AMERICAN APPAREL & FOOTWEAR ASSOCIATION

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May 18, 2023

Commissioner Melanie Loyzim
Maine Department of Environmental Protection
State of Maine
17 State House Station
Augusta, ME 04333

RE: Chapter 90: Products Containing Perfluoroalkyl and Polyfluoroalkyl Substances Third Concept Draft

Dear Commissioner Loyzim:

On behalf of the American Apparel & Footwear Association (AAFA), I am providing these comments regarding the Chapter 90: Products Containing Perfluoroalkyl and Polyfluoroalkyl Substances Third Concept Draft.

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, AAFA is the trusted public policy and political voice of the apparel and footwear industry, its management and shareholders, its more than three million U.S. workers, and its contribution of $470 billion in annual U.S. retail sales. AAFA approaches all of its work through the lens of purpose-driven leadership in a manner that supports each member's ability to build and sustain inclusive and diverse cultures, meet and advance ESG goals, and draw upon the latest technology.

We deploy our association's extensive expertise in trade, brand protection, supply chain management, and manufacturing to help our members navigate the complex regulatory environment, lower costs, and grow their sustainability and product safety efforts. With our members engaged in the production and sale of 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 through alerts, webinars, and conferences on the development, interpretation, and implementation of product safety standards and regulations.

AAFA and our members are proud advocates for regulatory requirements that can effectively protect human health and the environment. To that end, we are supportive of policy that meets our THREADS Protocol by establishing realistic, enforceable, and science-based requirements.

Indeed, many of our members routinely exceed regulatory requirements, and many are already in the process of phasing out the use of intentionally added PFAS. We have even added PFAS as a class to our own open-industry Restricted Substances List. However, the transition away from fluorinated substances is not a simple process and we have many remaining comments and questions about implementation and enforcement of Chapter 90: Products Containing Perfluoroalkyl and Polyfluoroalkyl Substances.

Definition of “Intentionally Added PFAS”

We appreciate DEP has maintained a clarification initially made in the Second Concept Draft that states “PFAS that is present in the final product as a contaminant” will not be considered to have been intentionally added. However, the Third Concept Draft still fails to specify how DEP will determine whether PFAS found in a product are the result of contamination or intentional addition. We suggest DEP further amend the definition of “intentionally added PFAS” by providing a Total Organic Fluorine (“TOF”) threshold that sets a numerical standard for contamination. Based on conversations with our third-party testing laboratory members, a TOF threshold of 100ppm would be an appropriate threshold for textile, apparel, and footwear products to differentiate between environmental contamination and intentional addition of any PFAS, as the presence of TOF below this threshold would not provide a technical effect in a finished product. This threshold would also help DEP meet practicality and applicability concerns we lay our later in this comment and align with thresholds set in other jurisdictions, allowing for harmonization, and facilitating compliance efforts.

Definition of “Product component”

We were pleased to see that the product packaging was removed from the definition of “product component” in the Third Concept Draft. We urge DEP to maintain the current definition of “product component” in the Third Concept Draft.

Definition of “Manufacturer”

The Third Concept Draft retains a definition of “manufacturer” that is impracticably broad. We request DEP narrow the definition by excluding “whose brand name is affixed to the product” from the definition. While licensed merchandise may use the licensor’s intellectual property (i.e., brand name, logo) on the licensee’s products, the licensor does not produce, own, or sell merchandise. Narrowing the definition would avoid requiring a licensor that has no control over the product to provide reports and appropriately place that responsibility on the licensee.

Separately, with such a broad definition of “manufacturer,” brand owners could be held liable for reporting unlicensed products and counterfeit products that use their brand name.

Definition of “Fabric Treatment”

We appreciated that DEP clarified during the October 27 stakeholder meeting that “Fabric Treatment” only applies to aftermarket consumer products (product purchased in a container from a hardware store, for example) and does NOT apply to industrial applications. We again suggest the addition of, “…or protective treatments applied at the industrial level.” to the last sentence in this section to provide that same clarity in the final regulations themselves.

Definition of “Significant change”

We appreciate that DEP took our suggestion and recognized that if the concentration of PFAS decreases, unless it decreases to zero, there is no value in repeated reporting. The amended definition of “significant change” in the Third Concept Draft that deletes “or removal” is an improvement.

However, we again stress that 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).

