Consumer Technology Association™

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Mark Margerum
Maine Department of Environmental Protection
17 State House Station
Augusta, Maine 04333-0017

Re: Consumer Technology Association Comments on Draft Rule for Chapter 90: Products Containing Perfluoroalkyl and Polyfluoroalkyl Substances

Dear Mark Margerum**,**

On behalf of the Consumer Technology Association (CTA), we respectfully submit these comments on Chapter 90: Products Containing Perfluoroalkyl and Polyfluoroalkyl Substances (Draft Rule). This Draft Rule to implement the Act to Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution (the Act) 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.

We appreciate the opportunity to provide comments on the Draft Rule and welcome continued dialogue with the Department of Environmental Protection (DEP) on this matter. We also recognize that the state legislature is currently discussing several proposals this session that may alter the Act, the Draft Rule, and the issues we discuss below. If the Act does change, we ask that DEP quickly engage with stakeholders and explain how it may impact their rulemaking and timelines.

Extension of Notification Timeline

We respectfully ask that the Department issue an extension for complex articles including electronic and electrical products for compliance with the notification requirement. The reporting deadline was January 1, 2023 and DEP's current rulemaking process is likely to extend late into this year. However, manufacturers still do not know exactly what information will be required and how to provide that information to the Department. We encourage DEP to issue a blanket extension for all manufacturers of electronic products and products with electronic components. The Maine Legislature, also recognizing the need for additional time, has passed LD 217 through the Environment and Natural Resources committee which extends the statutory notification time for all products to January 1, 2025.

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 go through this process through multiple levels of the value chain.

The Environmental Protection Agency is currently considering rules[1] on reporting and recordkeeping regarding PFAS substances. As we commented to EPA before[2], manufacturers of articles estimate it can take six to 12 months to track a single chemical through the supply chain. 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 10,000 chemicals. With this law, DEP is requiring manufacturers to greatly increase the tracking and reporting of materials information within just a few months.[3]

Until the Department completes its rulemaking, manufacturers cannot know exactly what information will be needed. 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 – issues which we address in further detail below. 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 only on substances already regulated in other jurisdictions, a 48-month extension from the effective date of this rulemaking may be sufficient to comply with notification requirements. However, if the Department does require notification on over 10,000 PFAS chemicals with no threshold limits, with the vast majority not regulated to this degree previously in other jurisdictions, and with limited laboratory testing capacity both in the US and globally, it is impossible to say how many years it would take for manufacturers to gather that information. Given the complexity of the issue and the extensive reporting the law requires, we respectfully ask that the Department grant an extension to the electronics sector for 48 months.

The Draft Rule Does Not Adequately Protect CBI and Trade Secrets

It is currently unclear how, practically, a notification entity could assert a CBI claim or trade secret under the Draft Rule. A well-defined CBI framework for all notification and future rulemaking (e.g. determinations of essential uses) will be essential for the protection of valuable intellectual property that might otherwise be jeopardized. We acknowledge that

[1] https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/tsca-section-8a7-reporting-and-recordkeeping

[2] https://www.regulations.gov/comment/EPA-HQ-OPPT-2020-0549-0087

[3] 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

DEP has made note of the need for CBI provisions and we urge DEP to adopt highly protective and enforceable CBI protections in its final rule.

The technology sector treats the chemical composition of materials as proprietary information that is carefully protected and of significant commercial value. DEP's regulations should contain explicit language explaining how manufacturers would provide the reporting information to DEP, how DEP will determine what CBI data may be withheld or provided in a generic/sanitized manner, and how that information will be stored and ultimately protected from unlawful disclosure to third parties.

The Act does not require disclosure to the public of any information notified to DEP. We request that DEP explicitly protect from disclosure under Maine's Freedom of Access Act information such as a manufacturer's production and sales volume data, the volume and concentration of PFAS in a product, and any information relating to sales volumes or production volumes. Additionally, we request that DEP confirm these protections as part of this rulemaking.

