Consumer Technology Association™

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

Re: Consumer Technology Association comments on the Concept Draft for the Maine PFAS in Products Program

Dear Ms. Malinowski Farris,

On behalf of the Consumer Technology Association (CTA), we respectfully submit these comments on the Second Concept Draft for the Maine PFAS in Products Program (Concept Draft). We appreciate the opportunity to comment on the Concept Draft and appreciate the Department's engagement with stakeholders on the implementation of the *Act to Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution* which will impact nearly the entire technology and electronics industry.

CTA is North America's largest technology trade association. Our members are the world's leading innovators – from startups to global brands – helping support more than 18 million American jobs. Our member companies have long been recognized for their commitment and leadership in innovation and sustainability, often taking measures to exceed regulatory requirements on environmental design, energy efficiency, and product and packaging stewardship.

Extension of Notification Timeline

We appreciate the six-month extension for compliance with the reporting requirement that was previously granted to CTA member companies that requested an extension. However, we would like to reiterate our previous concern that, as manufacturers of complex articles with a multifaceted supply chain, our industry will need additional time to sufficiently gather the data required to comply with the law. We respectfully ask the Department to consider granting the electronics industry a 48-month extension to comply based on the complexity of our products and extended supply chains.

A single electronic product can have thousands of components which are sourced from multiple suppliers from which manufacturers will have to obtain the necessary notification information. Manufacturers will need to facilitate information requests, create databases to generate necessary reports, conduct supplier training to understand the information requests, validate and clarify any information received, and then link all received information to products sold in Maine. In addition, all of these information requests will have to cascade up the supply chain through multiple levels of sub-tier suppliers.

The Environmental Protection Agency is currently considering rules on reporting and recordkeeping regarding PFAS substances. As we commented to EPA last year, manufacturers of articles estimate that it can take six to 12 months to track a single chemical through the supply chain. It is a struggle for manufacturers to estimate a realistic timeframe on the tracking of thousands of PFAS chemicals.

EPA's Master List of PFAS Substances lists over 12,000 chemicals. Last year on average, across the electronics sector, chemical data management programs were tracking anywhere from 500 to over 3,000 chemicals or chemical substance groups in response to regulatory requirements, voluntary initiatives, or special request from customers. With this law, DEP is requiring manufacturers to increase the tracking and reporting of this information by multiple times within just a few months.[1]

2. Definitions

We thank DEP for providing a number of important and clarifying definitions in the Concept Draft, and have a few comments on the following definitions:

- **Article:** Within the Concept Draft, "article" is not defined. We propose adding the definition: "an object which during production is given a special shape, surface or design which determines its function to a greater degree than its chemical composition".
- **Commercially Available Analytical Method:** First, we ask that in upcoming rulemaking that DEP provide a list of approved test methodologies to assess the presence of PFAS in articles. Second, DEP should allow supplier declarations as a proxy for this information due to the cost and delays caused by analytical testing. Supply chain restricted substance information has been used for decades to demonstrate compliance to restricted substance laws, such as the EU RoHS Directive, and it represents a balanced approach to information gathering particularly for smaller entities.
- **Currently Unavoidable Use:** We appreciate that the Concept Draft 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 will require 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 and to consider "essential use" exemptions established by other regulatory agencies, including the US Environmental Protection Agency under the US Toxic Substances Control Act and the European Union Chemical Agency under REACH for consistent application. Additionally, we look forward to learning about the procedures that will be established to allow entities to petition DEP on Currently Unavoidable Product uses and we encourage the DEP to prioritize clarity and efficiency when setting such procedures.
- **Product component**: We request that DEP remove "including its packaging" from the definition of Product component. The statute indicated that products within the scope of Title 32 Chapter 26-A and B are exempt, and those are "Reduction of Toxics in Packaging" laws (38 M.R.S. §1614). If 38 M.R.S. §1614 exempts packaging, the concept draft and Q&A should also exempt packaging from the scope.
- **Manufacturer**:
    - The definition of manufacturer does not contemplate OEM products – products that a company buys from a manufacturer, modifies, and sells under its own brand, also known as private labeling. The company which manufactures the product and the

[1] For a more thorough examination of the industry's efforts and the difficulties with securing the necessary information on PFAS reporting, we encourage you to read our entire comments to the EPA at https://www.regulations.gov/comment/EPA-HQ-OPPT-2020-0549-0087

company whose brand name is affixed to the product are sometimes not the same company. The Concept Draft does not specify the entity that will be responsible to register those products: the OEM or other manufacturer. We request that the DEP clarify which entity is the responsible party.

