July 18, 2022

To Whom it May Concern:

Re: Concept Draft for the Maine PFAS in Products Program

3M Company ("3M") appreciates the opportunity to comment on the "Concept Draft for the Maine PFAS in Products Program," ("Concept Draft") which was provided to stakeholders on July 1, 2022. 3M understands that the Concept Draft is a preliminary draft of regulations that the Maine Department of Environmental Protection ("DEP") proposes to promulgate pursuant to 38 M.R.S. § 1614 (the "Act") and that stakeholders will have an additional opportunity to comment on DEP's proposed regulations after DEP initiates the formal rulemaking process.[1] As a science-based company with substantial experience, expertise, and product stewardship of various PFAS chemistries, 3M encourages the DEP to create a regulatory framework that fulfils the legislature's goals in passing the Act , including accounting for risk-based criteria that does not unnecessarily restrict important products to consumers**.**

1. 3M Requests Clarification to Certain Regulatory Definitions.

3M has already undertaken significant efforts to gather information internally and from its suppliers in preparation for compliance with the broad notification and other requirements set forth in the Act. In furtherance of that effort, 3M requests that the DEP promulgate definitions in its regulations that make the scope of its obligations clear, including as set forth below.

a. "Consumer."

The definition of "Consumer" in the Concept Draft is confusing because it incorporates the word "person," which is broadly defined to include individuals, partnerships, corporations, firms, governments and public or private organizations. *See* Concept Draft at 2(E), (O). This is in contrast to more well-known regulatory definitions of "consumer," which generally exclude professional or industrial users of a product. *See, e.g*., 40 CFR 721.3 (Toxic Substances Control Act) and 15 U.S.C. § 2052 (a)(5) (Consumer Product Safety).

The use of the defined term "person" in the definition of "consumer" also renders certain other definitions in the Concept Draft confusing. For example, "Fabric treatment" is defined as a "consumer product", but the Concept Draft's broad definition of "consumer" would render the term "consumer product", as opposed to just "product," meaningless.

Clear definitions are imperative in order for manufacturers to understand and comply with their obligations under the Act and its related regulations. Accordingly, 3M recommends that DEP clarify the definition of "consumer" to be consistent with that used by the U.S. Environmental Production Agency's definition in the TSCA regulations: A private individual who uses a chemical substance or any product containing the chemical substance in or around a permanent or temporary household or residence, during recreation, or for any personal use or enjoyment. 40 C.F.R. 721.3. Alternatively, the DEP could add a definition of "consumer product" to mean "a chemical substance [or product] that is

[1] 3M's comments to the Concept Draft are intended to be high-level comments and 3M reserves the right to provide additional and/or expanded comments during the formal rulemaking process.

directly, or as part of a mixture, sold or made available to consumers for their use in or around a permanent or temporary household or residence, in or around a school, or in recreation." 40 C.F.R. 721.3[2]

b. "Alternative."

The Concept draft defines "Alternative" to be "a substance or chemical that, when used in place of PFAS, results in a functionally similar product and that, when compared to a PFAS that it could replace, would reduce the potential for harm to human health or the environment, or has not been shown to pose the same or greater potential for harm to human health or the environment as that PFAS. Alternatives include reformulated versions of products, including versions reformulated by removal or addition of one or more chemicals or substances, that result in the reduction or removal of intentionally added PFAS from the product. Alternatives also include changes to the manufacturing process that result in the reduction or removal of PFAS from a product."

The purpose of this definition is unclear; the term "alternative" is not used anywhere else in the Concept Draft. To the extent the DEP intends to use the term "alternative" in building out a framework for making an unavoidable use determination (which the current Concept Draft lacks, as discussed below), 3M recommends that DEP replace the term "functionally similar product" with "functionally equivalent product" in the definition of "alternative." This will help ensure the remaining availability of products containing intentionally-added PFAS for which there is currently no reasonably available non-PFAS-containing product that provides similar performance (which is crucial in critical sectors, including healthcare, energy and defense).

c. "Intentionally Added PFAS."

