DUNAWAY & CROSS

A PROFESSIONAL CORPORATION

GARY E. CROSS
MATTHEW F. HALL

SUITE 1000
1025 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20036

(202) 862-9700

J. PARIS FISHER*
GOVERNMENT RELATIONS ADVISOR
*NOT ADMITTED

May 19, 2023

Via Electronic Mail Only

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

Re: Proposed Rule: Chapter 90: Products Containing Perfluoroalkyl and Polyfluoroalkyl Substances

Dear Mr. Margerum:

On behalf of the Industrial Truck Association ("ITA"), this letter sets forth ITA's comments concerning the above-referenced proposed rule developed by the Maine Department of Environmental Protection ("DEP"). Our law firm is the General Counsel for ITA. ITA is the national trade association located in Washington, D.C. representing manufacturers of powered and non-powered industrial trucks, most of which are forklifts, and manufacturers of components and accessories for forklifts. ITA estimates that its members account for approximately ninety percent of the forklifts sold in North America. As a fixture of the material handling industry, forklifts are used pervasively in the U.S., most prominently in warehousing, wholesale and retail trade, and manufacturing of all kinds. Forklifts are indisputably one of the most valuable and essential tools in modern industry, including, of course, in Maine, and they are an indispensable tool for distributors to bring items like groceries and medical supplies to consumers. Forklifts are not sold for personal or household use.

ITA supports Maine's effort to address products containing Perfluoroalkyl and Polyfluoroalkyl Substances ("PFAS") consistent with the statute. As explained herein, however, ITA is very concerned that DEP's interpretation of the notification provisions of 38 M.R.S. §1614 to include non-consumer products, combined with the statute's prohibition on the sale of new products where the product manufacturer has failed to provide the required notice, will prevent ITA members from selling new forklifts into Maine long before manufacturers are able to comply with the notification requirements. If the scope of 38 M.R.S. §1614 reaches non-consumer products such as forklifts, an extension of the compliance date for manufacturer notifications will be essential to avoid serious dislocation to Maine businesses and a disruption in their ability to get goods into the hands of Maine's citizens.

As DEP has heard from several stakeholders, manufacturers of both consumer and non-consumer sophisticated end products simply cannot obtain, either from inquiries throughout their extensive supply chains or laboratory analysis, the detailed information about PFAS content and uses

required by the statute. For nonroad vehicles, including forklifts, collaborative industry efforts are underway to determine which components or fluids may contain PFAS, to categorize the types of PFAS in terms of chemical structure, and to correlate that information with various regulatory definitions and lists. These efforts predate the Maine statute and are in response to diverse evaluations from many quarters about the effects of PFAS. However, given that the Maine statute's definition of PFAS covers thousands of different substances and that many components, subcomponents, parts and materials in a nonroad vehicle may contain PFAS—belts, plugs, hoses, gaskets, o-rings, greases, adhesives, lubricants, etc.—collecting and synthesizing information at this level of generality is a major undertaking by teams of PFAS-knowledgeable experts. And even this level of expertise and effort is unlikely to yield the individual product information required by §1614 2.A.(3) of the statute: "The amount of each of the PFAS, identified by its chemical abstracts service registry number, in the product, reported as an exact quantity determined using commercially available analytical methods or as falling within a range approved for reporting purposes by the department." The exactitude of the statute's requirements, the lack of available testing methods for many substances, and the lack of reporting ranges mean there is no real prospect that individual forklift manufacturers can meet this requirement within an abbreviated time frame.

As with other nonroad vehicles, the introduction of PFAS into the forklift manufacturing process takes place deep in the global supply chain, such as an addition to the formulation of raw materials like rubber. As the original equipment manufacturers of the finished products, ITA members do not have regular visibility into these lower tiers of the supply chain and no direct relationship with the suppliers at that level, necessitating a time-consuming iterative process of inquiry—ITA member to Tier 1 supplier, Tier 1 supplier to Tier 2 supplier, Tier 2 supplier to Tier 3 supplier, etc.—to locate the point where PFAS may have been introduced. Even when the finished-product manufacturer can identify and reach the relevant suppliers at the origin of the supply chain, those suppliers are seldom able to provide even basic information about whether PFAS was introduced, much less the precise quantities and purposes of each PFAS as required by the statute.[1]

In short, because it is difficult to see how manufacturers of complex finished products such as forklifts will ever be able to comply fully with the statute's notification requirements, ITA believes that changes to the statute will be needed if new forklifts, and innumerable other products, can continue to be sold into Maine. ITA hopes that the legislative deliberations currently underway, including possibly setting de minimis thresholds, will address these problems so that compliance with the Maine law becomes possible. In the meantime, we recognize that DEP is presently charged with developing a rule that implements a quite specific and detailed statute, which constrains DEP's ability to remedy the situation in certain respects. The approaches we offer here are ones that we believe are currently available to DEP for addressing this fundamental problem pending possible statutory changes.

