

July 18, 2022

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 Kerri Malinowski Farris,

On behalf of the Consumer Technology Association (CTA), we respectfully submit these comments on the 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 and product stewardship.

Extension of Notification Timeline

We respectfully ask that the Department issue an extension for compliance with the reporting requirement. The reporting deadline is set for January 1, 2023, and companies still do not know exactly what information will be required and how to provide notice to the Department. We encourage DEP to issue a blanket extension for all manufacturers of products in the electronics sector and products with electronic components.

Since electronic devices are manufactured through a complex global supply chain, companies require sufficient lead time to implement any notification requirement. 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 addition, all of these information requests will have to cascade through the supply chain through multiple levels.

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 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. Extending Maine's reporting deadline would give DEP, to the maximum extent practicable, an opportunity to harmonize Maine's reporting requirement with EPA's, reducing the administrative burden on DEP and industry.

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 just over 3,000 chemicals or chemical substance groups in response to regulatory requirements, voluntary initiatives by manufacturers, or by special request from supply chain 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

Until the Department completes its rulemaking, manufacturers cannot know exactly what information will be needed. Therefore, we respectfully ask that any extension for the reporting deadline should take place after the completion of final rulemaking. Electronics manufacturers cannot say with certainty exactly how long it will take to supply the notification information at present without knowing threshold limits and reporting ranges.

The electronics sector is diverse and encompasses countless types of products. Each company's experience will vary when it comes to notification. Some CTA members estimate that if the Department aligned threshold limits with PFAS regulations in other jurisdictions and required notification on substances already regulated in other jurisdictions, a 48-month extension may be sufficient to comply with notification requirements. However, if the Department does require notification on over 12,000 PFAS chemicals with no threshold limits, it is impossible to say how many years it would take for manufacturers to gather that information. A notification requirement as outlined in the Concept Draft is without precedent and it is impossible to say how many years compliance would take. Given the complexity of the products and extensive reporting the law requires, we ask that the Department grant a waiver to the electronics sector for 48 months. In addition, we suggest that DEP produce a waiver process for companies to apply for additional waivers if manufacturers show a good faith effort at complying with the law but require additional time to secure needed information.

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:

- Commercially Available Analytical Method: First, we ask that in upcoming rulemaking that DEP provide a list of approved test methodologies, for PFAS that are

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>

covered by this statute and rule. Second, DEP should allow supplier declarations as an appropriate proxy for a manufacturer in lieu of testing data.

- Manufacturer: The definition of manufacturer does not contemplate OEM products – products that a company buys from a manufacturer, modifies, and sells under their own brand. It does not specify who will be responsible to register those products: the OEM or other manufacturer. The company which manufactures the product and the company whose brand name is affixed to the product are sometimes not the same company. DEP should clarify who is the responsible party.
- Intentionally added PFAS: This definition is overly broad and substantial guidance will be necessary for companies to successfully comply. We respectfully request that DEP consider adopting existing regulatory reporting requirements for restricted substances in electronic products with de minimis exemptions as well as exemptions for byproducts and impurities. While we recognize that the Concept Draft makes a distinction between PFAS used to impart a “characteristic, appearance or quality” and tries to address manufacturing processes, the last portion of this definition includes “is not present in the final product.” These seven words open the entire rule to including contaminants as “intentionally added PFAS.” This phrase should be removed at minimum.

Additionally, existing regulations such as EU Reach, EU RoHS Directive for EEE, and EU Waste Framework Directive have clear de minimis thresholds. DEP should also consider a definition to further define “added” to clarify if it means added as part of a substance, mixture or compound; added before during or after production; added by the end product manufacturer or another entity along the value chain.

The Concept Draft is also unclear as to what “a specific characteristic, appearance, or quality or to perform a specific function” means in practice. It should clarify what these terms mean and how much to weigh those criteria in determining whether the product is in scope. Adding a threshold limit like discussed above would also help clarify this issue.

- Product and Product Component: These definitions should clarify if spare parts are included in the scope of the law. Spare parts provided under warranty to customers are not “sold” directly but are sold when out of warranty.
- Significant Change: We are concerned with the definition setting a percentage threshold that would define a “significant change.” For certain products the manufacturing processes are not so exact as to detect a small percentage change in the concentration of PFAS. Significant change should be limited to the addition or removal of an intentionally added PFAS.

Notification

We appreciate the Department outlining a number of the elements that will be required for notification and we encourage DEP to provide further details in this formal rulemaking.

