May 19, 2023

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

Submitted via email to rulecomments.dep@maine.gov

RE: Comments on Posting Draft: Chapter 90: Products Containing Perfluoroalkyl and Polyfluoroalkyl Substances

Dear Ms. Malinowski,

The Alliance for Automotive Innovation[1] (Auto Innovators) appreciates the opportunity to provide comments on the State of Maine's Posting Draft that would add a Chapter 90 on Products Containing Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS). Auto Innovators represents the auto manufacturing sector, including automakers that produce and sell nearly 98% of the new light-duty vehicles in the United States. Our association also includes original equipment suppliers, technology and other automotive-related companies, and trade associations. We have worked closely with our members to review the Posting Draft and assess its requirements against the availability of information that Maine is proposing to collect regarding the potential presence of PFAS in our products. Our comments reflect an in-depth assessment of Maine's current approach and identification of the very real and significant challenges and obstacles that Maine's proposal presents for nearly the entire U.S. automotive sector.

Our understanding is that this draft is being developed to implement parts of Public Law ch. 477, An Act to Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution. This law requires manufacturers of products with intentionally added PFAS to report the intentionally added presence of PFAS in those products to the Department of Environmental Protection (DEP) beginning January 1, 2023.[2] The law also prohibits the sale of carpets or rugs, as well as the sale of fabric treatments, that contain intentionally added PFAS beginning on January 1, 2023. Further, effective January 1, 2030, any product containing intentionally added PFAS may not be sold in Maine unless the use of PFAS in the product is specifically designated as a currently unavoidable use by the DEP.

On November 10, 2022, after an in-depth review of all aspects of the second concept draft, Auto Innovators submitted detailed comments as well as recommendations that would make the regulation more practical and informative for DEP and more workable for the regulated community. We would like to acknowledge that DEP has adopted some of the recommendations that we have made over the course of this rulemaking. Specifically, we appreciate the modifications recognizing that CAS numbers

[1] From the manufacturers producing most vehicles sold in the U.S. to autonomous vehicle innovators to equipment suppliers, battery producers and semiconductor makers – Alliance for Automotive Innovation represents the full auto industry, a sector supporting 10 million American jobs and five percent of the economy. Active in Washington, D.C. and all 50 states, the association is committed to a cleaner, safer and smarter personal transportation future. www.autosinnovate.org.

[2] DEP has granted many entities an extension of that reporting deadline, pursuant to the terms of the law.

are critical for identification and reporting of PFAS, adjusting the definitions of "carpet or rug," and the addition of a workable definition for "reasonably available."

While the changes that DEP has adopted are a positive step in facilitating compliance, Auto Innovators is concerned that DEP left unaddressed many of the implementation issues that we identified in the first and second concept drafts. We recognize that DEP finds itself bound by the requirements of the statute; however, DEP has the authority to, and should, interpret the text and use its professional judgment to develop a tailored regulation that promotes compliance and feasibility. For instance, DEP should write submission requirements to require data that will be relevant to understanding how PFAS are finding their way into Maine's soil and water. Just as DEP has done with CAS numbers and the definition of "carpet or rug," DEP could add further refinements that would focus data reporting for relevant sectors, products and components. Our comments identify those areas where we believe DEP has authority, and thus leeway, to better focus its data collection efforts while meeting the goal of the statute.

Where appropriate we reiterate our earlier comments and address new or revised information provided by DEP in the Posting Draft. We have classified our comments into two general areas: overarching concerns about program implementation for the auto industry, and suggested revisions to the Posting Draft text.

I. Overarching Concerns About Program Implementation for the Auto Industry

Auto Innovators has identified a number of overarching concerns about implementation of the PFAS reporting program and rulemaking that may not directly relate to the text of the Posting Draft, but are issues that we believe DEP should consider as it proceeds.

By way of background, Auto Innovators members are producing complex durable goods that require a substantial investment of the customers who purchase them. Our products are expected to meet high performance standards after meeting multiple stringent federal safety, environmental, and fuel economy regulations. PFAS are used to enable our members to meet these performance standards by providing temperature performance, flammability, electrical performance, hydrophobic, and other essential properties. PFAS are critical to the electrification of the auto industry, used in electric vehicle batteries, binders, insulation systems, and are key to the next-generation discoveries that will enable widespread adoption. Maine's four-year plan for climate action, *Maine Won't Wait*, sets a goal of 219,000 electric vehicles on the road in Maine by 2030;[3] under the current PFAS law those vehicles will not be allowed to be sold.

The automotive supply chain is complex. At the lowest component level, vehicles contain as many as 30,000 individual parts. As many as ten tiers of suppliers, located all across the globe, aid in the production of a vehicle. Design, development, and production of an automobile is a lengthy process that takes years. The development of a single model year of a vehicle takes place over several years, and models are on redesign cycles, meaning they are only updated once every few years at most. To implement a substitute chemistry or alternative process change takes several years to transmute fully across an automaker's lineup.

[3] Maine Climate Council, Maine Won't Wait: A Four-Year Plan for Climate Action (Dec. 2020), *available at* https://www.maine.gov/future/sites/maine.gov.future/files/inline-files/MaineWontWait_December2020.pdf.

A. Timing of Notification Deadline

During the stakeholder meeting held on October 27, 2022, DEP clearly stated that the requirements of the Act to Stop PFAS Pollution would go into effect regardless of whether DEP had issued final regulations or had a reporting system in place. We appreciate that DEP has granted extensions to our member companies delaying the deadline for submission of data until six months after the effective date of DEP's final implementing rule.[4] While that extension eases some of the uncertainty surrounding what type of data will ultimately be required and of whom, the fact remains that six months is an inadequate period of time to fully respond to the ultimate requirements that DEP will identify in the final rule.