ITA believes that DEP has regulatory authority to alleviate the situation in at least two important respects: (1) eliminating the definition of "Consumer" or redefining "Consumer" to limit the term to refer to household and personal products, consistent with the common meaning of

[1] ITA members' understanding of these difficulties is informed by their experience with U.S. EPA's proposed regulation concerning the prohibition on the processing and distribution of PIP (3:1), which is used as a flame retardant in many products. See 86 Fed. Reg. 14398 (March 16, 2021). Many commenters expressed concerns about the inability to obtain information about this chemical from their supply chains. EPA acknowledged these problems and delayed the effective date of the requirements from March 8, 2021 to October 31, 2024.

"consumer"; and (2) granting additional extensions so that affected manufacturers do not lose the ability to deliver forklifts and replacement parts to the Maine businesses and communities that need them.

First, ITA believes that the proposed rule's definition of "Consumer" broadens the reach of the notification requirements beyond the plain meaning of the statute, capturing all products, not just "consumer" products. Both the statute and the proposed rule use the word "consumer" in the definition of "Product": "an item manufactured, assembled, packaged or otherwise prepared for sale *to consumers*, including its product components, sold or distributed for personal, residential, commercial or industrial use, including for use in making other products." (Emphasis added.) The definition of "Product" is critical because it is manufacturers of "Products" that are subject to the notification requirements. And the meaning of "consumer" is critical because it is central to the definition of "Product." While the statute defines "Product" to include consumer items that are sold to non-consumers ("commercial or industrial use"), this does not change their character as consumer items. The question is who is "a consumer" under the statute.

The statute does not define "consumer," but the proposed rule, without explanation or citation, defines it expansively as follows: "Consumer." 'Consumer' means *any person who purchases goods or services* which are sold by manufacturers, wholesalers, or retailers." (Emphasis added.) According to the Oxford English Dictionary, however, "consumer" means "a person who purchases goods and services for personal use," which is obviously narrower than "any person who purchases goods or services." Similarly, the Wikipedia entry for "consumer" states as follows:

> A **consumer** is a person or a group who intends to order, or uses purchased goods, products, or services primarily for personal, social, family, household and similar needs, who is not directly related to entrepreneurial or business activities. The term most commonly refers to a person who purchases goods and services for personal use.

Absent an explicit statutory definition, these ordinary meanings of "consumer" should prevail. The proposed rule essentially reads the words "to consumers" out of the statute and converts "an item . . . for sale" to "consumers" to "an item . . . for sale" to "any person." The state legislature could have omitted the word "consumers" from the statute, or it could have defined "consumer" to mean something other than its ordinary usage, but it used "consumers" without providing a definition. Under these circumstances, ITA does not believe that DEP is authorized to supply an expansive definition that changes the ordinary meaning of "consumer," thereby greatly expanding the statute's scope.[2] It appears that DEP recognized the statute's limitation to items sold to consumers, prompting DEP to craft a definition, but that definition amounts to a legislative policy determination. Establishing the statute's scope was the legislature's responsibility and the clearest reading of the statute is that non-consumer products as commonly understood are excluded.

[2] While not conclusive, the fact that the statute specifically prohibits the sale of carpets and rugs and fabric treatments supports the idea that the legislation focuses on items sold to consumers, as these items have received attention because of the potential exposure to young children. More broadly, the statute falls under Chapter 16 of Title 38 of the Maine Revised Statutes. Chapter 16 is designated "SALE OF CONSUMER PRODUCTS AFFECTING THE ENVIRONMENT."

ITA members recognize that, to the extent forklifts and other non-consumer products contain and can release harmful PFAS, they should be part of the solution. Individual and collaborative efforts to understand the role of PFAS in nonroad vehicles have been ongoing and will continue whether 38 M.R.S. §1614 as currently written, or as it may be amended, covers non-consumer products. ITA's point is not to avoid or postpone confronting the PFAS issue. Nevertheless, a finding that the statute as now written does not cover non-consumer products would reduce the immediate burden not only on some manufacturers, but also on DEP as it faces the considerable challenges posed in administering the current statute.

