Arnold & Porter

Judah Prero
+1 202.942.5411 Direct
Judah.Prero@arnoldporter.com

June 29, 2023

VIA E-MAIL PUBLICCOMMENTS@NEWMOA.ORG

Martin Suuberg
Executive Director
Northeast Waste Management Officials' Association, Inc.
89 South Street, Suite 600
Boston, MA 02111

Re: Draft PFAS Prevention Model Legislation

Dear Mr. Suuberg:

The Chemical Users Coalition[1] (CUC) appreciates the opportunity to provide our feedback on the Northeast Waste Management Officials' Association's Draft PFAS Prevention Model Legislation. CUC is an association of companies from diverse industries that are interested in chemical management policy from the perspective of those who use, rather than manufacture, chemical substances. CUC encourages the development of chemical regulatory policies that protect human health and the environment while simultaneously fostering the pursuit of technological innovation. Aligning these goals is particularly important in the context of chemical management policy in a global economy.

CUC Members have been actively engaged on PFAS-related legislation and rulemakings on both the federal and state levels, such as those in Maine and Washington State.

The CUC appreciates your consideration of these comments. If you have any questions relating to this submission, please feel free to contact me.

Best Regards,

Judah Prero

Enclosure

[1] The members of CUC are Airbus S.A.S., The Boeing Company, Carrier Corporation, HP Incorporated, IBM Company, Intel Corporation, Lockheed Martin Corporation, the National Electrical Manufacturers Association, RTX, Sony Electronics, Inc., and TDK U.S.A. Corporation.

Before The Northeast Waste Management Officials' Association
Draft PFAS Prevention Model Legislation
Comments of the Chemical Users Coalition

The Chemical Users Coalition ("CUC") appreciates the opportunity to provide our comments on the draft PFAS Prevention Model Legislation (the "Draft Act") prepared by the Northeast Waste Management Officials' Association ("NEWMOA"). CUC is an association of companies from diverse industries that are interested in chemical management policy from the perspective of those who use, rather than manufacture, chemical substances. CUC encourages the development of chemical regulatory policies that protect human health and the environment while simultaneously fostering the pursuit of technological innovation. Aligning these goals is particularly important in the context of chemical management policy in a global economy. CUC Members have been actively engaged with federal and state regulators on PFAS-related legislation and regulation, including recent efforts in the States of Washington and Maine.

General Comments

CUC appreciates NEWMOA's efforts to provide a potential template for use by state legislators who are seeking to gather information and data on consumer products that contain PFAS and to implement restrictions that are intended to eliminate unnecessary exposures to consumers of PFAS that might be present in household use products. We are providing comments on a section-by-section basis in the more detailed comments below. We also have these general comments as well.

First, CUC encourages NEWMOA to revise its Draft Act in light of the input we are providing today both to limit the Draft Act to an exclusive focus on consumer-use products containing PFAS and to devise a mechanism that would not simply ban the sale of PFAS-containing products in a state without having such a prohibition take into account whether a particular PFAS-containing product presents an actual risk of exposure to a consumer. In addition, the Draft Act should provide a mechanism whereby certain critical or essential products can be deemed to be "currently unavoidable" on the basis of criteria that are articulated and understood by product manufacturers.

Second, CUC is concerned about the manner in which the Draft Act might be adopted by multiple states if important changes are not made. To date, Maine is the only jurisdiction in the Northeast that has enacted a general prohibition on virtually all PFAS-containing products using a "class-based" approach to define PFAS. Maine has learned and is still learning from its experience, and the Maine legislature not only has already made changes to the law, but will be further reviewing the current law in light of issues that have been brought to light and need to be addressed to allow for effective implementation of the law. However, Maine's experience in developing and refining PFAS laws and regulations should be allowed additional time to run its course and then serve as a starting point for discussion on any legislation. CUC and numerous other large stakeholders from both inside and outside Maine have already invested a significant amount of work in advising officials in Maine of their concerns with that state's legislation (and proposed implementing regulations), and meaningful progress is being made toward a workable solution that will likely continue to be advanced in the upcoming months. If multiple jurisdictions prematurely take different approaches, serious problems with regard to the national

distribution of PFAS-containing products will be created due to likely inconsistencies in product-related PFAS regulatory requirements, as explained below.