The Concept Draft defines "intentionally added PFAS", in part, as "PFAS added to a product or one of its product components in order to provide a specific characteristic, appearance, or quality or to perform a specific function." However, the definition also states that "intentionally added PFAS also includes any degradation byproducts of PFAS." 3M assumes that this clause requires notification of only "degradation byproducts" that are intended to be included in a final product or one of its components "in order to provide a specific characteristic, appearance, or quality or to perform a specific function," as is implied by the broader definition of "intentionally added**."**

2. The Concept Draft Should Clarify that the <u>Final</u> Manufacturer or Distributor Selling or Distributing a Product for Sale in Maine is the Entity Required to Comply With the Notification Requirement.

The Concept Draft is unclear as to which entity is responsible for complying with notification requirements in a scenario where a product or product component is originally manufactured and sent to another manufacturer or distributor *outside of Maine* but incorporated by a later manufacturer into a final product that is later sold or offered for sale *inside of Maine*.

[2]*See also* 15 U.S.C. § 2052(a)(5) (CPSC's definition of Consumer Product: The term ''consumer product'' means any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation…)

Upstream manufacturers often lack visibility into where their products or product components are sold after they have been incorporated into a final product by a third party. In order to err on the side of caution and ensure compliance with the regulations as currently written, upstream product component manufacturers would potentially have to satisfy the notification requirements for ***all*** of the products that they sell to intermediate manufacturers or distributors, regardless of whether or not they are anticipated to or do end up in Maine. This would have tremendous cost in terms of information gathering (and regulatory fees) and does not further the legislature's goal of collecting information regarding products that are sold in Maine. It also will likely lead to double reporting by both the product component manufacturer and the final product manufacturer.

3M recognizes that Section 3(E)[3] of the Concept Draft requires a downstream manufacturer or distributor to comply with the notification requirements in certain circumstances where "notice of the product has **not** been submitted to the Department." 3M appreciates this attempt to reduce the burden on upstream manufacturers, but submits that it would be far less burdensome (and result in less duplication) for the DEP to clarify that a product's **final** manufacturer or distributor (*i.e*. the manufacturer or distributor that brings the product into Maine) is responsible for complying with notification requirements in the first instance, rather than requiring the final manufacturer or distributor to determine whether an earlier manufacturer in the supply chain had already provided notification.

3. DEP Should Allow a 12-Month Period for Rolling Compliance with the Notification Requirement.

The Act contemplates that the legislation's broad reporting requirement will *begin* to go into effect on January 1, 2023, but does not contain a firm deadline for completion of compliance with that requirement. *See* 38 M.R.S. § 1614(2)(A) ("[B]eginning January 1, 2023, a manufacturer of a product for sale in the State that contains intentionally added PFAS shall submit to the department a written notification that includes. . ."). The Concept Draft, in contrast, appears to state that compliance with the reporting requirement will be *completed* by January 1, 2023, and that no products containing intentionally added PFAS for which notification has not been made may not be sold in Maine after that date. *See* Concept Draft at Part 2(A).

As noted above, 3M has been working diligently towards compliance with the reporting requirement since the passage of the Act. The most significant hurdle is that the reporting system has not been made available, and the DEP has not even begun the formal rulemaking process, the combination of which looks to make notification by January 1, 2023 infeasible. Further, even if manufacturers were able to start entering information in the DEP's online notification system today, completing notification by January 1, 2023 would be a significant undertaking based on the incredibly broad definition of PFAS.[4] Accordingly, 3M requests that DEP implement a phased approach to reporting by committing to open the online reporting system by January 1, 2023 and requiring completion of all required reporting by December 31, 2023. Further, 3M recommends that the DEP's draft regulations provide for extensions to

[3] Section 3(E) states that "[i]f a product is imported into the State of Maine, rather than into the United States, to be sold, offered for sale, or distributed for sale outside of the sales and distribution channels controlled by the manufacturer and notice the product has not been submitted to the Department, it is the responsibility of the person bringing the product into the State of Maine to ensure the Department receives notice as required by Subsection A."