Second, apart from the issue of scope, subsection 3 of the statute states that DEP "may extend the deadline for submission by a manufacturer of the information required under subsection 2 [the notification provisions] if the department determines that more time is needed by the manufacturer to comply with the submission requirement." DEP references this authority in section 7.A. of the proposed rule. ITA appreciates that DEP has already used this authority to extend the deadline generally until six months after the effective date of the final rule. In doing so, DEP has recognized "the difficulty of determining the PFAS content of products containing components or materials from suppliers, the complexity of supply chains, and the lack of sufficient laboratory capacity for all persons potentially qualifying as manufacturers under Chapter 477 to complete laboratory analysis of their products prior to January 1, 2023" (excerpt from DEP correspondence to an ITA member).

While the six-month extension was helpful in avoiding the near-term dislocation that would have otherwise resulted from immediate enforcement, substantially more time will be needed to escape the imposition of a prohibition on sales of new products. ITA therefore proposes that DEP grant an extension of at least three years from the issuance of the final rule before product manufacturers are required to notify DEP about PFAS content. The statute sets no maximum time for any extension, requiring only that DEP determine that "more time is needed by manufacturers to comply with the submission requirement." At this point, considering the difficulties and complexities that DEP has already described, it is not reasonable to envision that manufacturers will know, for each of their products and product components, the "exact quantity determined using commercially available analytical methods, or as falling within a range approved by the Department" in less than three years from promulgation of a final rule.

Extending the notification compliance date would also provide DEP with the time it will need to develop the accompanying rules required by the statute, such as the determination of which uses of PFAS constitute "[c]urrently unavoidable use." Under subsection 7.A. of the statute, an exemption from the prohibition on the sale of a product arising from a manufacturer's failure to provide notice is available if DEP has determined that the use of PFAS in the product is currently unavoidable. DEP should make such determinations before manufacturers are required to accomplish the enormous task of generating the notification information.[3] DEP also needs additional time to develop its online reporting system because manufacturers should not have to guess as to how to report. This will

[3] In this connection, ITA notes that section 5 of the proposed rule omits mention of the "currently unavoidable use" exemption from the otherwise applicable sales prohibitions for new carpets, rugs and fabric treatments as of January 1, 2023, and for all new products as of January 1, 2030. The "currently unavoidable use" exemption of subsection 5.D. of the statute is an essential provision that DEP should add to the proposed rule. In the event that DEP does not clarify that the proposed rule's scope is limited to consumer products as commonly understood, or the Maine Legislature does not extend the January 1, 2030 statutory sales prohibition date, this exemption may become vital for ITA members and other product manufacturers.

include whether reporting by range is permitted and, if so, specifying the ranges. DEP also needs to make determinations as to whether "substantially equivalent information is already publicly available," which the statute provides as a basis for a waiver of the notification requirements. In this connection, we note that U.S. EPA is finalizing a regulation under section 8(a)(7) of the Toxic Substances Control Act that will overlap significantly with Maine's rule--apart from whether it would preempt Maine's law, it seems likely to yield "substantially equivalent information." ITA also believes that DEP should determine how it will implement 38 M.R.S.§1614(2)(B), which contemplates reporting for a type or category of product, before requiring manufacturers to report. More broadly, it is apparent from DEP's website that DEP intends to conduct routine technical rulemaking to provide further guidance to manufacturers. Extending the compliance time to permit DEP to accomplish this rulemaking makes more sense than requiring manufacturers to submit notifications without the necessary guidance already in place.

DEP's proposed rule contains a NOTE following section 7, stating, "The Department's initial focus will be on encouraging voluntary compliance. If a person resists efforts to achieve voluntary compliance the Department may take progressive steps to achieve compliance." ITA welcomes this statement, but it leaves considerable uncertainty as to what will constitute adequate efforts to achieve compliance. ITA suggests that DEP combine an extension of time for full compliance with additional guidance as to how manufacturers should prioritize their efforts to determine the sources of PFAS in their products, from research aimed at determining which components are most likely to contain and release PFAS in significant quantities, to coordinating efforts with other stakeholders, to identifying and contacting their supply-chain partners.

ITA members wish to do their part to address PFAS in their products, to the extent the statute may apply to them, and they understand the challenges that the statute poses for manufacturers and for DEP itself given the stringency of the requirements and the January 1, 2023 compliance date set forth in the law. ITA members stand ready to work with DEP to implement strategies that will focus on the most important tasks first and they welcome further interaction to that end.

Very truly yours,

/s/ Gary E. Cross