Our members are working diligently to identify PFAS in products and prepare to provide information to DEP; however, depending on the level of detail and the scope of product definition that is ultimately adopted by DEP, two to three years may be a more appropriate compliance timeframe. Because the category of PFAS were not identified as chemicals of concern until the last few years, vehicle manufacturers' chemical data management systems were not closely tracking all PFAS contained in products or component parts. As stated earlier, given the global nature of our multi-tiered supply chain, we will need time to gather that information. If DEP ultimately determines that reporting may be for ranges of PFAS in the complete product, in this case an automobile, instead of each component part, less time may be required to obtain that information and submit it to DEP. The more detailed the information requirements, the more time that will be required to collect that information, especially for components sourced from foreign suppliers. For this reason, it will likely be necessary that DEP provide additional extensions to ensure the collection of reliable, more accurate data; we expect that we would apply for such exemptions.

In addition, DEP should also clarify that for companies with reporting extensions, once those extensions have expired, those companies will only need to report sales as of that point in time. Any requirement for retroactive reporting would create an additional burden and take additional time, which is better utilized by focusing on implementation going forward.

B. Exemption for Legacy Automotive Replacement and Service Parts

Federal safety law requires auto manufacturers to have available replacement and service parts for 15 years after a vehicle is manufactured[5]; those parts are routinely manufactured at the same time as the original vehicle, and then held in storage. There are millions of replacement parts in commerce that are essential to maintain and repair in-service vehicles so that they remain safe and reliable; there were 1,121,106 vehicles registered in Maine in 2020,[6] all of which will require servicing and parts replacement at some point in time. Reporting PFAS content for legacy replacement parts produced years ago but sold today would be a herculean task. Manufacturers may have changed suppliers and may no longer be working with a company, or companies may have closed or gone out of business. Regardless, information requests to suppliers for products produced several years ago would be particularly difficult, and suppliers may not be able to provide accurate data. Because manufacturers are no longer selling as new the vehicles into which those replacement parts would be installed, reporting replacement parts for those past production vehicles would increase the number of reports received by DEP by thousands. We request that DEP specifically exempt legacy service parts from reporting, either by including such an exemption in the text, or through a written determination that

[4] Letter to Catherine Palin, Alliance for Automotive Innovation, from Blazka Zgec, State of Maine Department of Environmental Protection, October 25, 2022.
[5] *See* 49 U.S.C. § 30120(a), (g).
[6] *Highway Statistics Series: State Motor-Vehicle Registrations – 2020*, U.S. Federal Highway Administration, https://www.fhwa.dot.gov/policyinformation/statistics/2020/mv1.cfm (last updated Feb. 16, 2023).

legacy service parts intended to repair vehicles that would classify as "used" should themselves also be considered "used" and exempt from reporting.

C. Treatment of Non-Legacy Automotive Replacement and Service Parts

Auto Innovators members expect that they may be required to report as soon as early 2024. At that time, per federal definitions,[7] the industry will be in the 2025 and 2024 model years simultaneously, thus new vehicles being sold will be from those model years and later. Required PFAS notifications would be done by members for those model years at the vehicle level.

With respect to non-legacy automotive replacement and service parts—that is to say, "in-kind replacement" service or replacement parts for new models of vehicles, the sale of which per the Posting Draft will also be reported to DEP—we propose that DEP consider those replacement and service parts "product components" that need not be separately reported. As mentioned above, replacement and service parts are generally manufactured at the same time as the complete vehicles; therefore, Auto Innovators expects that any exposures or environmental releases of PFAS from those parts will be very similar, if not identical to, those reported for the vehicle itself. Adopting this proposed approach for non-legacy replacement and service parts will also substantially reduce the number of reports received by DEP, resulting in a reduced workload for both DEP and manufacturers, and will reduce reporting costs, all while providing the same information required by the rule.

This also appears to be consistent with DEP's understanding, given the following language in the Posting Draft:

> *For product components for which the Department has previously received notifications, which are used in more complex products containing the reported components, the manufacturer of the more complex product shall either report PFAS in the product including its components, or refer to the notifications for product components and any PFAS in the remainder of the product.*

Automakers are intending to submit intentionally added PFAS notifications for new vehicles at the vehicle level, i.e., in a manner that includes all of the PFAS that are contained in the product and the product components. We request that DEP add regulatory text and/or otherwise provide written confirmation (such as on the Frequently Asked Questions website) of this interpretation as appropriate.

D. Availability of the Reporting System

One of the critical pieces for implementation will be the data management system that will house the huge volume of data submitted under the current requirements of the Posting Draft. DEP has been noticeably silent as to the status of that data management system. Auto Innovators understands that DEP is working with the Interstate Chemicals Clearinghouse (IC2) to develop the data management system that will allow for electronic filing of information and will subsequently allow public access to the information.

Requiring thousands of companies to submit information before a data management system has been developed and beta-tested by the user community could prove to be a fatal flaw in Maine's implementation of this program. Having in place an effective, operational data management system that

[7] *See* 40 C.F.R. § 85.2304(a).

can manage and collect information and generate data for DEP and the public is essential before reporting comes due.

Auto Innovators understands that the IC2 is working with several federal and state agencies to supply frameworks and infrastructures necessary to accept, house, and generate reports based on the data submitted from a diverse set of stakeholders from multiple states. As the IC2 makes progress, input from stakeholders including DEP staff, Maine's citizens, and the regulated community would be invaluable. Auto Innovators hereby offers to help DEP and IC2 beta-test the system, the auto industry already having had years of experience submitting information to IC2's Interstate Mercury Education and Reduction Clearinghouse (IMERC).

E. Availability of Commercially Available Analytical Methods to Identify PFAS, and Reporting Ranges

The statute requires reporting of PFAS content in a product "as an exact quantity determined using commercially available analytical methods or as falling within a range approved for reporting purposes by the department[.]" Auto Innovators wants to make clear that it is not aware of any commercially available analytical methods that could be used to accurately quantify the presence and amount of a PFAS in products and product components, such as vehicles and replacement and service parts.

