

Maine Seeks Comments on Concept Draft Language for PFAS in Products Rule

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The Maine Department of Environmental Protection (MDEP) [announced](#) on August 5, 2024, that its Per- and Polyfluoroalkyl Substances (PFAS) in Products Program has developed new [concept draft language](#) to implement the recently amended Title 38, Section 1614, the section addressing PFAS in products. MDEP has made the concept draft language available for an informal outreach process until **August 30, 2024**. After the informal outreach process, MDEP plans to proceed with rulemaking in **fall 2024**. According to MDEP, there will be an opportunity for public comment on a proposed draft rule during the rulemaking process.

Background

As reported in our May 24, 2024, [blog item](#), on April 16, 2024, Governor Janet Mills (D) signed [LD 1537](#), amending [An Act To Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution](#). The amendments eliminate the general notification requirement that was scheduled to take effect **January 1, 2025**; create new sales prohibitions for products with intentionally added PFAS with varying effective dates; exempt certain product categories from the prohibitions; and establish a new reporting program for those product categories that receive a currently unavoidable use (CUU) determination from MDEP.

Concept Draft Language for PFAS in Products Rule

The concept draft language details the sales prohibitions for new and unused products and product components containing intentionally added PFAS, and the notification requirements for products containing intentionally added PFAS determined to be a CUU.

Definitions

The concept draft language includes the following definitions:

- Consumer products are defined as “goods which are intended to be used primarily for personal, family or household purposes.” MDEP includes a note that “[n]on-consumer

products and consumer products refer to the characteristic of a product, while the defined term consumer refers to a characteristic of a person. For the purposes of this Chapter, the character of the purchaser does not impact the character of the goods purchased.” MDEP also notes that “[t]he statutorily defined terms of carpet or rug, air care products, and automotive maintenance products are limited to consumer products.”

- Fluorinated container is defined as “any container which has been treated with fluorine atoms to create a permanent barrier that protects the container from the chemical it is intended to encounter.”

The following definitions are defined in the statute at 38 M.R.S. Section 1614(1):

- CUU: A use of PFAS that the department has determined by rule under this section to be essential for health, safety, or the functioning of society and for which alternatives are not reasonably available.
- Intentionally added PFAS: PFAS added to a product or one of its product components to provide a specific characteristic, appearance, or quality or to perform a specific function. “Intentionally added PFAS” also includes any degradation by-products of PFAS. MDEP notes in the concept draft language that intentionally added PFAS includes degradation by-products serving a functional purpose or technical effect within the product or its components, and products that consist solely of PFAS. Intentionally added PFAS does not include PFAS that is present in the final product as a contaminant or PFAS used in the manufacturing process or that comes into contact with the product during the manufacturing process but is not present in the final product.
- Manufacturer: The person that manufactures a product or whose brand name is affixed to the product. In the case of a product imported into the United States, “manufacturer” includes the importer or first domestic distributor of the product if the person that manufactured or assembled the product or whose brand name is affixed to the product does not have a presence in the United States. MDEP notes in the concept draft language that certain online retail platforms may allow for purchase of products directly from a producer. When no other person meets the definition of manufacturer, and the product is sold, offered for sale, or distributed for sale in the State of Maine, MDEP will consider the importer to be the manufacturer. MDEP states that when it is possible to consider multiple entities the manufacturer, it will consider the party who controls the formulation of the product and its PFAS content to be the manufacturer.
- PFAS: Substances that include any member of the class of fluorinated organic chemicals containing at least one fully fluorinated carbon atom. MDEP notes that the U.S. Environmental Protection Agency (EPA) “maintains a webpage of chemicals that it has identified as PFAS (available at: <https://comptox.epa.gov/dashboard/chemical-lists/pfasmaster>) which provides clarity on what is considered a PFAS.” According to MDEP, any product sold, offered for sale, or distributed for sale under a CUU determination that contains intentionally added PFAS must be reported “regardless of whether the substance is found on any list.”

Notification

By **January 1, 2032**, for products containing intentionally added PFAS that are covered by a listed CUU determination, manufacturers with more than 100 employees must submit a notification to MDEP that includes the following information:

- The purpose for which PFAS are used in the product, including PFAS in any product component;

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- The identity of each PFAS by its name and its Chemical Abstracts Service Registry Number[®] (CAS RN[®]), or in the absence of this number, a description approved by MDEP; and
 - The amount of each of the PFAS in the product or any product component reported as an exact quantity as a concentration, determined using commercially available analytical methods; the total organic fluorine if the amount of each PFAS is not known or easily ascertainable, determined using commercially available analytical methods; based on information provided by a supplier or as falling within a range approved by MDEP; or if neither quantities of specific PFAS compounds or total organic fluorine are known or reasonably ascertainable, a manufacturer must provide the total weight of the product.

