



May 19, 2023

Mark Margerum, Maine DEP  
17 State House Station  
Augusta ME, 04333-0017  
207-287-7842

RE: Chapter 90: Products Containing Perfluoroalkyl and Polyfluoroalkyl Substances

Dear Mr. Margerum and the Maine Board of Environmental Protection:

Thank you for the opportunity to provide additional comments on the proposed rules to *Public Law c. 477, An Act to Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution (LD 1503, 130th Legislature)*. The Maine Grocers & Food Producers Association and the Retail Association of Maine have worked closely with our members on the issue and previously submitted joint comments, so we felt we would continue to provide joint comments in an attempt to streamline the process for all involved.

The Maine Grocers & Food Producers Association is a business trade association representing Maine's food community; Main Street businesses, including independently owned and operated grocery stores and supermarkets, food and beverage producers and processors, manufacturers, wholesalers, distributors, and supportive service companies representing more than 250 members. The Retail Association of Maine has more than 350 members statewide and represents retailers of all product types and of all sizes, large and small.

Thank you to the Maine Board of Environmental Protection for understanding the many challenges including businesses' attempts to understand the reporting requirements, the bottleneck in testing capacity, and the evolving rule-making timing and pending legislative amendment.

First and foremost, we value and agree with the Department's determination that 'the packaging of a product is not required to be reported.' MGPFA & RAM also understand the intent is to include packaging when it is the product of the manufacturer, but no longer applies to the brand-owner of those packaging their goods for sale. This further clarifies and addresses our initial comments on the July and November 2022 draft rules specific to the exemptions under Title 32 § 32-A and 32-B. We also appreciate this clarity in the language of the pending bill, LD 217 'An Act to Support Manufacturers

Whose Products Contain Perfluoroalkyl and Polyfluoroalkyl Substances' which was unanimously approved by the Environment and Natural Resources Committee on May 11th, 2023 (now pending full legislative approval).

## 2. Definitions.

**Definitions, D. Commercially available analytical method:** We reiterate our comments from November of 2022. While it is helpful to refer to the commercially available analytical methodologies, the Maine DEP has noted that the US EPA approved methods will not be exhaustive. We feel that the rule should be limited to US EPA approved methodologies. Affected businesses need to know which methods are acceptable and there must be adequate testing capabilities related to the formulations in which reporting is required.

**Definitions, F. Currently Unavoidable Use:** We reiterate our comments from November of 2022. The definition of "currently unavoidable use" rulemaking is a major substantive rule, and the timeline for this rule being finalized could well be into 2024. This is problematic for those working to determine their compliance based on whether the use is unavoidable. With the pending passage of LD 217 this will ideally be resolved with the proposed 2025 reporting deadline but it is important to note how the timing may further impact the ability to understand for compliance.

**Definitions, I. Essential for Health, Safety, or the Functioning of Society:** We reiterate our comments from November of 2022. We express hesitation for how it relates to the definition of 'currently unavoidable use' and the long-time frame for determinization. Is this meant to imply that a currently unavoidable use is only products essential for the health, safety and functioning of society?

**Definitions, N. Manufacturer:** We reiterate our comments from November of 2022. This definition is one of our more major concerns. Certainly, if you are the manufacturer, you are required to report. We have no issue with that, and that was the purpose of this law. However, if the manufacturer, or the importer into the state cannot be tracked, it may fall on the retailer to be the required reporting entity. Our concerns are specific to the language, "whichever is first to sell, offer for sale, or distribute for sale the product in the State of Maine." The terms 'sell' and 'sale' will likely refer back to a retailer. We request clarity that the responsibility remain with the manufacturer or the product. Product packaging includes distributor or manufacturer information such as "Distributed by" and "Made In XXXXX / Distributed by" or "Property of" and we recommended that they are the responsible entity. We feel that the focus should remain on the manufacturers since they will have the greatest ability to test and report.

**Definitions, P. Perfluoroalkyl and polyfluoroalkyl substances (PFAS):** This particular session has been updated to by adding: "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 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." This provides additional clarity necessary to understand which PFAS by specifying those with CAS Numbers.