When states have laws and regulations which are harmonized, it ensures a level playing field and consistency across different regions. If each state has drastically different laws, it can create barriers to trade and increase costs for businesses operating across state lines. By regulating in a similar fashion, states can facilitate the smooth flow of data and regulated goods, services, and investments between different regions. Furthermore, when regulations are consistent, it becomes easier for businesses to comply with them, as they do not have to navigate a complex web of varying rules and requirements in different states. It also simplifies enforcement efforts for regulatory agencies, allowing them to allocate resources more effectively.

Lastly, when states regulate in a similar fashion, it promotes collaboration and learning among policymakers. States can share best practices, lessons learned, and successful regulatory approaches, leading to better-informed decision-making. This collaboration can enhance regulatory effectiveness, foster innovation, and create a collective knowledge base that benefits all states. CUC therefore requests that NEWMOA and its members carefully consider the importance of maintaining uniformity of regulation from state to state and refrain from pursuing the Draft Act at least temporarily to enable Maine's Act To Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution to serve as the starting, but not an end, point for any legislative efforts. Substantial improvements need to be made to ensure the Maine legislation on PFAS is more practical and can be realistically implemented, including efforts discussed in these comments to streamline the reporting provisions and to rationalize the prohibitions to focus instead on PFAS and products that are, in fact, of greatest concern. Collaboration with Maine should continue, so that Maine's experience can aid other jurisdictions considering such laws in crafting laws that are workable and achieve stated policy objectives.

NEWMOA has the opportunity to demonstrate leadership by considering carefully the comments it will be receiving from the regulated community and to recast its Draft Act so that it is more tightly focused on mitigating risks, rather than making assumptions about the risks PFAS-containing products might present to consumers and categorically banning their use without a basis founded on actual risks. If it can garner key stakeholder support, NEWMOA could potentially lead the way to a more practical and risk-based approach for states seeking to gather information on PFAS-containing products and to identify those products which might contribute to real-world consumer exposures and for which more reasonable restrictions can be phased in.

Our comments on specific provisions in the Draft Act follow.

Section 2. Findings

The findings contain broad generalizations about PFAS, such as "PFAS are a persistent and toxic class of chemicals of pollutants that bioaccumulate in the environment." These "one size fits all" statements, and the adoption of a class approach to regulating PFAS, fail to recognize that PFAS comprise a group of thousands of synthetic chemicals that are used widely throughout the world, in a broad range of applications. Chemically, toxicologically, and physically, PFAS differ widely. Included in the category as PFAS are substances in the solid (e.g., fluoropolymers), liquid (e.g., fluorotelomer alcohols), and gaseous (e.g., hydrofluorocarbon refrigerants) forms. The fundamental physical, chemical, and biological properties of solids, liquids, and gases are clearly different from one another. Furthermore, PFAS vary

substantially in their physicochemical properties and may include polymers and non-polymers; solids, liquids, and gases; volatile and non-volatile compounds; and compounds that are water soluble and water insoluble. In fact, when the Organisation for Economic Co-operation and Development ("OECD") released a definition of PFAS, they stated that "[a]s PFASs are a chemical class with diverse molecular structure and physical, chemical and biological properties, it is highly recommended that such diversity be properly recognized and communicated in a clear, specific and descriptive manner." The Draft Act, however, groups all PFAS together as a class; makes broad statements about PFAS, the effects of PFAS, how PFAS are used; summarily concludes that PFAS pose "imminent threats" and create a situation of "emergency"; and then proposes restrictions applicable to every substance in the class. In doing so, the Draft Act fails to recognize that there are significant differences among the unique substances included in the PFAS class and that many may not pose a risk of harm to human health or the environment.

Section 3. Definitions

- The Draft Act defines **"alternative"** as "a substitute process, product, material, chemical, strategy, or combination of these that has been evaluated and serves a functionally equivalent purpose to a PFAS in a product that has less risk to human health or the environment than use of PFAS in the product."

  The definition requires that an alternative "serve a functionally equivalent purpose." However, the fact that an alternative substance may serve an equivalent purpose does not equate to equivalent functionality of the substance. An alternative must perform its intended function in the same fashion as the original substance. It must not create problems for the manufacturing or processing of the product. It must not pose any new safety concerns.