We also respectfully request that the rulemaking include robust provisions that will allow protection of CBI and trade secrets through the use of generic chemical names and broad chemical ranges in any information that is released to the public. The EPA's proposed rule to centralize CBI claims under TSCA may serve as a model.[4] In order to provide certainty to the regulated community, the EPA proposed rule identifies specific information that submissions must include and the type of information that could qualify as confidential and, thereby, be shielded from disclosure under the Freedom of Information Act or other means. Maine should consider doing similarly.

Sales information, particularly future sales projections, if required by DEP, should also be protected from disclosure. CTA has significant reservations with the obligation for companies to report sales data. If sales data reporting is to be required, it should be limited to aggregated data within a past year and not include future forecasts. Recent historic sales data should be explicitly protected as CBI by DEP. We encourage DEP to develop strategies that would aggregate any sales data by product categories or across industry members through third party reporting.

The Draft Rule Must Establish a De Minimis Reporting Threshold

The electronics industry is concerned that the Draft Rule is silent on de minimis reporting thresholds. The lack of a minimum threshold for PFAS in products will make it difficult for manufacturers to properly comply with the Act. The Act is focused on the notification and prohibition of intentionally added PFAS chemicals, and adding a minimum threshold will avoid unnecessary reporting of byproducts and impurities in products.

We respectfully ask that the Department include in their rulemaking a threshold consistent with other jurisdictions' chemical reporting and restriction requirements. EU REACH provides 0.1% by weight threshold for substances of very high concern and Candidate List

[4] 87 Fed. Reg. 29078 (May 12, 2022) https://www.federalregister.gov/documents/2022/05/12/2022-09629/confidential-business-information-claims-under-the-toxic-substances-control-act-tsca

substances, above which suppliers of articles must provide to their customers relevant information on the substances in the products they sell. This threshold provides a rational, reasonable level that promotes the safe use of substances of high concern without overly burdening the supply chain by requiring excessive and destructive testing to determine whether trace amounts of these substances are present in articles. A threshold would also help ease the burden on DEP by preventing thousands of notifications related to parts and components that contain only trace amounts of PFAS.

The Draft Rule Must Contain Reporting Concentration Ranges

Compliance with the notification requirement for many PFAS substances will be impossible without ranges promulgated by DEP because there is no commercially available methodology for identifying an exact quantity of PFAS. In §1612(2)(A)(3), the Act specifically authorizes the Department to approve reporting ranges and the Draft Rule also mentions the ability to approve of ranges. However, without knowing those ranges in advance, manufacturers have no way to plan for using them. We ask that DEP provide these ranges well in advance of the notification deadline. As part of this rulemaking, DEP should specify concentration ranges for all PFAS or groups of PFAS subject to notification. Disclosing chemical concentration in ranges has been a long-established practice in other regulatory regimes such as the Globally Harmonized System of Classification and Labeling of Chemicals for Composition and Information on Ingredients, EU SCIP reporting, and EU REACH. We encourage the Department to consider reporting ranges already used under TSCA.

The specific amount of PFAS in each individual product within a product category will vary, meaning that without any reporting ranges it will be impossible for a manufacturer to comply by reporting by product category. The Draft Rule, in Section 3(C)(3), states that reporting of multiple products is allowed when the PFAS present is in "a substantially similar amount." Without reporting ranges, it is difficult to know what the Department might consider "a substantially similar amount." We also encourage the Department to define "substantially similar amount" clearly in its rulemaking.

The Draft Rule asks that manufacturers provide the amount of PFAS as a concentration but does not define how to calculate that concentration within a product or component. The Department should also define this clearly. Additionally, we request that manufacturers have the option to report the amount of PFAS as a weight, and not just a concentration. Having to calculate the concentration could add another layer of complexity in ensuring that accurate information is reported to DEP. Therefore, we encourage the Department to allow for the PFAS to be reported on a weight basis as well.

