Comments from American Apparel & Footwear Association

Concept Draft for the Maine PFAS in Products Program

July 18, 2022

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 Concept Draft.

While these comments are substantive, we feel the short timeline that stakeholders were given to review and draft such comments was completely unfeasible and unworkable. We hope that we are given adequate time to engage with the Maine DEP on this rulemaking in the future.

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. We are the trusted public policy and political voice of the apparel and footwear industry, its management, and shareholders, its three million U.S. workers, and its contribution of more than $350 billion in annual U.S. retail sales.

AAFA provides exclusive expertise in trade, brand protection, and supply chain & manufacturing to help our members navigate the complex regulatory environment, lower costs, and grow their sustainability and product safety efforts. With many of our members engaged in the production and sale of children's 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 on the development, interpretation, and implementation of product safety standards and regulations.

Collectively, we support responsible regulatory requirements that are protective of human health and the environment. Our members are leading efforts to aggressively phase out the use of intentionally added perfluoroalkyl and polyfluoroalkyl chemicals with a goal of a complete phase out by 2027 of intentionally added PFAS chemicals in our products.

H.P. 1113 /L.D. 1503- sets out an effective date of January 1, 2023. We are writing to respectfully request an extension of this deadline for reporting of products containing intentionally added substances defined as PFAS in the State of Maine. As you know, 38 MRSA Section 1612 has a broad impact on nearly every sector of the economy, including aerospace, autos, alternative energy, healthcare, building and construction, electronics, pharmaceuticals, and agriculture, that relies on PFAS chemistries for the reliable and safe function of a variety of products important for industry and consumers. Under 38 MRSA Section 1614 (3), the Maine Department of Environmental Protection (DEP) may grant an extension if the DEP determines that more time is needed by manufacturers to comply with submission requirements. We respectfully request the extension of the reporting deadline for the following reasons:

The delay in rulemaking makes it difficult for our members to come into compliance, with a reporting deadline in less than six months. Rulemaking for 38 MRSA Section 1614 has just started with the first stakeholder informational meeting on June 30, 2022. With an effective reporting deadline of January 1, 2023, manufacturers and companies have little knowledge of what information is required and how to

comply with a broad mandate that currently has few details about what information is necessary and the process for submitting information.

Our members are trying to comply but are having difficulty in obtaining information protected by intellectual property laws. Companies that are aware of the deadline and are preparing to provide information are having difficulty obtaining information from their suppliers for a number of reasons- (1) A disrupted global supply chain continues to create complexities at every level in the marketplace; (2) Suppliers 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.

Under section 3. Notification, (1) mentions an extension of the notification deadline is possible if the following conditions are met, but it doesn't list what those conditions are. We encourage consideration of whether a company has a phase out plan for PFAS usage over the next 3 years as a condition. Doing so would keep the DEP from having to manage the registration process for products where usage is being eliminated. Secondly, it would preclude such companies from having to spend time and effort to hire personnel to manage the notifications and supplier communications, etc. as well.

We recognize that there will be an obligation to report information on products containing PFAS; however, for the above-stated reasons, we are requesting a 12-month extension of the reporting deadline past the promulgation of the final rule.

In addition, we respectfully request an exception for personal protective clothing/professional uniforms that require oil and chemical repellency until there is a proven successful commercial non-PFAS option available. Our members have found that currently there is no replacement for PFAS for oil and chemical repellency, only a successful replacement for water repellency. Additionally, our members are unable to find chemical companies that have proven non-PFAS oil and chemical repellent products.

Section 2(J) – Definition of Fabric Treatment should be expanded/clarified that this is aftermarket consumer products (product purchased in a container from a hardware store, for example) and does NOT apply to industrial applications. The intent is to restrict aftermarket products only. We suggest the addition of, "…or protective treatments applied at the industrial level." to the last sentence in this section.

Section 5(B) - Language states: Effective 1/1/2023, "prohibition does not apply to sale or resale of a used fabric treatment…" Based on the proper definition of 'Fabric Treatment', there can be no such thing as a 'used fabric treatment'. We are not clear that there is a market for such items. The last sentence would be better understood if it read as follows "This prohibition does not apply to the sale or resale of a used product to which fabric treatment has been applied".

Regarding the definition of "brand name" and "manufacturer," we request a narrower definition be used and the exclusion of "whose brand name is affixed to the product" from the definition. Licensed merchandise may use the licensor's intellectual property (i.e., brand name, logo) on the licensee's products; however, the licensor does not produce, own, or sell merchandise. Therefore, with a such a broad definition of "manufacturer," brand owners could be held liable for reporting for products despite

having no control over unlicensed products and often no knowledge of their existence despite spending considerable amounts of resources on counterfeit products.