After reviewing the EPA website identified in the note of the Posting Draft's definition for "commercially available analytic method," and studying the six categories of analytical methods approved for measuring the concentration of a substance or pollutant, EPA has not identified or developed any commercially available analytical method to quantify the amount of PFAS in a product.

As recently as March 2023, the White House National Science and Technology Council issued a report on PFAS acknowledging that only a limited number of analytical methods have been developed to detect PFAS, and those focus predominantly on PFAS in various media. No methods to detect PFAS in product or product components are referenced.

> All of the existing analytical methods, with the exception of EPA 1621, include a discrete list of PFAS target analytes with defined chemical structures for which the methods have been validated, which varies across methods. . . . The number of PFAS that can be quantified through targeted analysis is limited. . . Additional PFAS standards will need to be developed in order for other PFAS to be added to these method lists.[8]

Since no approved or commercially available analytical methods are available to detect and quantify PFAS in products or product components, it is not clear how Maine DEP anticipates that the regulated community will be able to fully comply or how reliable the data submitted will be. It will be necessary for manufacturers to rely on their supply chain in the limited window of time they have to obtain information, and reporting for many PFAS may be unreliable at best.

Auto Innovators believes that reporting ranges will help alleviate this issue. Therefore, we request that DEP promptly promulgate reasonable concentration ranges for all PFAS or groups of PFAS subject to notification to enable reporting. While DEP has recognized the need for range reporting, the Department has not published any indication of what those ranges might be and has indicated that those ranges will be "found in the Department's online notification system."[9] Auto Innovators requests

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[8] National Science and Technology Council, Per- And Polyfluoroalkyl Substances (PFAS) Report (March 2023), *available at* https://www.whitehouse.gov/wp-content/uploads/2023/03/OSTP-March-2023-PFAS-Report.pdf.
[9] Posting Draft at § 3(A)(1)(c)(i).

that DEP staff identify and publish those ranges at the earliest possible opportunity in order to facilitate the regulated community's development of their own internal reporting mechanisms. In the short term, those ranges could be added to the Frequently Asked Questions website.[10]

F. Duplication of Effort

In a February 1, 2021, letter to EPA Administrator Michael Regan, Commissioner Loyzim requested that EPA move ahead to address potential health and environmental challenges posed by PFAS. The letter, signed by environmental agency Commissioners from six states, recommended coordinated action at the national level:

> Each of our states has taken significant action to clean up contaminated sites, to provide safe drinking water to our residents, and to address PFAS in past and current materials and commercial products. However, each state has different regulatory authority over PFAS. This creates a patchwork quilt of approaches to dealing with PFAS that generates confusion for our residents, complexity for regulated entities, and a significant duplication of effort. To effectively address this class of "forever chemicals" will require coordinated action at the national level. [11]

As you are aware, EPA proposed and is committed to finalizing a Toxic Substances Control Act (TSCA) section 8(a)(7) data gathering rule that would collect information substantially similar to the data being requested by Maine DEP. Given Commissioner Loyzim's encouragement of EPA to help avoid duplication of effort, we would hope that DEP provided comment on EPA's proposed 8(a)(7) rule to ensure that EPA's rule would fulfill DEP's PFAS data needs. While there is no record of comments submitted by the State of Maine in EPA docket EPA-HQ-OPPT-2020-0549, we would hope that communication between DEP and EPA allowed EPA to ensure that its final rule would meet Maine's legislative mandate.

Based on the imminent release of the TSCA 8(a)(7) rule,[12] we request that DEP defer its development of a final rule until such time as it can compare the data required to be reported under the Posting Draft with the requirements in the TSCA rule, and make appropriate accommodation to address federal preemption requirements and avoid duplication of effort. As the Posting Draft states, "The Department will treat as exempt products where an applicable federal law is written with language that explicitly preempts parts of this program."[13] By taking this approach, DEP will also save considerable resources that may be prematurely invested in a system already provided at the national level.

G. Adopt a Tiered Approach to Reporting

The Posting Draft's provisions appear better suited to simple consumer products than to complex durable goods. Moving along the spectrum from a simple product to a complex product, the challenges of identifying PFAS within the product multiply. DEP should consider developing a phased-in reporting structure, with lower-complexity products reporting earlier and manufacturers of complex products

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[10] *PFAS in Products*, Maine Department of Environmental Protection, https://www.maine.gov/dep/spills/topics/pfas/PFAS-products/index.html#.

[11] Letter from Melanie Loyzim, Acting Commissioner of Maine Department of Environmental Protection, *et al.* to Michael Regan, Incoming Administrator, U.S. Environmental Protection Agency, Feb. 1, 2021, *available at* https://www1.maine.gov/dep/spills/topics/pfas/PFAS-Letter-to-EPA-Feb-1-2021.pdf.

[12] EPA has reported in public forums that the rule is currently in intra-agency review prior to submission to the Office of Management and Budget.

