July 18, 2022

VIA EMAIL

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

Re: Comments on Rulemaking Concept Draft for Maine PFAS in 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 comment on the Maine Department of Environmental Protection's ("DEP's") concept draft for rulemaking under the Maine PFAS in Products Program. Our initial comments are provided below.

First, Consumer Brands is concerned that the DEP's concept draft requires burdensome and duplicative reporting. Although 38 M.R.S.A. § 1614(3) provides for a partial or total waiver of the notification requirement if and when the DEP determines that "substantially equivalent information is already publicly available," the discussion draft's notification provisions do not mention this option. This is particularly concerning because the U.S. Environmental Protection Agency ("EPA") is finalizing a Toxic Substances Control Act ("TSCA") reporting and recordkeeping rule this year that is expected to apply to PFAS-containing articles, and as first proposed by EPA, would require entities who have manufactured or imported a PFAS at any time since 2011 to submit certain information to the agency related to chemical identity, categories of use, volumes manufactured and processed, byproducts, environmental and health effects, worker exposure, and disposal. EPA anticipates finalizing its TSCA reporting and recordkeeping requirements for PFAS by December 2022.[2] Regulated entities would report to EPA during a six-month submission period, which would begin six months following the effective

[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.

[2] See, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202204&RIN=2070-AK67

date of the final rule.[3] Therefore, companies would have one year following the effective date of the final TSCA rule to collect and submit all required information to EPA. That data would then become readily available to the state to utilize and minimize the duplicative reporting burden for manufacturers. Consequently, we recommend that Maine DEP include in the proposed rule that if an entity has submitted reports to EPA on any PFAS-containing articles that it has manufactured or imported, then the requirement to also notify Maine DEP should be waived. We further recommend that DEP consider aligning its notification requirements with the effective date and submission period of the final federal TSCA reporting and recordkeeping rule.

We specifically recommend other changes with the discussion draft's notification provisions. As a general matter, because the rulemaking is not yet finalized and implementation will be time-consuming, we recommend a notification extension in Paragraph 3(A)(1) of twelve months from the publishing of the final rule and launching of DEP's electronic reporting website, whichever is later. This will allow manufacturers enough time to implement the rule, including requesting product testing for potentially millions of products through limited availability at outside laboratories, registering products over time as testing information becomes available, paying the applicable fees, and working out with DEP any challenges associated with the database or reporting system.[4] With respect to the notification provisions, in Paragraph 3(C), we respectfully request that DEP outline what information will be needed for it to determine that category or type reporting is feasible and consistent. In Paragraph 3(D), we request that DEP specify that information updated through the reporting website will supersede previous information. In practical terms, we request that when a manufacturer reports that PFAS is removed from a product, the previous information will no longer appear on the DEP's reporting website. We also request that DEP clarify whether the notification requirements under this statute are applicable to food packaging products, considering that such products are already subject to PFAS-specific restrictions under Title 32, chapter 26-A.

Second, Consumer Brands is concerned that the DEP's concept draft requires the disclosure of commercially sensitive and competitive information. The discussion draft articulates that as part of the notification requirement, entities must provide information to DEP that includes the amount of each PFAS as a concentration in the product, the chemical identity, associated Chemical Abstracts Service (CAS) registry number, and the purpose for which PFAS are used in the product. Disclosure to DEP must be balanced with the need to protect confidential business information (CBI) to ensure that innovation in the marketplace can continue to thrive. Product formulas including the names and concentrations of certain ingredients can be considered intellectual property and qualify for protection under existing federal trade secret laws. DEP should acknowledge in the regulation that companies can assert CBI for any PFAS for which a claim has been approved by EPA for inclusion on the TSCA Confidential Inventory, or for which a claim of protection exists under the Uniform Trade Secrets Act. An entity that possesses an approved federal CBI claim should have the option of withholding the CAS registry number and providing a generic name for the PFAS in accordance with current EPA guidance on the subject.[5]

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[3] See, https://www.regulations.gov/document/EPA-HQ-OPPT-2020-0549-0001

[4] This assumes that by the time the notification deadline approaches there are validated methods for determining the presence or concentration of PFAS in all of the products subject to this regulation. The regulatory concept draft discusses the use of "commercially available analytical methods" in order to meet the notification requirement but does not acknowledge that methods to measure organic fluorine in various media are very limited and still being evaluated for accuracy and efficiency.

[5] See, https://www.regulations.gov/document/EPA-HQ-OPPT-2018-0292-0001

Third, the DEP's concept draft lacks actionable guidance for industry related to the 2030 ban on all PFAS containing products. Although 38 M.R.S.A. § 1614(5)(D) states that exceptions to the 2030 ban may be available if the use of PFAS in a product or product category is "currently unavoidable," the draft does not elucidate how or at what point prior to the ban DEP will determine that a use is essential for health, safety, or the functioning of society and for which alternatives are not reasonably available. While compliance with the statute's notification provisions is of immediate concern, the 2030 sale and distribution ban clearly has the most far-reaching impacts on manufacturers, distributors, retailers, and consumers. It is essential that DEP provide the regulated community with timely information on how it must comply with this aspect of the law, and what information can proactively be provided to DEP to ensure that essential and lifesaving products can receive a regulatory exception to avoid being withdrawn from the marketplace in anticipation of the 2030 prohibition. Consumer Brands acknowledges that product notification will occur before the effective dates of the product bans, but we encourage DEP not to lose sight of the other significant issues of import in this rulemaking.

Fourth, we encourage DEP to include a reasonable threshold for testing as a secondary option in its definition of "intentionally added PFAS", as that would reflect the reality that brand owners cannot always determine the purpose behind any introduction of PFAS that was performed earlier in the supply chain, and therefore, will struggle to comply with the regulation. DEP should consider the presence of PFAS in a product or product component at or above 100 parts per million as an alternative method for a brand owner to identify intentional presence, as such entities may be several steps removed in the supply chain and may not always be able to ascertain relevant traceability information from their suppliers.

Lastly, Maine DEP specifically has invited comment on the appropriate percentage change of PFAS that would constitute a "significant change", thereby triggering an updated manufacturer notification to DEP under Paragraph 3(D) of the draft rule. Consumer Brands suggests ten percent or greater as appropriate. This amount is commonly used to trigger other labeling modifications to CPG products such as net contents and retail unit price changes.

Consumer Brands appreciates the chance to weigh in with these suggestions, and we look forward to working with DEP to ensure that Maine consumers continue to obtain essential goods with minimal disruptions. Thank you for your attention to our comments.

Sincerely,

Jared Rothstein
Director, Regulatory Affairs
Consumer Brands Association
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