- Frequently, manufacturers offer products on a wholesale basis to the retailer without knowing how they will be further distributed across every state and locality. We encourage additional clarification that expands on this relationship and how communication and reporting responsibilities should be handled given interstate distribution and sale of covered products. Will the rule exclude products that are imported into Maine, but then exported to another state for sale?

3. Notification

Confidential Business Information & Trade Secret Protection

While the Concept Draft does provide for protections for confidential business information (CBI), we are concerned that additional language is needed. Technology product manufacturers often consider certain chemical composition and distribution information to be highly valuable and proprietary information. It, therefore, may be considered confidential information and trade secrets by manufacturers. Prior to entities submitting data to the Department, there should be explicit language explaining how manufacturers would provide the reporting information to the DEP; how the Department will determine what CBI data may be withheld or provided in a generic/sanitized manner; and how the information will be stored and ultimately protected from disclosure to third parties.

The Concept Draft amends the original Concept Draft with a note that "Claims of Confidential Business Information [CBI] may be made at the time of reporting and will be managed under the Uniform Trade Secrets Act (10 M.R.S. §1542(4)(A)&(B))." We have the following interpretations for this Act as well as Maine's Freedom of Access Act (FOAA)

- The Act does not require disclosure to the public of any information notified to DEP. Neither does the Act's legislative history suggest that the general public should be privy to such information.
- Protection of information notified to DEP is required by FOAA. Under the FOAA, the public has the right to inspect and copy any agency records only if a statutory exemption does not apply (1 M.R.S. § 408-A). There is a statutory exemption for "[r]ecords that would be within the scope of a privilege against discovery or use as evidence recognized by the courts of this State in civil or criminal trials if the records or inspection thereof were sought in the course of a court proceeding." (1 M.R.S. § 402(3)(B)).
- Under Maine Rule of Evidence 507(a), in turn, "[a] person has a privilege to refuse to disclose, and to prevent any other person from disclosing, a trade secret that the person owns." Thus, trade secrets within agency records – which will include notifications provided to DEP – may not be disclosed to the public.
- The Maine Supreme Court[2] has held that the following factors should be taken into account when considering whether information is eligible for protection under the FOAA:
  (1) the value of the information to the plaintiff and to its competitors;
  (2) the amount of effort or money the plaintiff expended in developing the information;
  (3) the extent of measures the plaintiff took to guard the secrecy of the information;

[2] Blue Sky W., LLC v. Me. Revenue Servs., 215 A.3d 812, 824 (Me. 2019)

(4) the ease or difficulty with which others could properly acquire or duplicate the information; and
(5) the degree to which third parties have placed the information in the public domain or rendered the information 'readily ascertainable' through patent applications or unrestricted product marketing."

These interpretations thus conclude that trade secrets within agency records – which will include notifications provided to DEP – may not be disclosed to the public. We request Maine DEP to explicitly protect from disclosure under Maine's Freedom of Access Act, information such as the identity of any PFAS present in a product, the amount, and any volume data notified to the Department. Additionally, we request that Maine confirm these protections.

We also suggest that the rulemaking include robust provisions that will allow protection of CBI and trade secrets, through the use of generic chemical names and broad chemical ranges in any information that is released to the public. The U.S. EPA's proposed rule to centralize CBI claims under the Toxic Substances Control Act (TSCA), may serve as a model (87 Fed. Reg. 29078 (May 12, 2022). In order to provide certainty to the regulated community, the EPA proposed rule identifies specific information that submissions must include and the type of information that could qualify as confidential and, thereby, be shielded from disclosure under FOIA or other means.

Reporting of Product Sales Information
The 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. CTA has significant reservations with the requirement for companies to report sales data. Product sales volumes are proprietary information and commercially competitive in nature. If sales data reporting is to be required, it should be limited to the prior year and not include future forecasts. Furthermore, this data should be explicitly protected as CBI, and should not be allowed to be publicly accessible in any way. We encourage DEP to develop strategies that would aggregate any sales data by product categories or across industry members through trade association reporting in order to shield company specific information from disclosure.

Applicability of "Intentionally Added" to Complex Articles
As stated in our previous comments, we are concerned that the definition of "Intentionally Added" PFAS is too broad and should be further defined. Within this definition, we suggest that DEP include language that restricts PFAS reporting to information that is *"known or reasonably ascertainable"* by a company. Absent a reasonable limit on the scope of PFAS reporting, producers would be required to investigate any and all possible additions of PFAS – no matter how small.