  Furthermore, many products have stringent requirements that must be satisfied to ensure acceptable levels of performance, reliability, safety, and availability. An alternative must satisfy these requirements to be considered a "substitute." The process of testing/qualifying a substitute in those situations may take many years and considerable resources to be successful. Further, there is no guarantee that a potential alternative would successfully replace a PFAS until the replacement process has been completed. CUC recommends that the definition should read that an alternative "has been evaluated, is readily available, is economically feasible, and acts in a functionally equivalent manner to a PFAS in a product."

  The definition is not clear on whether an alternative PFAS can be considered to be a "substitute." Clarification on this point would be helpful. CUC recommends that the draft legislation should accept the premise that certain PFAS may have great utility as a potential substitute for a PFAS which is currently being used, and the use of such a replacement PFAS should be encouraged if the substitute PFAS has been shown to reduce overall exposure or release of the substance being replaced and to have a comparatively better environmental or health effects profile.

  The definition presumes that a substance has been evaluated and has been determined to present fewer risks than the use of PFAS. This definition does not provide detail as to who has performed the evaluation, and what aspects of the substance were evaluated. For example, if an alternative substance is less toxic to animals but results in greater emissions of hazardous air pollutants or greenhouse gases, does that alternative pose fewer risks than PFAS?

- The Draft Act defines **"Credible scientific evidence"** as **"**the results of a study, the experimental design and conduct of which have undergone independent scientific peer review, that are published in a peer-reviewed journal or in a publication of an authoritative federal, state, or international governmental agency, including but not limited to State Environmental and Public Health Agencies; the United States Department of Health and Human Services; National Toxicology Program; Food and Drug Administration and Centers for Disease Control and Prevention; the United States Environmental Protection Agency; the World Health Organization; and the European Union, European Chemicals Agency."

  CUC recommends that the definition include not just the results of a study, but all scientific information, technical procedures, measures, methods, protocols, methodologies, or models, employed in a consistent manner which is relevant for making decisions about a product. Such decisions should be made using these forms of information, based on the weight of the scientific evidence. Additionally, the definition should include studies and other information that may have been conducted or generated by a manufacturer or entity retained by a manufacturer, but which have remained non-public due to the confidential nature of product design and testing.

- The Draft Act defines **"currently unavoidable use"** as "a use of PFAS that the [Agency] has determined by rule to be essential for health, safety, or the functioning of society for which alternatives are not reasonably available."

  CUC suggests that greater clarity and detail is needed as to the criteria for a use that is "essential for health, safety or the functioning of society." CUC recommends that "essential for health, safety or the functioning of society" be defined as "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, public transport, aerospace, aeronautics, public safety and defense, and construction."

  Relying on agency rulemaking for such determinations will result in a significant burden being placed on agencies that simply will not be able to handle determination requests in a timely fashion. Recently, the State of Maine had to respond to requests from many companies for extensions for PFAS reporting requirements. This did not require rulemaking – all that was needed was a reply. Yet even with this simplified approval process, the State was backlogged by the substantial number of requests received due to the law mandating reporting on all PFAS in almost all products. In order to ensure that exemptions for currently unavoidable uses can be considered and responded to in a timely and efficient manner, CUC recommends that the relevant agency establish an administrative process by which commercial entities may seek a determination that a use is currently unavoidable. Doing so avoids embroiling state agencies in multiple rulemaking efforts that can strain already limited agency resources. The relevant agency also should identify the kinds of evidence it would consider credible and sufficient to support a timely determination. The agency should be required to make that determination

administratively and in accordance with a deadline (e.g., 60 day, rather than through a rulemaking process.

- The Draft Act defines **"Intentionally added PFAS"** as "the PFAS added to a product or one of its product components, or PFAS or precursors added to a product during its manufacture, processing, packaging, or storage. 'Intentionally added PFAS' also includes any degradation by-products of PFAS. The use of PFAS or precursors as a processing agent, mold release agent or any other source of PFAS in the product that is reasonably known to be present is considered intentional introduction for the purposes of this Act."

