November 10, 2022

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

RE: Comments on the Maine PFAS in Products Second Concept Draft

Dear Ms. Farris:

Thank you for the opportunity to provide additional comments on the recently updated proposed rules to *Public Law c. 477, An Act to Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution (LD 1503, 130th Legislature).* Since our associations provided joint comments on the first draft, we felt we would continue to provide joint comments in an attempt to streamline the process for all involved.

The Maine Grocers & Food Producers Association is a business trade association representing Maine's food community; Main Street businesses, including independently owned and operated grocery stores and supermarkets, food and beverage producers and processors, manufacturers, wholesalers, distributors, and supportive service companies representing more than 250 members. The Retail Association of Maine has more than 350 members statewide and represents retailers of all product types and of all sizes, large and small.

While had we hoped that food packaging materials would be exempt under Title 32 § 32-A and 32-B, it has been clarified that because no action has been taken yet, specific to PFAS within the Reduction of Toxics in Packaging and Toxic Chemicals in Food Packaging policies, there is no current exemption. We express frustration that it was necessary for the added verbal caveat of the AG's interpretation during the webinar to make this clear. A straight reading of the proposed rules would reasonably interpret the exemptions section as exempting food packaging materials. A traditional independent grocery store carries anywhere from 5,000 to 60,000 SKUs. Larger grocers offer more than 100,000 different SKUs at any given time. Hundreds of thousands of products (and likely more) will need to be tested and reported within the next two months. This is of significant concern to MGFPA and our listed members due to the profound number of impacted products, changing packaging landscape, and the lack of sufficient laboratory capacity. We plan to submit an extension request on behalf of some of our

members because of this and the other challenges our members facing in complying with the reporting requirement.

Comments specific to the program draft rules as published on 10/13/22:

2. Definitions.

Definitions, D. Commercially available analytical method: While it is helpful to refer to the commercially available analytical methodologies, the Maine DEP has noted that the US EPA approved methods will not be exhaustive. We feel that the rule should be limited to US EPA approved methodologies. Affected businesses need to know which methods are acceptable.

Definitions, F. Currently Unavoidable Use: The definition of "currently unavoidable use" rulemaking is a major substantive rule, and the timeline for this rule being finalized could well be into 2024. This is problematic for those working to determine their compliance based on whether the use is unavoidable.

Definitions, I. Essential for Health, Safety, or the Functioning of Society: This is new language to the proposed rule. We express hesitation for how it relates to the definition of 'currently unavoidable use' and the long-time frame for determinization. Is this meant to imply that a currently unavoidable use is only products essential for the health, safety and functioning of society?

Definitions, N. Manufacturer: This definition is one of our more major concerns. Certainly, if you are private labeling products, you are considered the manufacturer and required to report. We have no issue with that, and that was the purpose of this law. However, if the manufacturer, or the importer into the state cannot be tracked, it may fall on the retailer to be the required reporting entity. We feel that the focus should remain on the manufacturers since they will have the greatest ability to test and report. During the Q&A discussion hosted by the Maine DEP on 10/27/22, non-manufacturer examples were given such as a small business that sells customized merchandise that has their company branding on it or a farmer that is packaging a food item with their business name. If these small businesses/retailers use a label or packaging component that has PFAS, they would be required to report as the retailer. Small retailers and farmers do not have the time, capability or funding to perform the required testing and reporting.

Definitions, P. Perfluoroalkyl and polyfluoroalkyl substances (PFAS): As we understand it, there are thousands of different PFAS compounds, and that the US EPA list is NOT an exhaustive list of impacted compounds. There are some compounds that will be considered PFAS under this law that will not be on the US EPA list. We feel that a specific list needs to be identified and considered exhaustive. The regulated community deserves this clarity.

Definitions, W. Used: This excludes used products from the prohibition and we support that exclusion. We would recommend that department expand the definition of used to also include products that are acquired or sold at surplus and salvage stores. These retailers purchase whole warehouses or truckloads of goods from out of state businesses. These businesses have often been hit by natural disasters, slightly damaged goods, or from bankruptcies. They pack up all the goods, truck them to Maine, and look to resell what products are viable. This is not a normal supply chain, and they will have no way to track which goods may be compliant. We believe that under the proposed rules that these surplus and salvage stores retailers would be considered the first or sole importer into Maine, and the reporting requirement would fall on their shoulders.

3. Notification.

Section A, (1) (a) (i): The rules are proposing to change the affected products from UPCs to Global Product Classification brick category and code (Section 3, A, (1) (a) (i)). It is our understanding that GPC codes mostly refer to consumer products so we are not sure if using the GPC is the best alternative. Certainly, similar issues exist with UPCs, but much of the focus should be on manufacturers and not the GPC or UPCs that retailers utilize.

Section A, (1) (a) (ii): We have concerns about the 'confidential business information' provisions and the inclusion of "estimated sales volume". We understand that the Maine DEP is trying to understand the scope of PFAS use and exposure, but information like this must first be coupled with the potential for the PFAS to make it into the environment in Maine. Requiring sales volumes will require strict protections of the confidential business information to avoid this information being shared publicly. We urge the department to explore other alternatives.

Section A, (1) (c): The amount of each of the PFAS as a concentration. Our understanding is that the concentrations must also be taken in context with the specific product and its likelihood of the PFAS impacting people or the natural environment. For example, we know that the sludge that was spread on farm fields has a direct link to the impacts Maine is seeing. Whereas a piece of waterproof clothing will not have the same impact. Knowing and understanding the concentrations by product types should be considered.

Section E: As noted above in the definition of manufacturer, we believe this section also demonstrates our concern that the reporting requirement will unintentionally fall on retailers. One other recommendation we would make in this regard would be to clarify that the manufacturer, distributor or wholesaler be required to buy back or reimburse the retailer for any products found to be in non-compliance. We strongly feel that the reporting requirement should not fall on retailers unless they produce private label goods. Retailers should not be financially at-risk for goods that cannot be sold in

Maine if they are later found to be in non-compliance. A similar clarification was made in the flame-retardant in furniture law.

Section 4, Exemptions: As we noted in the opening paragraph, we feel it is confusing to imply the products subject to Title 32 § 26-A and Section 26-B are exempt when they are not.

Section 6, Fees:
A, Fee Amount: The department has asked for input on the proposed fee schedule. At this point, it is difficult to comment until it is clarified how certain product categories need to be reported. If the department can share how many products they are anticipating will need to be reported, we can provide better feedback on whether the fees are appropriate or not. We are pleased the department clarified that these are one-time fees, and not an annual renewal.

Section 7, Failure to Provide Notice and Section 8, Certificate of Compliance: These two sections work hand in hand and directly impact retailers. As noted above in Section E, manufacturers, wholesalers and distributors should be required to buy back or reimburse retailers for the cost of goods found to be prohibited.

Public Law c. 477 passed less than two years after the onset of the COVID-19 pandemic. It requires detailed reporting that can be challenging along the supply chain to confirm. The short compliance window and lack of clear published rules presents a significant obstacle which is only exacerbated due to the on-going supply chain issues and lack of available testing for the scale of the program. With less than two months remaining for final rulemaking and compliance, we would urge strong consideration of a blanket registration extension or enforcement delay.

Thank you for the opportunity to share our concerns with you. Please feel free to contact us with any questions.

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