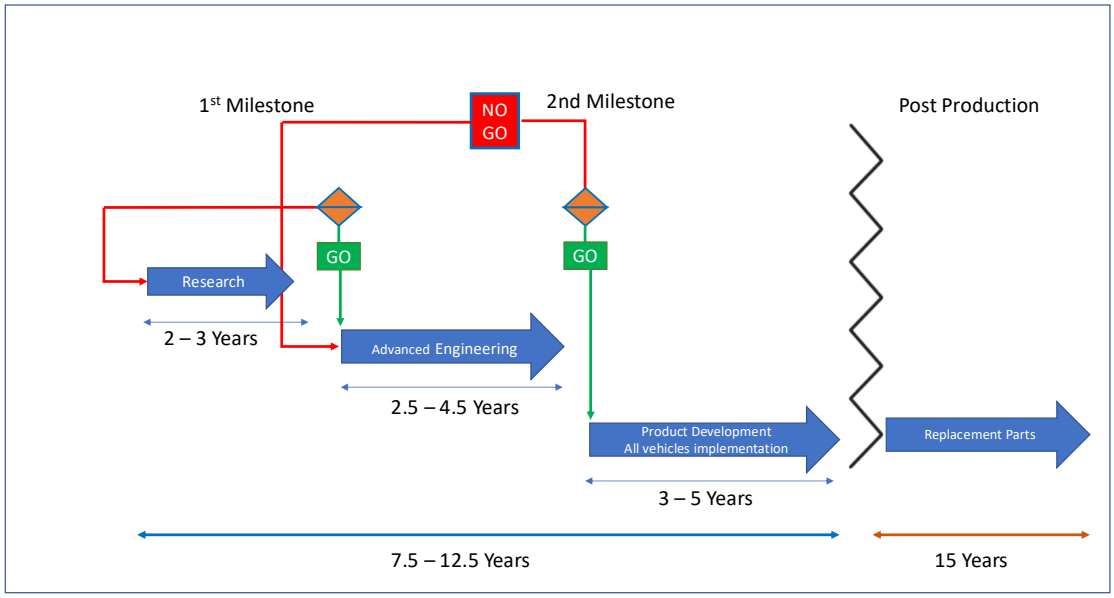
[13] Posting Draft, note at section 4.A(1).

reporting later. DEP could adopt a definition of complex durable goods similar to the TSCA definition.[14] This would permit DEP to incorporate lessons learned from early reporting of less complex products into the reporting procedures for more complex products and properly scale the required IT infrastructure for the online electronic portal. One option would be to allow manufacturers of complex goods to identify whether their product does or does not contain PFAS (a simple "yes" or "no") for the first two years, with more detailed reporting to follow in the subsequent years. This is not meant in any way to undercut the collection of PFAS data, but rather to find a feasible, practical way to implement the law in a manner consistent with industry's capabilities.

H. Currently Unavoidable Use Determinations

Auto Innovators anticipates that it and/or many of its members will be applying for a currently unavoidable use determination. As we have explained, identifying and replacing PFAS in any of our vehicles' components will take at a minimum three to five years, and phasing out PFAS from all vehicles by 2030 is likely near-impossible as viable alternatives for all vehicular uses have not been developed. The timeframe to phase out the use of a chemical in the auto industry is presented below. As can be seen, Maine DEP's timeframe would create an unworkable situation for the automotive sector.

Chemical Phaseout Timeline



We would like to take this opportunity to request that DEP outline the process to apply for an unavoidable use designation as soon as possible. This process and any associated regulation must be in place well in advance of the 2030 ban of PFAS in products so as to enable industries to plan and petition for an unavoidable use designation.

Given how critical the rulemaking allowing companies to apply for an unavoidable use designation will be, Auto Innovators requests that DEP outline either in this regulation or in its Frequently Asked

[14] "[T]he term 'complex durable goods' means manufactured goods composed of 100 or more manufactured components, with an intended useful life of 5 or more years, where the product is typically not consumed, destroyed, or discarded after a single use." 15 U.S.C. § 2605(c)(2)(D)(ii).

Questions website its timeline for implementing a rulemaking. We recommend that rule define the process for obtaining a currently unavoidable use designation as well as the information or data that will be required to support an application. We also recommend that DEP include language in that rulemaking that delays any product bans for six months to one after DEP finalizes an unavoidable use designation rule, to allow manufacturers to apply for an unavoidable use designation before any product bans would be in effect.

DEP has previously indicated that after completing this rulemaking on reporting, it will begin the rulemaking on currently unavoidable use determinations. Auto Innovators believes that to keep regulatory work implementing the PFAS law moving at a reasonable pace, DEP should start stakeholder meetings on that rule within 6 months of concluding this rulemaking, and should make clear that product bans will not be put in place while a rule on requesting an exemption is pending.

I. Collecting Environmentally Relevant Data

The stated intent of the legislature in developing the PFAS in products law was "to address the imminent threat of further contamination of **soil and water** in the State."[15] As explained above, automobiles are assembled from thousands of individual components that have been manufactured either domestically or by overseas suppliers. These components, which may contain minute quantities of various PFAS, do not release those chemicals into the soil or water during the assembly process or as a result of sales within the state of Maine. Small quantities or residues of chemicals used during the manufacturing process usually remain tightly bound in the article itself. Routine and usual use by consumers of complex durable goods such as automobiles does not result in substantial release of PFAS to the environment. It is not until a complex durable good reaches the end of its useful life that release of PFAS may occur, potentially during recycling, landfilling, or other disposal. Unlike products such as firefighting foams, where substantial quantities of PFAS may enter the environment during intended use, no such releases occur from automobiles.

Therefore, we suspect that a wealth of information on PFAS contamination in soil and water can be found from data on disposal sites and recycling facilities. It is these types of facilities where releases of PFAS from complex durable goods like vehicles would occur, and may result in leaching into the soil or water. Knowing if and how much of a PFAS may be in any of the thousands of parts in an automobile will not provide Maine with the information it needs to support the goals of the statute. The types of data that would better inform DEP of the potential sources of PFAS entering the water and soil would include the following:

- Data that will be collected from the EPA proposed TSCA 8(a)(7) rule.
- Data from the Federal Toxics Release Inventory (TRI), detailed information from domestic facilities that manufacture, process, or use listed chemicals, including a large set of PFAS. This data includes air, land, and water releases.
- Data that will result from EPA's proposed designation of certain PFAS as CERCLA hazardous substances, requiring reporting of PFOA and PFAS releases (proposed rule August 2022**,** final rule expected summer 2023).
- Review and updating of permit limitations for landfills and other waste management facilities.
- Data collected pursuant to MRSA Title 30-A, section 3001 and 3755, Maine's "Junkyard and Automobiles Graveyards" law.
- Rulemakings under the Resource Conservation and Recovery Act to address PFAS.