[4] 3M notes that the broad definition of "perfluoroalkyl and polyfluoroalkyl substances" encompasses thousands of substances with widely varying toxicity, fate and transport, and other characteristics

be granted to manufacturers that demonstrate good cause and can show that they have made reasonable efforts to comply within the regulatory timeframe.

4. The Concept Draft Does Not Contemplate Exemptions for Currently Unavoidable Uses.

Notably – and in contrast to the Act – the Concept Draft does not contain exemptions from any of its requirements for "currently unavoidable use." Such an exemption is crucial to ensure that manufacturers can continue to supply critical industries including government, healthcare, energy, and transportation. 3M recommends that the DEP draft rules codifying the "currently unavoidable use" exemptions to the notification requirements and the eventual product ban, including an efficient process for making and approving exemption requests.

5. The Concept Draft Does Not Address Protection of Confidential Business or Trade Secret Information.

The Concept Draft requires manufacturers to provide relatively detailed information about the use and amount of intentionally-added PFAS in their products. However, the Concept Draft does not contain any provisions allowing for the treatment of this information – when warranted – as Confidential Business Information ("CBI") or trade secret information. This is troubling, given that 3M understands the DEP intends for the information provided by manufacturers to be hosted on a publicly available database. None of the legislature's objectives in passing the Act requires the public disclosure of protected CBI and trade secret information by manufacturers (and, in some cases, disclosure of such information is prohibited by contracts with suppliers). 3M encourages the DEP to provide for the designation and treatment of CBI and trade secret information as confidential and commit to shielding it from public disclosure.

6. Additional Comments on the Reporting Requirements.

The Concept Draft sets forth a detailed reporting requirement for each product containing intentionally-added PFAS unless a manufacturer has obtained approval to report by category. However, the regulations imply that the DEP will only approve of reporting by category "through the online notification system," which raises questions as to whether a manufacturer is *first* required to enter individual product information and *then* seek approval to report by category (which would defeat the purpose of reporting by category). 3M requests that the regulations clarify that a manufacturer may report by category in the first instance and then must only provide additional, product specific information if the DEP determines such is necessary to fulfill the purposes of the Act.

3M also recommends that DEP add a provision to the reporting requirement allowing manufacturers to report on the amount of intentionally-added PFAS in their products by concentration ranges (e.g., 0 – 0.001 g/g). This will better enable reporting by category and will also account for minor variations in PFAS concentration within individual products that can result from manufacturing processes. In addition, many manufacturers receive composition information from their suppliers, which frequently provide such information in a range.

The Concept Draft likewise contemplates that fees will be paid for each product added to the notification system. 3M recommends that a cap be placed on fees to prevent large manufacturers from having to pay exorbitant fees.

7. Certificate of Compliance.

As currently drafted, Section 8 of the Concept Draft provides that a manufacturer of a product containing intentionally-added PFAS that has failed to comply with the notification requirement must either (1) provide a certificate of compliance establishing that the product at issue does not contain intentionally-added PFAS; (2) or notify all persons who sell, offer for sale or distribute for sale in Maine that the product is prohibited. *See* Section 8(A)(1)-(2). 3M recommends that Section 8 be revised to allow a manufacturer to continue selling the product at issue in Maine if it completes the notification process within 30 days of being notified that the product contains intentionally-added PFAS.

8. The DEP Should Add Clarity to the Exemptions Contained in Section 4.

3M appreciates that the Concept Draft exempts "product for which federal law or regulation controls the presence of PFAS in the product in a manner that preempts state authority." Section 4(a)(1). In order to provide manufacturers more clarity[5], 3M requests that the DEP specify – or at least provide a non-exhaustive list of – which federal laws it considers preemptive. In addition, 3M recommends adding an exemption for those PFAS specifically approved under the U.S. EPA SNAP Program as replacements for ODSs and HFCs, in those applications for which they are approved.

3M appreciates the opportunity to provide comments to the Concept Draft.

[5] The need for clarity is particularly warranted in light of the next sentence, which states "[f]or this purpose, the provisions of this Chapter are severable, and if any phrase, Section or Subsection is preempted by federal law or regulation, the validity of the remainder of this Chapter shall not be affected."