In their chemical reporting rules, EPA has required reporting of only information that is *"known or reasonably ascertainable"* by a company. This is the standard EPA uses for its quadrennial Chemical Data Reporting rule requirements (40 C.F.R. § 704.3). Importantly, this is also the standard that EPA has proposed for its PFAS reporting rule[3]. Under this standard, as long as the company exercises an

[3] 86 Fed. Reg. 33926, 33927 (June 28, 2021) ("The Agency is proposing this action pursuant to TSCA section 8(a)(7) to obtain certain information known to or reasonably ascertainable by manufacturers of PFAS."); proposed 40 C.F.R. § 705.15 (requiring manufacturers to report "the following information to the extent known to or reasonably ascertainable by them").

appropriate level of due diligence (e.g., in the form of supplier inquiries) and accurately reports what it knows or reasonably can ascertain through supply chain data, it has complied with the reporting requirement (86 Fed. Reg. at 33928).

In addition, a *de minimis* reporting threshold should be incorporated for intentionally added PFAS content, such as 0.1% by weight of the article, which is generally understood in the industry[4] and applicable law as an appropriate threshold of significance. EU REACH provides a 0.1% by weight threshold for substances of very high concern and Candidate List substances, above which suppliers of articles must provide to their customers' relevant information on these substances in the products they sell. This threshold provides a rational, reasonable level that promotes the safe use of substances of very high concern without overly burdening the supply chain by requiring excessive due diligence and destructive testing to determine whether trace amounts of these substances are present in articles. Implementing a 0.1% by weight threshold would also help ease the burden on DEP by preventing thousands of notifications related to parts and components that contain only trace concentrations of PFAS which are relatively insignificant from a safety and health perspective.

Under these proposals, reporting would not be required in the following cases:

- A product for which the manufacturer has done appropriate due diligence using supply chain restricted material disclosure data and has not discovered that any PFAS is present; or
- A product is known to contain PFAS but contains less than 0.1% PFAS by weight would be regarded as not containing "intentionally added" PFAS.

These are reasonable interpretations of the statute and would be an equitable solution for manufacturers that are being asked to perform a burdensome due diligence exercise on an extremely tight timeline for a broad class of chemicals. Testing all products to confirm presence or absence of PFAS – whether by January 1, 2023 or on any timeline – is not feasible.

Exemptions for byproducts and impurities should also be specifically defined. For complex articles, these additional clarifications would streamline the reporting process and reduce burdens on reporting entities, while still meeting the intent of the law.

Reporting of PFAS Concentration Ranges

In order to accurately execute the reporting requirements, we request that DEP approve specified intentionally added PFAS concentration ranges, as part of the current rulemaking process, prior to the compliance date. We recommend DEP approve concentration ranges that would reduce reporting burden but also still provide ample information to DEP. For example, ranges on the order of "between 0.1 and 1 percent" and "above 1 percent" would appear to address the statutory intent while avoiding the information-collection challenges and CBI protection concerns associated with more granular reporting. Obtaining concentration range data from suppliers would be far more realistic than exact amounts due to supply chain variations over time. Additionally, we also suggest that DEP allow suppliers declarations as a means of documenting the amount of PFAS used in the product. Manufacturers should be able to rely on the information they receive from their supply

[4] See, e.g., EU Regulation No. 1907/2006 Concerning the Registration, Evaluation, Authorisation, and Restriction of Chemicals (REACH) Articles 7 and 33; OSHA Hazard Communication Standards, 29 C.F.R. Part 1910.

chain that the components, parts, etc. that they purchase and incorporate into their products do not contain PFAS.

PFAS are a chemical class comprising thousands of different substances and are typically present in electronic products in low concentrations, which contrasts with other products and markets. This makes identifying and quantifying specific PFAS present in a given article extremely challenging and costly. It would be much more feasible for manufacturers to implement the notification requirements if DEP is able to provide a clear list of substances covered under this law. The link provided in the Concept Draft cites over 12,000 chemicals. CTA recommend that DEP align with regulated PFAS lists that are emerging and have been adopted by other jurisdictions. This would allow more meaningful and comparable data for DEP but also allow for more streamlined compliance for regulated entities. For complex products containing many parts, manufacturers commonly have multiple suppliers for each part to ensure supply chain resilience. It is critical for business planning that regulated entities understand well in advance what ranges will be permissible and for which chemicals and products those ranges apply.