[15] Pub. L. ch. 477 at preamble (emphasis added).

We expect that the reported presence of PFAS in vehicles and vehicle parts will provide little meaningful data to DEP. Recycling and disposal facilities are better positioned to provide more accurate data on what chemicals are released from their facilities. We recommend that DEP also mine the available data from the above sources to determine if collectively they might provide a significant amount of information on the sources of PFAS in Maine.

J. Classification as a "Routine Technical" Instead of "Major Substantive" Rulemaking

The legislature has classified this rulemaking as a "routine technical rule" under Maine's Administrative Procedures Act, as opposed to a "major substantive rule."[16] The definitions of each are as follows:

> **Routine technical rules** are procedural rules that establish standards of practice or procedure for the conduct of business with or before an agency and any other rules that are not major rules as defined [below]. Routine technical rules include, but are not limited to, forms prescribed by an agency; they do not include fees established by an agency except fees established or amended by agency rule that are below a cap or within a range established by statute.
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> **Major substantive rules** are rules that, in the judgment of the Legislature:
> (1) Require the exercise of significant agency discretion or interpretation in drafting; or
> (2) Because of their subject matter or anticipated impact, are reasonably expected to result in a significant increase in the cost of doing business, a significant reduction in property values, the loss or significant reduction of government benefits or services, the imposition of state mandates on unites of local government as defined in the Constitution of Maine, Article IX, Section 21, or other serious burdens on the public or units of local government.[17]

We recognize that this designation was chosen by the legislature and is enshrined in the statute. However, we would like to note that we believe this regulation will result in a significant increase in the cost of doing business in the state of Maine, and should have been classified as a major substantive rulemaking. Companies will undertake large cost to collect data and file reports pursuant to this rulemaking, expending many man-hours to contact suppliers throughout the supply chain. On July 18, 2022, when we submitted our comments on the first concept draft, we also attached our comments on EPA's proposed TSCA section 8(a)(7) rule, which included an analysis of the economic impacts of reporting PFAS under that rule, and many parallels can be drawn to reporting in Maine. We believe that this rulemaking should have been classified as major substantive so that it could be more closely scrutinized and so that the legislature would have a final review and authorization of the rule, because of its sizeable economic impacts.

II. Suggested Revisions to Posting Draft Text

We recommend a number suggested revisions to the text of the Posting Draft and other comments that we believe will add clarity for the regulated community. We offer those suggestions in the order they appear in the Posting Draft.

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[16] 38 MRSA § 1614(10)*; see also* the Rulemaking Fact Sheet, *available at* https://www.maine.gov/dep/rules/index.html#10415809.
[17] 5 MRSA § 8071(2).

A. Definitions

Auto Innovators appreciates that DEP has revised key definitions to better focus and clarify its notification regulation. Several definitions continue to remain unclear or undercut the efficacy of the reporting program.

1. Carpet or Rug

"Carpet or rug" means any consumer product made from natural or synthetic fabric marketed or intended to be used as a floor covering inside commercial, industrial, or residential buildings. This includes carpeted door mats intended for indoor use.

We thank DEP for including in the Posting Draft the clarification that "carpet or rug" includes only floor coverings inside of buildings and strongly encourage the Department to keep that definition in the final rule.

2. Currently Unavoidable Use

"Currently unavoidable use" means a use of PFAS that the Department has determined by rulemaking to be essential for health, safety or the functioning of society and for which alternatives are not reasonably available. In determining whether a use is currently unavoidable, the Department will apply a risk-based approach that considers hazards and exposure potential as well as the availability of functional and cost-effective alternatives.

The statute bans the sale of all products containing intentionally added PFAS after January 1, 2030, unless DEP has determined by rule that the use of PFAS in the product is a currently unavoidable use.[18] Whether PFAS can be phased out in a particular product depends on the functionality of the PFAS and potentially available alternatives to meet that functionality. DEP should take a risk-based approach to determining which uses should in fact be prohibited, and which should receive a critical use exemption. Auto Innovators recommends that language be added to the definition of "currently unavoidable use" to indicate that DEP will utilize a risk-based approach that includes assessing the hazard and exposure potential of the PFAS and will include a serious consideration of the availability of alternatives.

3. Essential for the Health, Safety or Functioning of Society

"Essential for Health, Safety or the Functioning of Society" means products or product components that if unavailable would result in a significant increase in negative healthcare outcomes, an inability to mitigate significant risks to human health or the environment, or significantly interrupt the daily functions on which society relies. Products or product components that are Essential for Health, Safety or the Functioning of Society include those that are required by federal or state laws and regulations. Essential for the Functioning of Society includes but is not limited to climate mitigation, critical infrastructure, delivery of medicine, lifesaving equipment, transportation, and construction.

The definition of "essential for health, safety or the functioning of society" is a critical one as it will form the basis of unavoidable use exemptions. As presented in our testimony at the public hearing on April 20, 2023, we request that Maine DEP replace the term "public transport" with the word "transportation."

[18] 38 MRSA § 1614(5)(D).

Use of the term "public transport" overly narrows the interpretation of essential for health, safety or the functioning of society; we expect that outside of cities like Bangor, Lewiston, or Portland, personal vehicles are key for transportation (and thus the functioning of society) as public transport may not be available. It is noteworthy that in Gov. Janet Mills's Executive Order Regarding Essential Businesses and Operations of March 24, 2020, in the early days of the COVID-19 pandemic, gas stations and auto repair businesses were deemed essential—signifying that functional personal transportation is critical to the operation of society.[19] If this definition remains unchanged, our industry's ability to apply for an unavoidable use designation may be harmed.

