Beveridge & Diamond

Ryan J. Carra
1900 N Street, NW
Suite 100
Washington, DC 20036
202.789.6059
rcarra@bdlaw.com

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ELECTRONIC TRANSMISSION

Kerri Malinowski Farris
Maine Department of Environmental Protection
Office of the Commissioner
Kerri.Malinowski@maine.gov

Re: **Comments on the Concept Draft Regulations for the Maine PFAS in Products Program**

Dear Ms. Malinowski Farris:

We write today on behalf of a large multi-national information technology company that develops a variety of electronic products that are distributed and sold in Maine. Our client has followed the implementation of the Maine Department of Environmental Protection's (DEP's) PFAS in Products Program with interest and concern. Our client appreciates the opportunity to provide comments on the Concept Draft regulations to implement this program.

Our client looks forward to engaging with DEP when DEP formally proposes regulations. Because upcoming obligations are so critical to our client (as well as many other companies), our client respectfully requests that the public be given more time to comment on the proposed regulations than it was given on the Concept Draft. Meaningful public participation will be critical to DEP's challenging task to implement the program.

I. The January 1, 2023 notification deadline is unworkable for the electronics industry. DEP should grant an extension of at least one year applicable to manufacturers of electrical or electronic products.

The current deadline is extremely aggressive given the magnitude of necessary data gathering. The type of information sought by DEP is not currently collected by electronics manufacturers. Collecting this information would therefore require a significant investment in novel supply chain information collection efforts.

PFAS are widely used in a very broad range of electronics applications. For example, PFAS are used in screens (monitors, tablets, phones), circuit boards, and lithium-ion batteries. PFAS provide smudge- and water-resistant properties, lubrication, and chemical resistance. PFAS also

serve as dialectic and elastomeric materials and are used in cables and wiring for corrosion prevention and electrical isolation. Organizations like ChemSec have already been gathering, for public consumption, information about the multiple applications of PFAS in potentially dozens of categories of electronics and components of electronics. We understand that information will be published later this summer.

The January 1, 2023 deadline is particularly aggressive for manufacturers and importers of highly complex goods, who might have hundreds of suppliers, located in dozens of overseas countries (where English may not be spoken) whom they will need to contact and get information from. These suppliers will likely, in turn, need to gather information from their own suppliers, who need to gather information from their suppliers, and so on.

DEP has the express discretion under the statute to extend the deadline for any manufacturers if "more time is needed to comply" with the reporting requirement. Since the law was enacted, companies (including our client) have been preparing for compliance. However, more time is needed, due to many factors, including supply chain complexity and the late start in DEP implementing the law, which we understand is due largely to staffing shortages. With less than six months until the reporting deadline and a full round of notice and comment remaining until regulations are finalized, many key questions will remain open for some time.

Additionally, as DEP is aware, the U.S. Environmental Protection Agency (EPA) has proposed a reporting rule under the Toxic Substances Control Act that would require reporting for all PFAS in all articles, including electrical and electronic products. By statute, EPA is required to finalize this rule by January 1, 2023. Once final, this EPA rule will largely duplicate the reporting requirement the Maine legislature envisioned.

DEP should grant a blanket reporting deadline extension to all manufacturers of electrical and electronic products. DEP should consider an extension of at least one year and as long as 48 months. Taking this approach instead of issuing company-specific waivers, whereby each electronics manufacturer must individually request and substantiate their similar circumstances, will significantly reduce the administrative burden on DEP. The extension will allow the necessary time for electronics manufacturers to comply. The extension will also give DEP sufficient time to harmonize its regulations, as appropriate, to EPA's finalized PFAS reporting rule. This harmonization will reduce the burdens for both manufacturers and DEP.

II. DEP's rules should incorporate EPA's "known or reasonably ascertainable" standard.

For chemical reporting rules, EPA typically requires reporting information that is "known or reasonably ascertainable" by a company. This is the standard EPA uses for its quadrennial Chemical Data Reporting rule requirements. 40 C.F.R. § 704.3. Importantly, this is also the standard that EPA has proposed for its PFAS reporting rule. 86 Fed. Reg. 33926, 33927 (June 28, 2021) ("The Agency is proposing this action pursuant to TSCA section 8(a)(7) to obtain

certain information known to or reasonably ascertainable by manufacturers of PFAS."); proposed 40 C.F.R. § 705.15 (requiring manufacturers to report "the following information to the extent known to or reasonably ascertainable by them"). Under this standard, as long as the company exercises an appropriate level of due diligence (e.g., in the form of information-gathering activities) and accurately reports what it knows or learns, it has complied with the reporting requirement. 86 Fed. Reg. at 33928.