We also have a concern about the definitions of Person, Consumer, Product, Product Component, and Offer For Sale. Tied together, they seem to indicate that any corporation who purchases goods sold by manufacturers and wholesalers, or who offers a product for purchase by consumers, including online sales, will be responsible for reporting this information to the state, and not just the manufacturer of the final consumer product (as product is defined as including product components that are sold or distributed for personal, residential, commercial, or industrial use, including for making other products). We believe the intent is for the final consumer product manufacturer to report and not every manufacturer and distributer of every product component within a particular supply chain. The current wording is confusing and depending on final interpretation is likely to be highly duplicative. We suggest that DEP limit the definitions or add a consumer product definition and reference under section 3. Notification requirements should be limited to the manufacturers of consumer products for sale directly to end users (not product components). Even this is highly duplicative.

In regards to the ICC reporting system, we have reviewed the reporting system and there are many concerns with that system as it exists today. Product differentiation is not specific enough for a consumer to be able to know which product has PFAS content. Consequently, the information is either confusing or insufficient, making it difficult for a consumer to know they are buying PFAS free products.

In addition, the comment timeline doesn't allow for proper vetting of the ICC database. Nonetheless, it is important to note the following: It would be good for the DEP to talk to the groups that are using this reporting database already (or users that have to report for these purposes today) - Oregon Toxic-Free Kids Act (TFKA) and/or the Washington State Children's Safe Products Act to determine how implementation has gone for those two organizations and their requirements. For example, Oregon TFKA has specific limits for specific chemicals and no reporting is required if below the limit. We strongly believe a reporting limit would be beneficial to capture only the intentionally added chemistry. The reporting limit for PFAS should be 100ppm, which aligns with all other product reporting limits in other legislation and 3rd party certifications, such as California food packaging and cosmetics legislation, as well as GreenScreen for furniture and fabrics requirements, in addition to the food compositing certification, and certification for recycling of items.

In addition, this legislation allows 3 biennial notices and then the chemicals must be removed, which could take care of the further regulation of PFAS in products altogether for the state of Maine. Further, additional time to fully vet the system and speak with users is of utmost importance as I believe you can improve the functionality and usability for all involved, including the intended beneficiaries of this new law, consumers in the state of Maine.

Regarding a significant change in percentage levels, we suggest only asking to report a change if the amount of PFAS is increased. 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 reporting will be in the form of a range the explains the maximum amount contained in the product. If the amount is increased, the department should then be notified. However, 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). We suggest only reporting a change in content if it is 400ppm higher than the average number in the range of content originally reported. For example, if a company reports a range of 800-1200ppm total fluorine, then no change is reported unless it is 1400ppm or higher (1000ppm average + 400ppm = 1400ppm). If the range was 1800-2200ppm, then the company doesn't report unless the value is 2000+400ppm = 2400 ppm or higher.

Feedback was requested concerning the number of SKU's a company would have to report and the fees you should charge. It is difficult for our membership to evaluate how many SKU's our customers would have and which would sell into Maine. However, just to give you perspective, members have reported that number could be as high as 12,000 SKU's that would be subject to reporting if they are all sold into the state of Maine.

Concerning the fees that should be charged, we would again refer you to Oregon and Washington state and their implementations. We note that Oregon charges $250/sku. Referencing a company as described above that has 12,000 SKU's, the $250 fee could result in $3,000,000 per year for this particular company. Additionally, please consider charging the fee only to one category of products, and not each individual SKU.

For Section 3, part D, updates to the system should only be annually or as things change, within 90 days of the change. Mainly due to the time it takes to get test results back and the time it takes to hire and train new personnel, if the contact person for the company changes. This will reduce the number of requests for changes you have to deal with and limit what the system has to manage as well.

As for Exemptions in section 4 – there 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. Consider adding recycled content materials without intentionally added PFAS content to the exemption list.

Section 8 – Certificate of compliance – A. instead of "reason to believe that" please consider changing the wording to "substantial information". In addition, 30 days isn't 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 would also suggest that you take out the (2) requirement of downstream notification. If the company can't provide the certificate, the company is restricted from business in the state of Maine and the Department may need to consider posting that failure to comply on the same website where contents are reported.

Section 2(J) – Definition of Fabric Treatment should be expanded/clarified that this is aftermarket consumer products (product purchased in a container from a hardware store, for example) and does NOT apply to industrial applications. The intent is to restrict aftermarket products only. We suggest the addition of, "…or protective treatments applied at the industrial level." to the last sentence in this section.

Lastly, we have several questions for the Maine PFAS in Products Concept Draft that we would like clarification on:

1. When reporting the amount of each PFAS used in the product falling within a range approved by the Department, can you clarify what's the Department-approved range?
2. What's the format or form to submit to the Department's online notification system? Do brands and manufacturers need to fill out and submit the excel form approved by the Department with required information, or do we need to manually select the brick and PFAS concentration range of each product in the online notification system?
3. Does the fee need to be paid for each individual product registered, and is it also by the CAS number of each PFAS in the product?
4. UPC (if applicable) is included as part of the product description, can other unique identifiers such as style number be used instead of UPC?
5. The draft mentions a commercially available analytical method for determining PFAS in a product, but the reference to the EPA methods does not contain methods for testing consumer products. It only references environmental media test methods. Please confirm which test methods are to be used.

In 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 Nate Herman of my staff at nherman@aafaglobal.org if you have any questions or would like additional information.

Sincerely,

Stephen Lamar
President & CEO