4. Intentionally Added PFAS

"Intentionally added PFAS" means 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. ~~Intentionally added PFAS also includes any degradation byproducts of PFAS serving a functional purpose or technical effect within the product or its components~~. Products containing intentionally added PFAS include products that consist solely of PFAS. Intentionally added PFAS does not include PFAS that is present in the final product as a contaminant.

DEP should remove byproducts from the definition of "intentionally added PFAS" to ensure that PFAS created as a byproduct are not included under this regulation. Byproducts, impurities, and contaminants would never be intentionally added to a product. Byproducts are generally exempt from other regulatory schemes. For example, impurities and byproducts are exempt from EPA's Premanufacture Reporting Notification (PMN) reporting.[20] In addition, a byproduct that is not used for a commercial purpose after it is manufactured was not required to be listed on the TSCA Inventory.[21] Requiring companies to gather information on byproducts to assure compliance with a data collection requirement would force producers, importers, and suppliers to expend substantial resources and a significant amount of time with very little, if any, environmental benefit. Therefore, we ask that DEP make the above modification to the definition of "intentionally added PFAS."

5. Perfluoroalkyl or Polyfluoroalkyl Substances

"Perfluoroalkyl and polyfluoroalkyl substances" or "PFAS" means substances that include any member of the class of fluorinated organic chemicals containing at least one fully fluorinated carbon atom and that have a Chemical Abstracts Service number, excluding refrigerants and fluoropolymers.

NOTE: The EPA maintains a webpage of chemicals that have been identified as PFAS (available at: https://comptox.epa.gov/dashboard/chemical-lists/pfasmaster) which provides clarity on what is considered a PFAS. Any product sold, offered for sale, or distributed for sale in the State of Maine which contains intentionally added PFAS must be reported to the Department regardless of whether the substance is found on any list.

NOTE: 38 M.R.S. § 1614 requires notification of intentionally added PFAS by CAS number, therefore chemicals which do not have CAS numbers assigned are not subject

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[19] *Available at* https://www.maine.gov/governor/mills/sites/maine.gov.governor.mills/files/inline-files/An%20Order%20Regarding%20Essential%20Businesses%20and%20Operations%20_0.pdf.
[20] 40 C.F.R. § 720.30(h).
[21] 40 C.F.R. § 710.4(d)(2).

to this Chapter. ~~*However, chemicals that do have CAS number assigned but are withheld by other persons or are otherwise unavailable are subject to this Chapter.*~~

The definition of PFAS is arguably one of the most critical definitions in this regulation. Therefore, we have comments on several different elements of this provision.

First, we support DEP's interpretation that chemicals that do not have CAS numbers are not subject to the regulation and urge the Department not to change it. In fact, because of the importance of this clarification, we request that it be added to the definition itself, as suggested above. DEP should also define the regulated PFAS with a list of chemical names and CAS numbers. That would clearly define the universe of chemicals that require notification and further clarify reporting requirements.

Auto Innovators also requests that DEP provide further guidance on how they expect the regulated community to report on PFAS that have a CAS number but "are withheld by other persons or are otherwise unavailable." What due diligence is required to seek out PFAS that may be present in a product but are claimed as confidential business information (CBI) by the supplier or other entity or covered by non-disclosure agreements? We anticipate that this may be a difficult request to comply with, and we request that instead DEP eliminate that part of the note as shown above.

DEP should also exempt fluoropolymers and refrigerants[22] from the definition of PFAS, as shown above. The current definition of PFAS being used by DEP includes the refrigerants that are used in motor vehicle air conditioning (MVAC) applications. Those refrigerants are already the subject of regulations covering hydrofluorocarbons (HFCs) at both the state and federal levels; in fact, those regulations have resulted in the industry undertaking over the past several years the behemoth task of transitioning from one type of refrigerant to another that has a lower global warming potential. Banning use of the refrigerant now currently used in our vehicles, as the Maine PFAS law will do, would require OEMs to have an available alternative that is also approved by all of those HFC regulations, and would result in OEMs having to significantly redesign and reengineer our recently revamped MVAC systems and vehicles, possibly even with a need to retrofit older vehicles. Similarly, fluoropolymers satisfy widely accepted criteria to be considered polymers of low concern, indicating that they do not present a significant risk to human health or the environment. For this reason, fluoropolymers should be regulated differently from PFOA and PFAS. The definition of PFAS needs to be revised to exempt these substances.

B. Notification Requirement

Auto Innovators makes two recommendations for the notification provision. First, that DEP add a "known or reasonably ascertainable" standard; and second, that DEP add a *de minimis* exemption for reporting.

1. "Known or Reasonably Ascertainable" Standard

Auto Innovators recommends that DEP add a "known or reasonably ascertainable" standard to its notification requirement, as shown below.

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[22] We recognize that DEP has stated that "[c]loser to 2030 the Department may undertake an investigation to determine if refrigerants are, at that time, a currently unavoidable use." *PFAS in Products*, supra. However, in order to provide certainty to the regulated community, we recommend that these substances be exempted from the definition of PFAS.

3. Notification.
A. Beginning January 1, 2023, a manufacturer of a product for sale in the State that contains intentionally added PFAS shall submit to the Department a notification. This section does not apply to used products.
(1) A notification under this section must include:
. . .
(c) The amount of each of the PFAS as a concentration, identified by name and its chemical abstracts service (CAS) registry number, of each PFAS in the product or any product component reported as an exact quantity determined using commercially available methods, or as falling within a range approved by the Department, to the degree known or reasonably ascertainable;

Manufacturers of products subject to the notification requirement should be able to rely solely on documents or information provided by suppliers and the supply chain to determine whether such products contain intentionally added PFAS, especially in light of the lack of available testing noted above. If a supplier informs the manufacturer that the components, parts, or other elements they purchase that are incorporated into their products do not contain PFAS, a manufacturer should be able to rely on that information in the absence of contrary evidence. The notification requirement should make clear that a manufacturer's inquiry regarding PFAS content with respect to any supplier ends with the existing information provided to manufacturers by suppliers for parts, components, etc.