**Definitions, W. Used:** We reiterate our comments from November of 2022. This excludes used products from the prohibition and we support that exclusion. We would recommend that department expand the definition of used to also include products that are acquired or sold at surplus and salvage stores. We suggest, similar language to how it's referenced in the EPR for Packaging Program law, "goods it acquired through insurance salvages, closeouts, bankruptcies and liquidations." These retailers, who could potentially be determined the manufacturer, purchase whole warehouses or truckloads of goods from out of state businesses. These businesses have often been hit by natural disasters, slightly damaged goods, or from bankruptcies. They pack up all the goods, truck them to Maine, and look to resell what products are viable. This is not a normal supply chain, and they will have no way to track which goods may be compliant. We believe that under the proposed rules that these surplus and salvage stores retailers would be considered the first or sole importer into Maine, and the reporting requirement would fall on their shoulders.

We appreciate and agree with LD 217's exemption for 'A used products or used product component.'

### **3. Notification.**

**Section A, (1) (a) (i):** We concur with the additional reporting description of the product details by expanding beyond the GPC and UPC and allowing for additional reporting details by name and SKUS, providing flexibility in providing details of the reported item.

**Section A, (1) (a) *Previously (ii):*** We had concerns specific to 'confidential business information' provisions, 'Estimated sales volume in the State or nationally for the full calendar year following the year in which the product is being reported.' Interestingly, the sales volume language has been removed from the latest version of draft rules in which we are commenting, but are clarified in LD 217. In LD 217, the policy now looks to require 'a brief description of the product, including an estimate of the total number of units of the product sold annually in the State or Nationally.' We appreciate the flexibility in respect to supply chain complexities. We express continued concerns for requiring sales volumes as it will require strict protections of the confidential business information to avoid this information being shared publicly. We urge the department to explore other alternatives or additional language specific to protecting proprietary sales data.

**Section A, (1) (c):** We reiterate our comments from November of 2022. Our understanding is that the concentrations must also be taken in context with the specific product and its likelihood of the PFAS impacting people or the natural environment. For example, we know that the sludge that was spread on farm fields has a direct link to the impacts Maine is seeing. Whereas a piece of waterproof clothing will not have the same impact. Knowing and understanding the concentrations by product types should be considered.

**Section E:** We reiterate our comments from November of 2022. As noted above in the definition of manufacturer, we believe this section also demonstrates our concern that the reporting requirement may unintentionally fall on retailers. One other recommendation we would make in this regard would be to clarify that the manufacturer, distributor or wholesaler be required to buy back or reimburse the

retailer for any products found to be in non-compliance. We strongly feel that the reporting requirement should not fall on retailers.

Retailers should not be financially at-risk for goods that cannot be sold in Maine if they are later found to be in non-compliance. A similar clarification was made in the flame-retardant in furniture law, Title 32, Chapter 16 §1609-A., "3-A. Retailer indemnification. If upholstered furniture delivered to a retailer in the State by the manufacturer of the upholstered furniture is subsequently determined to contain flame-retardant chemicals such that it is prohibited from sale or distribution in the State under subsection 2, the retailer is entitled to a full refund from the manufacturer with respect to that upholstered furniture, including shipping and other related costs."

**Section 4, Exemptions:** The exemptions specific to Title 32, § 26-A, *Reduction of Toxics in Packaging*, and Title 32, § 26-B, *Toxic Chemicals in Food Packaging* and the note, 'applies to all packing, packing components and food packaging as defined in as defined in 32 M.R.S. § 1732, regardless of whether the Department has specifically regulated such items', is now outdated and addressed in LD 217 (and currently designated differently on the PFAS in Product's landing page). We find the latest packaging clarification helpful and the necessary for industry.

**Section 6, Fees:** We are pleased that the department clarified that these are one-time fees, and not an annual renewal. It appears as though it is still unknown how many products will be registered and therefore challenging to determine the true funding of the program. Similar to the Pesticides Registration program, it will be important that the department does not become reliant on funds in which the registrations will reduce overtime with the reduction and ultimate ban of PFAS in products.

**Section 7, Failure to Provide Notice and Section 8, Certificate of Compliance:** We appreciate the added notation, "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."

Public Law c. 477 passed less than two years after the onset of the COVID-19 pandemic. It requires detailed reporting that can be challenging along the supply chain to confirm. We are appreciative of the Department's efforts, Environment and Natural Resources Committee work, and pending action of the Legislature, to address industry's concerns specific to compliance.

Thank you for the opportunity to share our concerns with you. Please feel free to contact us with any questions.

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