MDEP may waive all or part of the notification requirement if it “determines that substantially equivalent information is publicly available.” Waiver requests must include a description of any publicly available records that contain information substantially equivalent to the information required; a statement that information is updated in a similar manner as required by the regulations; and a link to or copy of all publicly available substantially equivalent information described by the manufacturer.

Exemptions

The following are exempt from the requirements:

- A product for which federal law or regulation controls the presence of PFAS in the product in a manner that preempts state authority;
- A package, except when the package is the product of the manufacturer. The exemption does not apply to the package of a product prohibited from sale, offered for sale, or distributed for sale if the package is a fluorinated container or container that otherwise contains intentionally added PFAS;
- A used product or product component;
- A firefighting or fire-suppressing foam or related product regulated under 38 M.R.S. Section 424-C to which PFAS has been intentionally added;
- A prosthetic or orthotic device or any product that is a medical device, drug, or biologic or that is otherwise used in a medical setting or in medical applications that are regulated by or under the jurisdiction of the U.S. Food and Drug Administration (FDA);
- A veterinary product intended for use in or on animals, including diagnostic equipment or test kits and the components and any product that is a veterinary medical device, drug, biologic, or parasiticide or that is otherwise used in a veterinary medical setting or in veterinary medical applications that are regulated under the jurisdiction of FDA, the U.S. Department of Agriculture (USDA) pursuant to the federal Virus-Serum-Toxin Act; or EPA pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), except that any such product approved by EPA pursuant to FIFRA for aerial or land application is not exempt;
- A product developed or manufactured for the purposes of public health, environmental, or water quality testing;
- A product required to meet standards or requirements of the Federal Aviation Administration (FAA), the National Aeronautics and Space Administration (NASA), the U.S. Department of Defense (DOD), or the U.S. Department of Homeland Security (DHS), except that the exemption does not apply to any textile article or refrigerant that is included in or as a component part of such products. If similar products are available for sale, offered for sale, or distributed for sale in Maine either in compliance with an intentionally added PFAS sales prohibition or otherwise documented to be PFAS free, a manufacturer must, at MDEP’s request, provide sufficient justification that the product containing intentionally added PFAS is necessary to meet said requirements;

- A motor vehicle or motor vehicle equipment regulated under federal motor vehicle safety standards and any other motor vehicle, including an off-high vehicle or specialty vehicle, such as an all-terrain vehicle, side-by-side vehicle, farm equipment, or personal assistive mobility device, except that the exemption does not apply to any textile article or refrigerant that is included in or as a component of such products;
- A watercraft or a seaplane, except that the exemption does not apply to any textile article or refrigerant that is included in or as a component part of such products;
- A semiconductor, including semiconductors incorporated into electronic equipment, and equipment and materials used in the manufacture of semiconductors. In the concept draft language, MDEP notes that “[w]hile semiconductors incorporated into electronic equipment are exempted from this Chapter, electronic equipment in their entirety is not. Manufacturers of electronic equipment are still subject to sales prohibitions, currently unavoidable use determinations, and notification requirements on the balance of their product which is not comprised of semiconductors”;
- Non-consumer electronics and non-consumer laboratory equipment not ordinarily used for personal, family, or household purposes; or
- Equipment directly used in the manufacture or development of products described above.

Prohibition on Sale of Products Containing Intentionally Added PFAS

The prohibitions do not apply to a retailer in the State of Maine unless the retailer sells, offers for sale, or distributes for sale a product containing intentionally added PFAS for which the retailer has received a notification that the sale of the product is prohibited. The prohibitions apply to any of the listed products that do not contain PFAS but are sold, offered for sale, or distributed for sale in a fluorinated container or in a container that otherwise contains intentionally added PFAS. The prohibitions do not apply to the sale or resale of used products or products for which MDEP has designated a CUU. The prohibitions include:

- Effective January 1, 2023, a person may not sell, offer for sale, or distribute for sale a carpet or rug that contains intentionally added PFAS.
- Effective January 1, 2023, a person may not sell, offer for sale, or distribute for sale a fabric treatment that contains intentionally added PFAS.
- Effective **January 1, 2026**, a person may not sell, offer for sale, or distribute for sale:
 - A cleaning product containing intentionally added PFAS;
 - A cookware product containing intentionally added PFAS;
 - A cosmetic product containing intentionally added PFAS;
 - Dental floss containing intentionally added PFAS;
 - A juvenile product containing intentionally added PFAS;
 - A menstruation product containing intentionally added PFAS;
 - A textile article containing intentionally added PFAS. The prohibition under this Subsection does not include outdoor apparel for severe wet conditions or a textile article that is included in or a component part of a watercraft, aircraft, or motor vehicle, including an off-highway vehicle;
 - Ski wax containing intentionally added PFAS; or
 - Upholstered furniture containing intentionally added PFAS.
- Effective **January 1, 2029**, a person may not sell, offer for sale, or distribute:
 - Artificial turf containing intentionally added PFAS; or
 - Outdoor apparel for severe wet conditions containing intentionally added PFAS, unless the apparel is accompanied by a legible, easily discernable disclosure that includes the following statement: “Made with PFAS chemicals.” The disclosure

requirement applies to all sales, offers for sale, or distributions for sale for outdoor apparel for severe wet conditions containing intentionally added PFAS.