  CUC suggests that the definition be narrowed to avoid unnecessary and burdensome reporting and to facilitate the submission of information that is of greatest importance to the policy objectives. Accordingly, the definition should specifically exclude manufacturing byproducts and impurities that might remain unintentionally present in a product in commerce, as well as PFAS degradants that might be formed during product manufacturing but also be considered unintended components. CUC suggests that the definition read "*Intentionally added PFAS" means PFAS known to have been added to a product or one of its product components in order to provide a specific characteristic, appearance, or quality for the product as manufactured or to perform a specific function in the final product. 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 reasonably believed to be present in the final product as a contaminant."*

- The Draft Act defines **"Manufacturer"** as "any person, firm, association, partnership, corporation, organization, combination, or joint venture which produces a PFAS-added product, or an importer or domestic distributor of a PFAS-added product produced in a foreign country. In the case of a multi- component PFAS-added product, the manufacturer is the last manufacturer to produce or assemble the product. If the multi-component product is produced in a foreign country, the manufacturer is the importer or domestic distributor."

  CUC appreciates the clarity provided by the definition, namely, that the manufacturer, and the entity that has legal responsibility, is the last manufacturer to produce or assemble the final product.

- The Draft Act defines **"Perfluoroalkyl and polyfluoroalkyl substances"** or **"PFAS"** as "all members of the class of fluorinated organic chemicals containing at least one fully fluorinated carbon atom."

  CUC believes that the definition of PFAS to be used should be one that is both scientifically relevant and consistent with the goals of the legislation. The definition in the Draft Act is extremely broad and captures many substances not generally considered to be PFAS. For example, this definition would capture hydrofluoroolefins (HFOs), which are gases or volatile liquids that, when released, ultimately break down in a matter of days into naturally occurring substances that do not bioaccumulate in the environment and are not mobile in soil and water. Similarly, fluoropolymers differ significantly from other, non-polymeric PFAS (e.g., PFOA or PFOS) in their molecular weight, toxicity, and their insolubility in water. As discussed above in

the "Findings" section, the OECD has noted that, "the term 'PFASs' does not inform whether a compound is harmful or not, but only communicates that the compounds under this term share the same trait for having a fully fluorinated methyl or methylene carbon moiety."[1]

CUC is concerned that the use of an overly broad definition of PFAS for regulation could lead to several unintended and unnecessary consequences, including the eventual restriction of substances with critical uses that do not pose a risk to public health or the environment. There is also a concern that replacement ingredients for restricted PFAS would perform less effectively or be unable to provide a similar level of functionality. CUC recommends that any legislation focus only on PFAS that are likely to pose specific concerns to human health or the environment when part of products used in the state, and that regulated PFAS be clearly identified by their Chemical Abstract Service Registry Numbers ("CAS Numbers").

CUC therefore suggests that the following definition of PFAS be used: *"Perfluoroalkyl and polyfluoroalkyl substances" or "PFAS" means a group of synthetic perfluoroalkyl and polyfluoroalkyl substances that contain at least two sequential fully fluorinated carbon atoms, excluding polymers, gases and volatile liquids."*

- The Draft Act defines **"product"** as "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."

  CUC recommends that the scope of the term "product" be narrowed to include solely consumer products and not industrial and commercial products and those products, specifically machinery, used to manufacture other products. By limiting the scope and breadth of products that are subject to the law, regulators can focus on those products that are generally used by the public, and are therefore of greater potential concern. This focus will provide a more reasonable and practical opportunity for manufacturers and suppliers of products and components to determine the presence of PFAS in the supply chain and to seek opportunities to phase out certain uses of PFAS where possible.

Section 4. Interjurisdiction Clearinghouse

The Draft Act provides for a state's participation in an interjurisdiction clearinghouse to collect PFAS-related information supplied by the entities that are subject to reporting requirements in participating states. CUC appreciates the intent of this provision, which could potentially streamline reporting requirements.

To that end, CUC recommends that any jurisdiction considering enactment of notification or reporting requirements should look to the regulations that the US Environmental Protection Agency will be promulgating pursuant to Section 8(a) of the Toxic Substances Control Act (TSCA). The TSCA reporting rule for PFAS will be issued in final form in 2023. Consideration of this national reporting requirement will help ensure that opportunities for efficiencies are optimized.

