Regulatory Affairs
Consumer Brands Association