It would be unreasonable for the notification rule to require manufacturers to conduct a burdensome due diligence effort essentially to prove what they already believe, i.e., the absence of intentionally added PFAS in parts and components that go into their products. Prior to Maine's law, most manufacturers had little reason to collect extensive information from their domestic and foreign suppliers about the presence of intentionally added PFAS in the components and parts they purchase and use in the manufacture of their products. Automotive manufacturers typically have complex global supply chains, and each product can have thousands of individual parts and components sourced from a variety of suppliers. We recommend that Maine DEP limit the notification requirement to instances where the presence of intentionally added PFAS is "known" to manufacturers. What is "known" to manufacturers should be limited to information provided by their component and parts suppliers without any requirement to perform additional due diligence or other information gathering up the supply chain.

2. *De Minimis* Exemption

Auto Innovators recommends that DEP add a *de minimis* exemption to its notification requirement, as shown below.

3. Notification.
A. Beginning January 1, 2023, a manufacturer of a product for sale in the State that contains intentionally added PFAS shall submit to the Department a notification. This section does not apply to used products.
. . .
H. If a product contains a PFAS in a concentration below 0.1 percent of the mixture by weight, that PFAS is not required to be notified.

We recommend that the notification requirement exclude reporting for a PFAS present at less than 0.1% by weight. Products with *de minimis* levels of PFAS account for insignificant contributions of PFAS in the environment. A 0.1% by weight threshold is an appropriate threshold for DEP to employ for purposes of the notification requirement. It would reasonably limit the volume of notifications and amount of data collected, particularly for parts and components sold into Maine. Otherwise, Maine DEP

could be burdened with literally hundreds of thousands of notifications related to products that contain only minimal concentrations of PFAS, which would be insignificant from a safety and health perspective.

The automotive industry parts database (the International Material Data System, or IMDS) utilizes a default *de minimis* 0.1% reporting threshold, unless otherwise specified, which is the level utilized for Safety Data Sheets. IMDS is used throughout the global automotive supply chain to collect and analyze all parts and materials on the vehicle at the point of sale, including replacement parts. It provides analysis capabilities of the substances present in vehicles and vehicle components. IMDS manages the aggregated data tiered suppliers proactively send up through the complex supply chain. The use of a 0.1% *de minimis* concentration will support the accuracy of the data provided by the supply chain to the material database. The 0.1% concentration is a threshold that has been almost universally adopted by international regulatory bodies and many states within the United States. Therefore, we recommend an exemption for PFAS present at or below 0.1%.

In addition, promulgating a notification rule without a *de minimis* threshold would overly burden the supply chain. All product manufacturers that sell any goods into Maine would be required, in the absence of a *de minimis* threshold, to spend considerable time and effort to attempt to determine whether any product component, whether sourced locally or globally, might contain a small concentration of PFAS. Those manufacturers would also need to determine whether the PFAS was "intentionally added," which based on the current definition must likely be assumed, and the specific purpose and amount of PFAS. This expansive data gathering would place an enormous burden on manufacturers to try to obtain from their suppliers, some of which are second, third, etc. tier suppliers—information that would be difficult, if not impossible, to obtain.

3. Contact Person and Responsible Official

The Posting Draft requires a manufacturer to provide the following information as part of notification:

> *3. Notification.*
> *A. Beginning January 1, 2023, a manufacturer of a product for sale in the State that contains intentionally added PFAS shall submit to the Department a notification. This section does not apply to used products.*
> *(1) A notification under this section must include:*
> *...*
> *(d) The name and address of, and a contact person for, the reporting manufacturer, and the name, address, email address, and phone number of a responsible official for the manufacturer. The responsible official provided must have the authority to execute or direct others to execute the steps in Section 8 below.*

We recommend that DEP allow for separation between a contact person and a responsible official, as noted above. The person responsible for supplying PFAS information to DEP may not be the same person who would have the described authority during a noncompliance situation.

4. Requested Clarifications on Notification Provisions

Auto Innovators requests clarification, either in the final rule or the Frequently Asked Questions website, of what information and process DEP is expecting with respect to the following provisions.

Unless an alternative category is approved under Subsection C below, if neither GPC code nor HTS number is applicable, products or product components must be registered individually by name and with sufficient information, such as stock keeping unit (SKU), to differentiate them from similar items or items with different compositions.

The referenced Subsection C allows the submitter to propose a category for reporting that is seemingly similar to the "sufficient information" mentioned in this paragraph. We request that DEP clarify (1) whether these two things are interchangeable, and (2) whether the proposal of a category occurs at the time of reporting and whether the electronic system will account for that.

When reporting by range is appropriate and the submitter chooses to use a category approach, the draft states:

The Department will review the proposed category to determine its reasonableness and either approve or deny the proposed category. During the Department's review the manufacturer will be considered in compliance with the requirements of Section 3 so long as they have submitted all required information.

We ask that DEP clarify how will this review be initiated and what criteria DEP will use to make its determination. It is unclear as to whether the category should be proposed at the time of notification or at some time prior to submission of data.