[1] Organisation for Economic Co-operation and Development, *Reconciling Terminology of the Universe of Per- and Polyfluoroalkyl Substances: Recommendations and Practical Guidance*, July 2021

However, participation in such a clearinghouse does present challenges. CUC Members produce and distribute highly complex products. The content of such products and the many individual components therein is regarded by CUC Members and their customers, some of which include domestic and foreign governments and the military, as sensitive. For this reason, CUC Members consider it to be imperative that every state establish a process (and the necessary accompanying data security and protection capabilities) by which claims to protect Confidential Business Information ("CBI") can be asserted for information that is submitted. Further, any information that may be sensitive due to national security concerns should be exempted or alternate measures taken to protect such information should made with the cognizant federal agency (e.g., the US Department of Defense). To meet the goals of the interjurisdiction clearinghouse, claims for confidentiality can be accommodated by requiring reporting entities asserting such claims to provide a "nonconfidential" (redacted) copy of each confidential report for purposes of the clearinghouse. The confidential submission that is required under the law would remain with the state agency, would not be submitted to the clearinghouse, and would be subject to the state's relevant CBI protection laws.

Section 5. Notification

The Draft Act proposes a requirement that a manufacturer of a product for sale that contains intentionally added PFAS must submit notifications containing information about the product that contains PFAS, how it is used, which PFAS are used, and quantities of PFAS used.

- As discussed above, EPA will be promulgating a nationwide PFAS reporting requirement. CUC therefore recommends states (and NEWMOA) wait for EPA to issue its final rule. If a state then decides to pursue a state-specific reporting requirement, it should first look to leverage that collected data. States should then craft any reporting requirement to ensure consistency with that of EPA to create efficiencies and ease of compliance.

- Regarding the specific requirements for notification, legislators and regulators need to understand that manufacturers may not know if PFAS is contained in the products they sell and that actors in the supply chain need time to gather the information covered by the notification from their suppliers. Testing all products to determine if PFAS is in the product is not viable or even possible. Consequently, many manufacturers will be entirely dependent on component suppliers (who will in turn also ask their upstream suppliers) for information concerning PFAS content.

  Any provisions requiring manufacturers to provide information about PFAS content should also adopt a "reasonably ascertainable" standard for determining if any obligation to report exists. If a manufacturer can reasonably ascertain, via supplier communications or proven and economical testing, that PFAS is present in the product, they have an obligation to report. If a manufacturer cannot reasonably ascertain whether or not a product contains PFAS, the rule should state that a manufacturer has no obligation to report.

  Furthermore, even with due diligence, manufacturers may only be notified concerning the presence of PFAS in their products after the notification deadline has passed. Consequently, legislation should explicitly state that manufacturers are not penalized in such cases as long as the manufacturers have made a good-faith effort to reasonably ascertain the use of PFAS prior

to selling the product into the state after the effective date. Article manufacturers work within complex (and sometimes global) supply chains composed of potentially thousands of suppliers, and it is anticipated that some time and resources will be needed for upstream suppliers to become aware of the use of PFAS.

Additionally, PFAS content in packaging should not be subject to the reporting requirement. This adds another layer of complexity, as packaging may also be manufactured through multiple value chain layers and obtaining PFAS content information may prove to be challenging.

- CUC recommends that the Draft Act provide for a limited scope of both PFAS and product categories for the initial round of reports, and that the scope of the reporting requirement be revisited thereafter. By limiting the scope and breadth of PFAS and products for which reporting requirements are initially imposed, a state can provide a more reasonable and practical opportunity for suppliers of products and components that are incorporated into complex articles to determine the presence of PFAS in the supply chain and to seek opportunities to phase out certain uses of PFAS where possible. This also will permit the development and submission of more accurate reporting.

- To ease compliance burdens with the notification requirements, CUC recommends that the Draft Act mandate creation of a list of specific PFAS that are a priority to protect health or environment and require reporting only on products containing listed PFAS in "priority products" (i.e., those posing unacceptable risk to human health or the environment). Such a list should include the CAS Number and the specific chemical identity using CAS nomenclature for each substance for which reporting is required. The use of CAS Numbers enables businesses throughout the value chain and across global marketplaces to understand which substances must be identified for reporting purposes. For materials lacking CAS Numbers (e.g., some fluoropolymers), equivalent identifiers (standardized material names or acronyms) may be needed if a state requires reporting for those materials.