Additionally, we request that Maine DEP supply to entities a full list of the specified CASRNs for which chemicals they would like reported. Without a specified list of CASRNs, tracking a class of chemicals containing thousands of potential suspects is virtually impossible. Additionally, electronics manufacturers require their suppliers to provide detailed chemical data, which is inputted into a chemical database that the manufacturer has access to. These databases are sorted by CASRN as it is a globally recognized chemical-specific identifier and there is no other feasible method to identify chemical data.

Finally, the statute does not specify the numerical basis regarding the amount of PFAS in the product. Allowing both a concentration and a weight basis as means for reporting would provide added flexibility and consumer understanding of the amount of PFAS contained in the covered product in relation to the scale and size of the covered product.

New Product Information

The Department requires manufacturers to update information in the notification whenever there is a significant change to the reported information. Considering the introduction of new products in the marketplace, we request reporting be submitted within 30 days of first import into the state of Maine. Additionally, we request that "significant changes" be limited to additions and not "additions and removals", this would further reduce the burden of reporting and decrease costs.

Increased Flexibility for Reporting by Category

While we appreciate DEP's willingness to clarify and simplify the level of reporting by suggesting Global Product Classification (GPC) brick codes, this category of reporting is not familiar to our industry. It would be costly and time intensive to adopt new codes to cover of all our products.

We respectfully request that DEP allow for greater flexibility in the codes reporting, by adopting the Harmonized Tariff Schedule (HTS) as an alternative coding mechanism. The HTS is a global nomenclature system used to classify traded goods based on their material composition, product name and/or intended function. The HTS is a code designed so that each article falls into only one category. All products already have an HTS code and most companies already have their products identified by these codes. Additionally, they are easily accessible online at no cost. Allowing the use

of a coding structure that companies are already familiar with will decrease the burden to comply with this reporting law.

We appreciate Maine DEP's effort to describe situations in which reporting by category would be permissible, however, we are particularly concerned with the requirement that reporting by category would be appropriate only if the *"same PFAS are present in every product."* In many cases, a manufacturer will dictate performance specifications of a part but not specific chemical composition, so suppliers of the same part may use different chemicals to meet the specifications. Under these circumstances, even one product stock keeping unit (SKU) may be considered as falling under multiple reporting categories in Maine. This feasibility issue would be addressed if Section 3.C(2) were amended to read *"PFAS are present in every product and are used for the same or similar purposes."* This change would still allow DEP to gather information that would be relevant to a later determination about whether a use was currently unavoidable.

5. Prohibition of Sale of Products Containing Intentionally Added PFAS

- **Spare parts**: The prohibition of sales should exclude the sale of spare parts to maintain and repair products that were manufactured prior to the sales prohibition date. Spare parts for existing products may need to contain PFAS chemicals in order for the existing product to function. Covering spare products under the PFAS reporting rule may result in the scrapping of existing inventories, resulting in electronic waste.

- **Enforcement based on date of manufacture**: The basis for the sales prohibition should be enforced based on a date of manufacture and not a date of sale. Companies manufacturing products can only control when the product is made and not when it is sold to the consumer. The date over which industry has the most control in the manufacturing, distribution and retail chain is the "manufactured by" date. Manufacturers can determine compliance because these "manufactured by" dates can be confirmed based on unique product identifiers such as lot or serial numbers which can be marked on finished goods. For this reason, many US states use "date of manufacture" for product-specific regulations. A prohibition based on date of sale means a finished product on retail shelves can be compliant one day and out of compliance the next. This can lead to significant resource loss and an increase in environmental impact as the materials and resources utilized to create finished goods are lost and generate electronic waste and additional resources, including energy, must be utilized to create the new finished goods to replace non-compliant goods.

6. Fees

As previously stated, the electronics industry is composed of complex articles with many components. After reviewing the fee structure proposed by DEP, we have determined that it will result in significantly higher fees for electronics than other types of consumer products. We propose that DEP consider a third tiered flat fee structure. Other states, like New Jersey, have proposed a one-time fee of $1000 notification fee.

Conclusion

Thank you again for the opportunity to provide these comments on the Concept Draft. We welcome further engagement with stakeholders in this process, and if you have any questions about our above comments please do not hesitate to contact me at apeck@cta.tech.

Sincerely,

Ally Peck
Sr. Manager, Environmental Policy and Sustainability Issues
Consumer Technology Association