Section 3 - Notification

Subsection A

We thank the DEP for responding to our request by updating this section to clearly articulate a used product exception in the notification obligations under Section 3. Clear exceptions for used products will help support the DEP's efforts of reducing waste and will ensure affordable apparel options remain accessible throughout the state of Maine.

We recognize DEP's efforts to ease some of the reporting burden by allowing covered entities to report by Global Product Classification (GPC) brick category and code or by Harmonized Tariff Code (HTS). However, there is still little clarity on what constitutes an individual notification. It is unclear whether notifications should be done by GPC Brick/HTS Category and then multiple CAS #s and/or concentration ranges can be associated under each GPC Brick/HTS. Or will notifications be by CAS # and then multiple GPC Bricks/HTS Categories and/or concentrations will be associated under each CAS #? Or will a HTS Category/GPC Brick plus a given CAS# be one notification?

We caution that the exact structure of the reporting will significantly impact the number of reports that need to be submitted. This last option would require an enormous number of reports – much more than would be required to meaningfully assess the sources of PFAS in the state of Maine. Additionally, the associated fees would also be immense.

We understand there is a note following 3(1)(d) stating that companies may claim confidential business information at the time of reporting. It is unclear from the way that the notification section is drafted whether the ability to claim confidential business information extends to other sections of the reporting requirement. Given that estimated sales volumes are confidential business information, we would also ask DEP to make explicit in the final regulations that such information can be claimed as confidential.

We further understand DEP is constrained by the language in the statue, but we must reiterate that the expectation that companies report the precise PFAS found in products by CAS # in their products is unworkable. CAS #s for each of the 12,000+ PFAS are not available – a fact we assume DEP is contending with as it builds out the online reporting portal.

Additionally, test methods identifying all the individual PFAS are not commercially available; our third-party testing laboratory members indicate that not more than 100 of the many thousands of PFAS can be individually identified in consumer products through currently available test methods. The draft mentions using commercially available analytical methods for determining PFAS in a product; however, the reference to the EPA methods does not contain methods for testing consumer products. It only references environmental media test methods. TOF testing is a commonly used method for consumer products and such testing provides a concentration of total PFAS but does not identify individual PFAS chemicals. We again urge the adoption of a TOF threshold, where products with a TOF below 100ppm are considered merely contaminated and excluded from reporting.

Subsection B

In the event the reporting portal is not online before those with exemptions will be required to report, we would suggest that the DEP create a fillable Word, Excel, PDF, or similar template and provide clear instructions for reporting and paying the associated fees while the portal is being built out.

Subsection C

Again, we are unaware of the test methods DEP would like manufacturers to use. DEP should furnish a definition of a “substantially similar amount” or establish an acceptable concentration range. Again, we would suggest adopting acceptable TOF concentration ranges, and that products with a TOF of less than 100ppm should be considered merely contaminated and excluded from reporting.

Subsection D

Updates to the system should only be required annually if something has changed. This will reduce the number of requests for changes DEP will need to field and limit what the system must manage as well.

Section 4 - Exemptions

We again respectfully request an exception for personal protective clothing/professional uniforms that require oil, viral, and chemical repellency. Our members have found that currently there is no replacement for polymers made with fully fluorinated carbon atoms PFAS for oil, viral and chemical repellency. Such stable barrier products are critical components in protective clothing that protects first responders against fire, bloodborne pathogens, hazardous chemicals and terrorist attacks involving chemical and biological agents such as Sarin gas or mustard gas. Additionally, our members are unable to find chemical companies that have proven non-PFAS oil and chemical repellent products.

There also 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. We urge DEP to add products that utilize recycled content and have not intentionally added PFAS post-recycling to the exemption list.

Section 8 - Certificate of Compliance

Instead of “reason to believe that” we again ask the Department to change the wording to “substantial information”. In addition, 30 days does not provide 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 suggest DEP provide at least 120 days.

We also suggest removal of the requirement of downstream notification. If the company cannot provide the certificate, the company is restricted from business in the state of Maine and DEP should instead consider posting that failure to comply on the same website where contents are reported.

Conclusion

We appreciate the opportunity to once again 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 Chelsea Murtha of my staff at cmurtha@aafaglobal.org if you have any questions or would like additional information.

Sincerely,

Stephen Lamar
President & CEO
American Apparel & Footwear Association