5. Claiming Confidential Business Information (CBI)

It is currently unclear from the Posting Draft how, in a practical manner, a manufacturer could assert a CBI claim or trade secret, or how that protection would be executed by DEP. The data reporting system must allow manufacturers to claim certain data for products or components as CBI. This is especially important for manufacturers that have had to enter into non-disclosure agreements with suppliers; in such a case, quite simply, the reporting manufacturer may not have ownership over the CBI such that it has the right to be sharing that information with third parties like DEP. This is also particularly key if DEP or the legislature require manufacturers to report sales volumes, which can be considered highly sensitive competitive information. Other information that might require careful protection could include (for example) the identity of any PFAS present in a product, the volume and concentration of such a substance, and any information relating to sales volumes or production volumes.

A well-defined CBI framework for all notification and future submissions (e.g., critical use exemption requests) will be essential for the protection of valuable intellectual property that might otherwise be jeopardized. We acknowledge that DEP has made note of the need for CBI provisions, and we urge DEP to adopt highly protective and enforceable CBI protections in the text of the final rule—not solely in a note. The disclosure of trade secrets by DEP, whether intentionally or inadvertently, would give rise to significant legal and practical concerns.

C. Regulatory Prohibition on Sale of Products Containing Intentionally Added PFAS

In Section 5 of the Posting Draft, DEP reiterates the 2030 ban of sales of products containing PFAS that is enshrined in the statute. However, Auto Innovators asks that DEP modify the Posting Draft text to accurately replicate the statutory provision, as shown below.

C. Effective January 1, 2030, a person may not sell, offer for sale, or distribute for sale in the State of Maine any product that contains intentionally added PFAS, unless the

> *Department has determined by rule that the use of PFAS in the product is a currently unavoidable use. The department may specify specific products or product categories in which it has determined the use of PFAS is a currently unavoidable use. This prohibition does not apply to the sale or resale of a used product.*

As mentioned above, the auto industry will likely be applying for a determination that PFAS use in vehicles is a currently unavoidable use. Therefore, it is critical to us that DEP's final regulation includes all elements of the statutory provisions discussing potentially exempting products from the sales prohibition.

D. Fees Provisions

The note that appears in the Fees section should be modified so that it does not interfere with the above-suggested treatment of vehicle parts as product components. That section of the note reads:

> *A separate notification and fee are only required for product components when they are offered or distributed in Maine without the intent to be incorporated into a more complex product.*

Motor vehicle parts are sold with the intent that they will be incorporated in a more complex product. Dealerships, for example, will sell customers a part and at the same time or shortly after, might install that part into the vehicle. Similarly, we expect that auto parts as a consumer product have little value or utility unless and until they are installed in the vehicle. Therefore, we recommend the above modification of the note.

E. Failure to Provide Notice

In a comment that piggybacks on the discussion in section II.C. just above, in the Failure to Provide Notice section, DEP provides information on requesting a critical use exemption in a manner that it may not intend. Our recommended edit is below.

> ~~(2) The Department may exempt a product from the prohibition under this subsection if the Department has determined that the use of PFAS in the product is a currently unavoidable use.~~

The statement itself is somewhat true: under the PFAS law, the Department can exempt a product from the 2030 sales prohibition if the use of PFAS in the product is a currently unavoidable use. However, the effect of including that modifier under the provision establishing that a manufacturer that does not notify the presence of PFAS in their products cannot sell them in Maine is that a manufacturer can fail to notify DEP of the presence of PFAS in the product but can still sell the product in the state of Maine if they receive a critical use exemption. We are not sure that the Department intends that outcome. Therefore, we recommend that this exemption sentence be deleted from the Failure to Provide Notice section 7 and instead be placed in the Prohibition section 5, as noted above in II.C.

III. Conclusion

As indicated by our comments, Auto Innovators and its members will be significantly impacted by the requirements currently outlined in this rulemaking. Our comments are not intended to undermine the intent of the authorizing legislation but rather to point out the challenges that some of the reporting requirements and proposed processes and timeframes will pose for both DEP and the regulated community.

It is imperative that DEP give serious consideration to the overall scope of this data collection effort, and that it work to craft a final regulation that puts into place a workable reporting program. Auto Innovators believes that collecting data for complex durable goods such as automobiles and replacement and service parts essential to the maintenance and safety of those vehicles will be a very time-intensive and difficult undertaking, and will offer little information to advance the intent of the legislation. As we have described, we expect that there is no release of PFAS to soil or water from automobiles during their years or decades of routine use.

As we have been assessing our ability to meet the requirements laid out in the Posting Draft, Auto Innovators members and other industry interests have begun to explore which vehicle components may contain PFAS, the identities of those chemicals, and how the auto industry could potentially approach reporting—particularly given the provisions in the Posting Draft on reporting categories of products and ranges of PFAS. We have developed a proposed reporting approach that relies on many of the recommendations we have made in these comments and the information that we have available to us through the International Material Data System, a searchable database unique to the automotive sector that tracks the presence of many regulated chemicals in vehicles. We request that DEP provide us with the opportunity to meet with DEP staff prior to the finalization of this proposed rule to discuss our proposed approach to data submission and share other insights and information learned from going through this exercise. I can be reached at the below contact information to schedule such a meeting.

The auto industry is large and complex; we are responsible for roughly 5% of America's GDP, we support a total of roughly 9.6 million American jobs, and last year we sold around 13.3 million new vehicles. In Maine, we make up about 4% of the state's GDP, employ about an equal share of the state's workforce, and in 2018 we sold roughly 70,500 new vehicles.[23] It is difficult to explain here all of the intricacies of our business impacted by the Posting Draft and the PFAS law, and we would welcome the opportunity to answer any questions that arise and discuss with you in greater detail.

Sincerely,

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[23] *See Autos Drive Maine Forward*, Alliance for Automotive Innovation, https://www.autosinnovate.org/resources/insights/me; and The Driving Force: Merging Innovation and Policy, Alliance for Automotive Innovation, *available at* https://www.autosinnovate.org/resources/papers-reports/Driving%20Force%20Annual%20Report.pdf.