From the “Notification” section of the Concept Draft we have the following comments:

- Product notification: The Department should provide more clarity on what specific level of product will require notification. If manufacturers are required to report on the smallest individual product level, there could be tens of thousands of reports per manufacturer for complex products like electronics. Many electronic products are modular with numerous component parts. For example: if a consumer purchases a computer they often custom order various components like hard drives, batteries, and even the color of the plastic casing. This can lead to thousands of possible permutations for a single “product” and therefore thousands of notifications. The Department may receive hundreds of thousands of notifications just from the electronics sector alone. Given this situation, we encourage the Department to, where possible, allow for product category-level reporting with wide enough ranges to make that level of reporting feasible. In addition, DEP should determine the requirements for reporting under categories long in advance of the notification deadline for manufacturers to properly prepare.
- De minimis threshold limit: The notification requirements should include a minimum threshold requirement to avoid unnecessary reporting of byproducts and impurities. As we discussed briefly above in the definition for “intentionally added PFAS,” we ask that the Department implement a rule consistent with other jurisdictions’ chemical reporting and restrictions requirements. 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.
- Range reporting: We encourage DEP to make use of flexible range reporting for notification. DEP should commission a study to determine the typical concentration ranges of PFAS by use and allow reporting on that basis. 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 chain that the components, parts, etc. that they purchase and incorporate into their products do not contain PFAS. DEP should approve ranges of reporting with sufficient time to allow manufacturers to make appropriate use of range reporting.

- PFAS as a concentration: The Concept Draft asks that companies provide the amount of PFAS “as a concentration” but does not define how to calculate that concentration. This rulemaking should clarify how to calculate “concentration” and whether it is by product weight, at the product or component level, and other details.
- List of PFAS Substances: 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. Instead aligning with a definition adopted by other existing jurisdictions, that have a clear scope of specific PFAS chemicals, and providing a more specific definition of the covered substances would make compliance significantly more feasible.
- Limiting to PFAS with CASRNs: We ask that the Department consider limiting reporting requirements under this rule to those PFAS with CASRNs. Manufacturers often face a challenge on reporting rules for the presence of these chemistries because of a lack of harmonized definition and naming system. Chemical Abstracts Service Registry Numbers (CASRNs) exist for many PFAS and provide a uniform and consistent means of communicating information on chemical substances and one that our industry heavily relies on for chemical management within global supply chains. Regulatory agencies in the EU have directed PFAS legislation to focus on specific PFAS chemistries with CASRNs to ensure easier compliance processes throughout the supply chain. These chemistries are also more toxic and persistent than other PFAS chemistries that may not otherwise be known without a CASRN. Therefore, we request limiting reporting requirements to PFAS chemistries with CASRNs that are already prioritized by the EU until more PFAS chemistries are identified and information on these chemistries are made readily available.
- “Reasonably Ascertainable” Standard: We ask that the reporting requirements be based on a “reasonably ascertainable information” standard. Due to the complexity of the supply chain for the electronics sector, a significant amount of time would be required to determine the use/non-use of unregulated PFAS chemicals. Therefore, the notification requirements should be based on information that is “reasonably ascertainable.” For chemical reporting rules, EPA typically requires reporting information that is “known or reasonably ascertainable.” This is the standard EPA uses for its quadrennial [Chemical Data Reporting rule requirements](#) as well as the standard EPA proposed for its PFAS reporting rule. Under this standard, as long as the company exercises an appropriate level of due diligence and accurately reports what it knows or learns, it has complied with the reporting requirement.
- Category reporting: Under the Concept Draft, DEP would in many cases disallow reporting by category or type unless “the same amount” of PFAS is present. This requirement is far too stringent and, if maintained, would effectively negate the legislature’s intent to allow companies to report by category or type under appropriate circumstances. Analytical chemistry methods are too sensitive (i.e. provide data to many significant figures) to use “the same amount” standard, and not even individual

units of the same product are likely to contain “the same amount” of any chemical. For these reasons, DEP should change “the same amount” to “a substantially similar amount” and remove the reference to analytical testing.

- Certificates of Compliance: Under the Concept Draft, if the Department has a reason to believe that a product contains intentionally added PFAS but was not reported, it can require a manufacturer to either certify that the product does not contain intentionally added PFAS or notify sellers and distributors that the product cannot be sold in Maine. A third option should be added, which is that the manufacturer should be allowed to submit a written notice to DEP that the product contains intentionally added PFAS. Unintentional late notification should not result in the drastic result of products being pulled off the shelves.

Confidential Business Information & Trade Secret Protection

The Concept Draft is silent on protection of confidential business information. Much of the information which will be provided for the notification requirement will be confidential and we hope the Department’s plans and procedures to protect CBI will be included in this rulemaking.

Prohibition of Sale of Products Containing Intentionally Added PFAS

- Currently unavoidable uses: The Concept Draft does not contain any information regarding DEP’s authority to determine by rule that the use of PFAS in a product is a currently unavoidable use. We respectfully ask that this rulemaking address how the Department may make these determinations and what the standards will be for “currently unavoidable use.” Manufacturers will need to plan soon for any potential waiver of the sale prohibition and any information the Department can provide on this process will be useful.
- Spare parts: The prohibition of sales should exclude the sale of spare parts to maintain products which 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.
- 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. 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 additional resources are utilized to create the new finished goods to replace it.

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 dmoyer@cta.tech.

Sincerely,
Dan Moyer
Sr. Manager, Environmental Law & Policy
Consumer Technology Association