Notification

- **Notification of PFAS with CASRNs:** We strongly encourage DEP to issue a list of PFAS that are subject to the rule. Without a specified list of chemical names and CAS numbers, tracking a class of thousands of chemicals is incredibly difficult. We also recommend that reporting also be allowed by PFAS group instead of only by discrete PFAS substance.

- **"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[5] as well as the standard EPA proposed for its PFAS reporting rule. Under this standard, as long as a manufacturer exercises an appropriate level of due diligence and accurately reports what it knows or learns, it has complied with the reporting requirement. DEP should expressly harmonize the Draft Rule to mirror this standard.

- **New Products on the Market:** Starting January 1, 2023, the Act requires notification for products which are sold, offered for sale, or distributed in the State of Maine. However, the Draft Rule offers no guidance on when notification must take place for new products. We recommend that DEP allow at least one month after a new product is offered for sale in Maine for manufacturers to submit notification.

- **Notification on Purpose for PFAS Use:** Section 3(A)(b) of the Draft Rule requires manufacturers to provide the purpose for which PFAS is used in a product. It is unclear what level of detail DEP will require to specify the purpose of the chemical. Detailed and specific information on functions that chemicals serve in finished products is highly technical and is often proprietary for material or component suppliers and may not be available to finished product manufacturers.

- **DEP Should Provide Clarity on Reporting Platform and Mechanisms:** There is a high degree of uncertainty among manufacturers on a large number of procedural details on exactly how and what data will be required for reporting. A lot of these details will not be clear until companies can actually see the reporting platform that DEP plans to use. Given this uncertainty, we encourage DEP to allow manufacturers access to the reporting platform for several months before the reporting deadline so they can test and accurately prepare their data. If that is not possible, at minimum, DEP should provide all the mandatory data fields and data requirements that will be in the reporting platform before finalizing the rule and before reporting is required. It will take considerable time for manufacturers to develop and master the logistics of reporting.

Definitions

- **Commercially available analytical method:** First, we ask that DEP in the rulemaking provide a list of approved test methodologies for PFAS. The Draft Rule contains a link to "EPA approved methods," however that page confirms the lack of available approved testing methods measuring the presence of PFAS in articles.

[5] https://www.law.cornell.edu/cfr/text/40/704.3

EPA's page on fluorocarbon testing[6] notes three EPA-approved methods. Method 537 "is currently only used for drinking water samples." There is also a test method for compounds in soil and a test method for water, sludge, influent, effluent, and wastewater. None of the methods listed address testing complex articles.

Second, we respectfully ask that DEP allow for supplier declarations as an appropriate proxy for a manufacturer in lieu of testing data. It is unrealistic to expect individual testing of the hundreds or thousands of components within electronic products. Allowing manufacturers to rely on declarations of suppliers will help mitigate this issue. Supply chain restricted substance information has been used for decades to demonstrate compliance to restricted substance laws, such as the EU RoHS Directive, and it represents a balanced approach to information gathering particularly for smaller entities.

- **Essential for Health, Safety, or the Functioning of Society:** The last sentence of this definition lists out a series of examples for what is considered essential for the health, safety, or the functioning of society. We are concerned that this list unnecessarily limits the definition, reducing DEP's future flexibility in granting exemptions for necessary products. We note that there are numerous other vital categories such as communication, food production, social interaction, recreation, education, law enforcement, research and development, energy production, and countless others that are not included within this list of examples. We ask that DEP not limit its future determinations on this issue and make clear that this term can be interpreted to encompass a wider range of potential needs.

  This definition should also make clear that it does not only apply to end products themselves as being essential for health, safety, or the functioning of society, but that each step in the supply chain to create such products is also essential.

- **Fabric Treatment:** The Draft Rule should be clear that the definition of "fabric treatment" refers to products applied to fabric and does not include products with fabrics which have been treated.