- CUC suggests that the Draft Act establish a threshold (e.g., de minimis) level for PFAS content in manufactured articles, beneath which level no reporting would be required (such as PFAS present at 0.1% by product weight or greater). The de minimis level of 0.1% is practical and is generally understood by the manufacturers and distributors of manufactured articles that move among various international markets because the level aligns with the level imposed in European Union for substances of very high concern when present in articles. However, states should provide for stakeholder input concerning the establishment and selection of a specific de minimis value that manufacturers can reasonably be expected to ascertain based on information from their supply chains. Inclusion of a common threshold would streamline and reduce administrative burdens on a state's personnel and administrative resources, and reduce reporting burdens imposed on the manufacturers and distributors of complex (multi-component) articles/products, including imported products.

- The Draft Act provides that the notification must include a description of the product. CUC requests greater clarity as to what is meant by "a description." Does it refer to consumer vs. commercial, retail vs. wholesale, or product category such as toy/consumer electronic/furniture

etc.? Would it also include (as a requirement) the principal intended uses of the product? CUC suggests some level of recommended standardization on the elements of the "description."

- The Draft Act further provides that the notification must contain the amount of each PFAS in the product by name and CAS Number. CUC has significant concern with this requirement. The Draft Act presumes that it is possible to identify all PFAS in a product. At this time, testing is not available to specifically identify all PFAS. Consequently, the only other way to ascertain PFAS content is from suppliers. However, if PFAS content information – such as the CAS Number of the specific PFAS in the product and the amount contained – cannot be obtained from others, due to trade secret concerns or simply refusal to cooperate, a manufacturer will not be able to provide the required notification. CUC recommends that any legislation address this extremely likely scenario. Utilizing a "reasonably ascertainable" standard, as discussed earlier, is an option states should seriously consider, and it should be within a state's discretion to provide such clarification and guidance.

  CUC also recommends that manufacturers be allowed to report on PFAS content on the basis of information obtained from suppliers, as opposed to relying exclusively on analytical methods.

- The Draft Act requires notification of "an amount" of PFAS. CUC recommends that this be clarified to allow for reporting the amount of PFAS either by concentration or by weight. The same components which contain PFAS can be used in multiple products, and that would result in different PFAS concentrations in the overall product. To simplify reporting, we believe that both options should be made available.

- To address the situation where PFAS content information cannot be obtained from a supplier due to trade secret or non-responsiveness concerns, CUC suggests that states authorize and implement a joint submission system.[2] Such a system would allow manufacturers to submit their suppliers' contact information when such suppliers were reluctant to provide chemical substance information to the customers due to confidentiality concerns. The system would directly contact the upstream suppliers so that those suppliers could submit the needed information directly to the state. The duty to report would then lie with the suppliers, and the reporting manufacturers would have fulfilled their notification obligation by providing the supplier contact information.

- CUC supports the provision allowing for notification for a product category as opposed to each individual product.

- CUC believes that notification should be a one-time requirement, absent change in the reported information. There is no need to report the same information every three years, as the Draft Act currently provides.

[2] See 40 CFR 710.29(d)(4), 40 CFR 710.33 for an example of joint submissions.

- The Draft Act requires a manufacturer to update notification information whenever there is a change in the reported information. CUC recommends that this requirement should state that an update of information in a notification should occur when the filer **becomes aware** of a change, not merely when there is a change. A filer may not become aware of changes when they occur, and only find out later, especially with regard to product components.

  Similarly, the prohibition on selling PFAS-containing products for which notification was not provided should only be effective when the manufacturer has knowingly failed to provide the information, after exercising due diligence to reasonably ascertain PFAS presence in the product.

Section 6. Restrictions on the Sale of Certain PFAS-Added Products

The Draft Act establishes a ban on the sale of all PFAS-containing products, requires an inventory take back, and provides for waivers from the sales ban for currently unavoidable uses of PFAS.