This commonly used standard is appropriate for DEP to use for its pending reporting requirement, which is similar to EPA's proposed requirement. Even holding electronics manufacturers to this standard will require a massive due diligence effort by the electronics industry. Applying a more stringent (i.e., strict liability) standard given the volume and diversity of products and the complexity of supply chains would be unreasonable.

To align with this standard, we recommend the following changes to the Concept Draft:

- Amending the first sentence of Section 3.A as follows (new text emphasized): "Beginning January 1, 2023, and prior to sale or distribution for sale in Maine of a product that contains intentionally added PFAS, *to the extent known to or reasonably ascertainable by the manufacturer*."

- Amending the first sentence of Section 3.D to read (new text emphasized): A manufacturer must update the information in the notification whenever, *to the extent known to or reasonably ascertainable by the manufacturer,* there is a significant change in the reported information or when requested to do so by the Department."

- Amending Section 8.A.1 to read (new text emphasized): "Provide the Department with the certificate, on forms provided by the Department, attesting that the product does not contain intentionally added PFAS, *to the extent known to or reasonably ascertainable by the manufacturer*."

III. DEP should harmonize its PFAS definition with EPA's proposed reporting rule.

Although the statute defines PFAS as "substances that include any member of the class of fluorinated organic chemicals containing at least one fully fluorinated carbon atom," DEP should explore whether it has the discretion to clarify this definition in a manner that will facilitate and enhance compliance while reducing the administrative burden and uncertainty on the regulated community.

Maine's statute arguably gives DEP discretion to define PFAS identically to EPA's proposed reporting rule, through its reference to "the class of fluorinated organic chemicals." That is not a defined term under the statute. DEP should exercise the discretion that it is afforded under the statute to define that term with more precision and in a manner capable of implementation, by aligning it with the definition that EPA proposes to use in its reporting rule, i.e.,: "any chemical

substance or mixture that structurally contains the unit R-(CF2)-C(F)(R′)R″. Both the CF2 and CF moieties are saturated carbons. None of the R groups (R, R′ or R″) can be hydrogen." Proposed 40 C.F.R. § 705.3.

IV. DEP's rulemaking must ensure protection of confidential business information and trade secrets.

We understand that DEP has interpreted the statute to provide for public release of at least some information that manufacturers report to DEP pursuant to section 1612.2. We see no indication in the statute, which focuses on reporting *to DEP*, that DEP has regulatory authority to convert those reports into publicly accessible information.

To the extent that DEP believes that it has discretion to release some of the information that is provided to it, it is essential that DEP provide a robust mechanism to protect from public release information that manufacturers regard as confidential business information or trade secrets, i.e., information that is closely held by the manufacturer and that would substantially harm the manufacturer's competitive position if it were released.

Protection of that information is required by Maine's Freedom of Access Act (FOAA). Under the FOAA, the public has the right to inspect and copy any agency records only if a statutory exemption does not apply. 1 M.R.S. § 408-A. There is a statutory exemption for "[r]ecords that would be within the scope of a privilege against discovery or use as evidence recognized by the courts of this State in civil or criminal trials if the records or inspection thereof were sought in the course of a court proceeding." 1 M.R.S. § 402(3)(B). Under Maine Rule of Evidence 507(a), in turn, "[a] person has a privilege to refuse to disclose, and to prevent any other person from disclosing, a trade secret that the person owns." Thus, trade secrets within agency records – which will include notifications provided to DEP – may not be disclosed to the public. At the very least, therefore DEP's proposed rulemaking must contain robust provisions that will allow protection of confidential business information and trade secrets, e.g., through the use of generic chemical names and broad chemical ranges in information that is released to the public.

V. DEP's rulemaking must approve reporting concentration within a range or it will be unrealistic for manufacturers to comply with the reporting requirement.

Under the DEP Concept Draft, companies would be required to report "[t]he 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 statute allows DEP to approve a range of reporting, but under the Concept Draft, it is not clear how and when DEP would be issuing these approved ranges. It is critical for business planning that regulated entities understand in advance what ranges will be permissible and for which chemicals and products those ranges apply.

As part of the rulemaking, DEP should specify acceptable ranges now. Failure to do so would leave insufficient time before the reporting deadline for DEP to act and for the regulated community to prepare for compliance. PFAS are a chemical class comprising thousands of different substances, and are typically present in products in very low concentrations. This makes identifying and quantifying specific PFAS present in a given article extremely challenging and costly. For complex products containing many parts, manufacturers commonly have multiple suppliers for each part to ensure supply chain resilience.