- **Intentionally Added PFAS:** The definition in the Draft Rule is overly broad and substantial guidance will be necessary for manufacturers to successfully comply. As we discuss above, we respectfully request that the Department consider adopting existing regulatory reporting requirements for restricted substances in electronic products with exemptions for byproducts and impurities through de minimis levels.

- **Product and Product Component:** These definitions should clarify if spare parts are included in the scope of the law. Spare parts when provided under warranty to customers are not "sold" directly but are sold when out of warranty.

[6] https://www.epa.gov/measurements-modeling/challenges-measuring-perfluorinated-compounds-pfcs (Accessed 5/14/2023)

- **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 of an intentionally added PFAS or, at minimum, be set to a much higher percentage.

Prohibition on Sale of Products Containing Intentionally Added PFAS

- **Currently Unavoidable Use Rulemaking Timeline:** If DEP maintains the ban on all products containing PFAS by 2030, it should promulgate in this rulemaking a schedule and objective standards for the development of "currently unavoidable use" exemption rulemakings. The Act requires that DEP engage in major substantive rulemaking in order to identify any currently unavoidable uses which will take significant time.

  Determinations of currently unavoidable uses will be complex – requiring DEP to process a significant volume of data relating to PFAS uses in a wide variety of applications. Not only will DEP need ample time and resources to undertake appropriate, reasoned, and objectively supported analysis to make these determinations, manufacturers will need months in advance of any proposed essential use rulemaking to pursue data collection to engage in that process. DEP will need to conduct these rulemakings well in advance of 2030 for manufacturers to plan appropriately.

  We therefore ask that the Department provide a clear schedule for its subsequent rulemakings because without this there may not be enough time for the process to play out before 2030. If DEP cannot establish a schedule for essential use determination rulemakings in the years leading up to 2030, then we encourage the Department to push back the January 1, 2030 effective date for the ban on all products containing PFAS.

- **Spare Parts:** The prohibition on sales of products containing PFAS 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 for the existing product to function. We also want to encourage the continued use and maintenance of existing products and discourage the premature disposal of electronics.

- **Enforcement Based on Date of Manufacture:** The basis for the sales prohibition should be enforced based on a product's 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 value chain is the "manufactured by" date. These 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 used to create the new goods to replace them.

- **Currently Unavoidable Use Exemption in Section 5:** The Act allows the Department to exempt from the section regarding the prohibition of sale for PFAS in products that are deemed to be a currently unavoidable use. Section 7(A)(2) of the Draft Rule outlines that the Department may exempt a product from the prohibition under that Section if determined the PFAS in the product is a currently unavoidable use. However, Section 7 is about failure to provide notice. The Draft Rule should also include language similar to 7(A)(2) under Section 5 regarding the prohibition of sale.

Fees

The Draft Rule creates a fee for each notification submission. CTA encourages the Department to be mindful that, unless the regulations narrow the scope of products subject to reporting, there are many categories of electronic products that may be subject to notification requirements. If that's the case, companies in this sector will be subject to very high fees, especially if it is not possible to consolidate information under broader categories.

Packaging

CTA supports the Draft Rule excluding product packaging from scope of the notification requirements and material restrictions. This aligns with the language in the Act and makes policy sense to treat product packaging separately. The Draft Rule properly clarifies that all product packaging is out of scope of the act except for when sold individually and not used in the marketing, handling, or protecting a product.

Used Products

CTA appreciates the Draft Rule excluding used products from the notification requirements and material restrictions. Allowing for the continued sale and re-sale of used products is consistent with circular economy principles benefiting consumers and the environment.

Conclusion

Thank you again for the opportunity to provide these comments on the Draft Rule. We welcome further engagement with stakeholders in this process, and if you have any questions about our comments, please do not hesitate to contact me at dmoyer@cta.tech.

Sincerely,

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