- As discussed above, the definition of PFAS used in the Draft Act is incredibly broad. Accordingly, the sales ban would apply to a myriad of products, ranging from semiconductors to medical devices to pharmaceuticals and common household products. A ban on all such products, many of which provide significant benefit to the health and welfare of society, and for many of which there is little to no exposure to the PFAS in the product, is not based on sound policy or science. Even with a waiver process, manufacturers of critical products will be faced with administrative and compliance challenges that simply serve to hinder the availability of these critical products.

  Along the lines of what CUC suggested for the notification requirements, CUC recommends that the legislation provide for a limited scope of both PFAS and products subject to an initial sales restriction. The scope of the restriction could then be revisited. By limiting the scope and breadth of PFAS of products subject to the sales restriction, a state can provide a more reasonable and practical opportunity for suppliers of products and components that are incorporated into complex articles to determine the presence of PFAS in the supply chain and to seek opportunities to phase out certain uses of PFAS where possible.

- CUC recommends that the sales prohibition not extend to previously manufactured products (existing stocks produced before the law's effective date), spare/replacement parts for existing products, and materials needed to maintain and repair existing products. These parts often are not newly manufactured. Rather, when a new product is manufactured, spare and replacement parts are manufactured and maintained in accordance with either contractual or regulatory requirements so that the product can be continuously used and need not be replaced solely because a replacement part is not available. If these parts are not newly manufactured, it may be difficult for the entity selling the parts in any specific state to ascertain PFAS content due to the lapse of time since manufacture. The availability of spare/replacement parts would also allow for the continued use and maintenance of existing products, thereby preventing the accumulation of unnecessary waste including e-waste.

- CUC supports inclusion of a waiver from the sales restriction for currently unavoidable uses of PFAS. As discussed, as the definition of PFAS used in the Draft Act is so broad, many entities will need to file for waivers. States will need to be prepared for the significant burden that will be imposed on their agencies due to the voluminous amount of waiver requests that will be submitted if the current definition of PFAS and implementation structure are maintained. As mentioned earlier, Maine's experience with responding to reporting extension requests should be heeded by other states considering taking this route. If a transparent, predictable, fast, and efficient waiver process is not established, the process will likely collapse due to sheer volume, and either consumers will not get critical products or companies will find themselves in a situation where they need to risk noncompliance. Consequently, states will need to develop and provide understood, objective standards for what constitutes a currently unavoidable use, and what information and/or data is required to support such a finding.

- CUC supports the indefinite renewal of currently unavoidable use determinations. However, if the Draft Act provides for a limited renewal period, a two-year renewal is likely too short a time. As stated, many products require PFAS, and in many cases no alternatives are available. With such a short renewal period and considering the likely workload of a state agency processing waiver requests, companies may be faced with the prospect of filing a waiver request as soon as one is granted in order to ensure that a waiver is effective at the proper time. CUC recommends that the waiver period be a minimum of 5 years in length or when the state becomes aware of information that would lead to a conclusion that the use of PFAS is no longer currently unavoidable.

- CUC believes that no statutory provision is needed to address federal preemption. If a federal law preempts a state law, it does so without permission or grant of authority by a state.

Section 7. Certificate of Compliance

The Draft Act provides that manufacturers shall provide Certificates of Compliance with the requirements of the law in certain circumstances and establishes certain requirements for the certificates.

CUC recognizes the intent behind this section, and the fact that it can assist a manufacturer in ensuring compliance. However, it can create significant hardship and difficulty as well. Manufacturers of complex goods often work within complex (and sometimes global) networks and supply chains composed of potentially thousands of suppliers. Securing compliance certifications from all these different entities would be extremely challenging, if at all possible.

Therefore, as discussed above, should a provision that mandates certificates of compliance be included in legislation, CUC recommends that manufacturers certify compliance based on a "reasonably ascertainable" standard for determining if their product contains PFAS and is therefore subject to the regulations and restrictions. If a manufacturer cannot reasonably ascertain, via supplier communications or proven and economical testing, that PFAS is present in the product, they would be able to certify compliance.

CUC supports providing for the provision of the certificates via a website.

Section 8. Labeling of PFAS-Added Products

The Draft Act provides that a product that has been determined to have a currently unavoidable use of PFAS may only be sold if it has a label that discloses PFAS content or if the PFAS content disclosure is available via an alternate method approved by the state.