A requirement to report specific concentrations could be read as a requirement, in effect, to establish those concentrations through product testing. We assume that DEP does not intend to require testing to substantiate these reports. (If testing of each component for exact amounts *were* required, this would make the manufacturers' burden even less reasonable, especially in cases where each supplier may utilize different PFAS chemicals in the same functional group in order to meet the required performance specifications.)

In order to avoid the unrealistic prospect of testing every product, DEP must timely approve reporting of intentionally added PFAS within concentration ranges, as part of the current rulemaking process. We recommend that DEP approve broad concentration ranges, which should provide ample information to DEP. For example, ranges on the order of "below 0.1 percent", "between 0.1 and 1 percent", and "above 1 percent" would appear to address the statutory intent while avoiding the information-collection challenges and CBI protection concerns associated with more granular reporting.

VI. <u>DEP must make it more realistic for manufacturers to be able to report by category or type</u>.

Under the Concept Draft, DEP would in many cases disallow reporting by category or type unless "*the same amount* [of PFAS is present] as determined by a commercially available analytical method." (Emphasis added.) This requirement, if maintained, would effectively negate the legislature's intent to allow companies to report by category or type under appropriate circumstances.

Analytical chemistry methods are too sensitive (i.e., provide data to too many significant figures) to use "the same amount" standard. Not even individual units of the same product manufactured during the same process are likely to contain "the same amount" of any chemical (not limited to PFAS) as measured by current analytical methods. For these reasons, DEP should change "the same amount" to "a substantially similar amount" and remove the reference to analytical testing.

VII. <u>The electronics industry looks forward, in future years, to working with DEP to identify "currently unavoidable uses" of PFAS</u>.

A January 1, 2030 prohibition will apply to all in-scope products unless DEP determines by rule that a use of PFAS in a product "is a currently unavoidable use." In the coming years, the

electronics industry will work cooperatively with DEP to identify whether any uses must, at that time, be regarded as unavoidable. DEP must act with sufficient time prior to the January 1, 2030 prohibition deadline to provide certainty to the industry and to minimize regulatory burdens.

VIII. DEP should allow more time to report a "significant change."

Under the Concept Draft, reporting would need to be updated prior to sales of a product that has undergone a "significant change" in formulation. Reporting would also need to be updated within 30 days of certain other changes (e.g., change in contact person). These timelines are overly burdensome, with no commensurate benefit that could justify such a short timeline. Annual reporting and annual review of materials content is generally the norm for the electronics sector. Manufacturers should only be required to provide updates on an annual cadence (and should not be required to submit annual updates in years that no significant changes occur).

IX. DEP should assess a reasonable flat fee that is the same for every manufacturer, of an amount to be determined after the reporting deadline, when more information will be available.

The statute allows DEP to collect fees only "to cover the department's reasonable costs" in implementing and administering the law. DEP is not required to collect the fee on a per-product basis. The concept draft envisions that DEP will collect a fee "for each individual product registered." This invites confusion, as companies may take different positions on how the "product" definition applies to their inventory (e.g., whether different configurations of desktop computers are different "products"). The per-product approach would also increase the administrative burden on the regulated community and on DEP, compared to a simple per-manufacturer fee.

Furthermore, DEP will not know how many products will be registered, nor how many manufacturers will report, until after the reporting deadline. Finalizing a per-product or per-manufacturer fee before the reporting deadline would be inconsistent with DEP's obligation to only collect fees sufficient to implement and administer the law. To address these concerns, the regulations should state that DEP will determine the appropriate flat fee, levied per manufacturer, at a certain point after the reporting deadline (and making allowances for any extensions).

X. The "Certificate of Compliance" provision must be amended to make compliance more realistic.

Under the Concept Draft, if DEP had "reason to believe" that a product contained intentionally added PFAS but was not reported, DEP could require a manufacturer to do one of the following within 30 days: 1) certify that the product does not contain intentionally added PFAS or; 2) notify sellers and distributors that the product cannot be sold in Maine.

The "reason to believe" standard is overly subjective and should be changed to "*analytical test reports supporting a conclusion that [….]*". Additionally, a third option should be added, which is that the manufacturer should be allowed to: "*3) submit a written notice to DEP that the product contains intentionally added PFAS.*" This would allow the product to continue being sold in Maine. It is far too drastic a remedy for unintentional late notification to require that a product be pulled from the market. Finally, the 30-day window should be changed to 90 days in order to allow the manufacturer sufficient time to assess and respond.

If DEP has any questions about these comments, please do not hesitate to contact me.

Best regards,

Ryan J. Carra