- As discussed above, the Draft Act uses a broad definition of PFAS that does not relate to any specific harm or risk posed by the use of PFAS. Requiring PFAS disclosure on a product label may actually confuse consumers and make it difficult for them to make informed decisions. If a product that is essential is labeled, and a consumer mistakenly believes that the PFAS disclosure indicates danger, the result may be that the consumer will actually cause themselves needless harm. Labeling should only be required when the state has credible scientific evidence that the PFAS in a specific product poses a risk to human health or the environment.

  Furthermore, the current Draft Act contains no de minimis threshold for PFAS content. Consequently, labeling would be required for products that may have an insignificant (trace) amount of PFAS (including impurities), for which exposure to the PFAS is highly unlikely, and that would pose minimal risk over the product lifecycle. CUC believes that labeling in such scenarios serves no useful purpose and imposes a needless compliance burden with no corresponding benefit to human health or the environment.

- Imposing labeling requirements can disproportionately affect small businesses that may lack the resources and expertise to comply. Compliance costs, such as redesigning labels and printing new packaging, can be a significant financial burden. This could hinder small businesses' ability to compete with larger corporations and may result in reduced product diversity and market competition. These are criteria that a state should consider if a product manufacturer applies to utilize an alternative method for PFAS content disclosure.

- States must recognize that there are federal statutes that regulate product labeling. Accordingly, PFAS disclosure on a label may not be possible for certain products, such as pesticides regulated under the Federal Insecticide, Fungicide, and Rodenticide Act. Consequently, this is another factor that a state should consider if a product manufacturer applies to utilize an alternative method for PFAS content disclosure.

- Labeling every PFAS-containing component is impossible in complex manufactured goods. Even utilization of alternative methods may prove to be difficult, due to the number of individual components that may be within a finished good (for example, an automobile). Additionally, it is possible that disclosure that a distinct component in a finished good contains a PFAS may be a trade secret.

Section 9. PFAS-Containing Products; Producer Responsibility

The Draft Act provides that products that have been determined to have a currently unavoidable use of PFAS can only be sold if the manufacturer has a “take-back” plan for the product, and the implementation and operation of the plan meets certain requirements.

- As discussed above, the Draft Act uses a broad definition of PFAS that does not relate to any specific harm or risk posed by the use of PFAS. For certain PFAS, routine disposal may not pose a significant risk to human health or the environment. In certain applications, such as in medical products, there are existing rules and regulations concerning the disposal of such products. Consequently, development of costly take-back programs is not warranted, and only serves to impose yet another compliance burden on industry. Such a burden could be significant for small businesses. CUC believes that a take-back program should only be required when the state has credible scientific evidence that the PFAS in a specific product poses a significant risk to human health or the environment.

- Take-back programs, despite outreach and education, face obstacles in achieving the goals and objectives of the program. Many consumers may not be motivated to participate in product take-back programs. Lack of awareness, apathy, or inconvenience can hinder their willingness to return products for recycling or proper disposal. Products that are not designed with ease of disassembly and recyclability in mind can pose challenges. Furthermore, monitoring and enforcing the product take-back can be challenging, both for the manufacturer and for the state. Consequently, CUC reiterates its opinion that if a state desires to mandate a take-back program, such a program should only be required for products when the state has credible scientific evidence that the PFAS in that specific product poses a risk to human health or the environment.

Section 10. Jurisdiction Procurement Preferences for Non-PFAS-Added Products

The Draft Act provides that state procurement administrators should give priority and preference to the purchase of products that do not contain PFAS, and includes criteria such administrators should utilize when making preference determinations.

- As discussed above, the Draft Act uses a broad definition of PFAS that does not relate to any specific harm or risk posed by the use of PFAS. Consequently, imposing procurement preferences simply due to PFAS presence may needlessly limit the range of available products and suppliers, potentially reducing the government's ability to find the most cost-effective and innovative solutions. It may also restrict access to products or services that are better suited for a particular project or have unique capabilities.

Conclusion

CUC appreciates your consideration of these comments. CUC looks forward to additional opportunities to discuss the concerns detailed above with NEWMOA and its member states.