- Effective **January 1, 2032**, a person may not sell, offer for sale, or distribute for sale any product that is not already prohibited for sale that contains intentionally added PFAS. The prohibitions under this Subsection do not apply to:
 - Products subject to Section 5.F. of the concept draft language.
- Effective **January 1, 2040**, a person may not sell, offer for sale, or distribute for sale in the State of Maine:
 - Cooling, heating, ventilation, air conditioning, or refrigeration equipment that contains intentionally added PFAS; or
 - Refrigerants, foams, or aerosol propellants that contain intentionally added PFAS.
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 - Refrigerants, foams, or aerosol propellants that contain intentionally added PFAS.

Fees

To cover the administrative costs incurred by MDEP to administer the program, a manufacturer of products or product components required to provide notice shall, as part of the submission of notification, pay a fee of \$5,000 for each notification submitted. For the purposes of calculating fees, each submission that for either an individual product or product component or a group thereof reported under a single CUU determination will be considered a separate notification. The concept draft language notes that notifications are required only for products or product components that are subject to a CUU determination and are sold, offered for sale, or distributed for sale. Product components that are incorporated into complex products are not subject to the notification requirement, even when information regarding the product components is provided as part of that product's notification submission.

CUU

Proposals for CUU determinations may be submitted by manufacturers individually or collectively. A separate proposal must be submitted for each individual combination of product category and industrial sector. For initial CUU proposals, the requester shall submit a proposal no later than 18 months prior to the applicable sales prohibition. MDEP will not consider any proposals for an initial CUU determination prior to 36 months in advance of the applicable sales prohibition; any proposals received prior to this date will need to be updated and resubmitted "between 36 and 18 months before the effective date of the applicable sales prohibition."

A proposal must include:

- A brief description of the type of product to which PFAS is intentionally added, including a brief narrative of the product; its physical structure and appearance; how it functions; and if applicable, its place in larger items, systems, or processes.
- An explanation of why the availability of PFAS in the specific product is essential for health, safety, or the functioning of society. This may include a description of the negative impact that would be caused by the unavailability of PFAS for use in the product and the subsequent unavailability or unsatisfactory performance of the product.
- A description of how the specific use of PFAS in the product is essential to the function of the product. The proposal must include the required specific characteristic or combination of characteristics that necessitate the use of PFAS chemicals.

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- A description of whether there are alternatives for the specific use of PFAS that are reasonably available.
 - A list of federal regulations, other Maine regulations, and regulations of other states to which the product is subject by reason of containing PFAS.
 - If, in another jurisdiction, subject to an absolute prohibition or no CUU determination or similar has been made, a list of comparable products of which the proposer is aware that remain available within that jurisdiction.
 - If a similar program's sales prohibition is identified as applicable and similar products are available for sale, offered for sale, or distributed for sale.
 - A justification explaining how products available in compliance with other similar sales prohibitions are not reasonably available alternatives in Maine.
 - Documentation demonstrating that products containing PFAS alternatives in other jurisdictions would not perform as intended in Maine due to differing physical or climate conditions.
 - Any information known or reasonably ascertainable by the manufacturer regarding the impacts on human health or the environment of the product.

The concept draft language notes that although the statute provides a mechanism for the protection of proprietary information, CUU determinations are subject to MDEP's rulemaking process, including approval by the Board of Environmental Protection in a public meeting and response to public comments. Should a proposal for a CUU determination contain claims of confidentiality, MDEP "may determine that there is insufficient publicly available information to justify a rulemaking." MDEP "strongly recommends that all proposals for currently unavoidable use determinations do not contain claims of confidentiality."

CUU determinations will include an expiration date upon which a CUU determination is no longer applicable and all sales, offers for sale, or distributions for sale will be immediately prohibited. If a person believes the CUU remains, they may submit a proposal to MDEP for a new CUU determination. That proposal, in addition to the information required above, must include a description of any changes since the time of the first CUU determination and a summary of efforts made during that time to develop or discover alternatives or to make existing alternatives reasonably available. MDEP will consider all subsequent proposals no sooner than 24 months prior to and no later than 12 months prior to the expiration date of the determination in effect.

Commentary

The Maine PFAS law has seen more than its share of revisions as the state has tried mightily to balance the interests of environmental protection and the burdens on regulated entities. Throw in the difficult task of implementing the concept of CUU and making CUU determinations, you have a state PFAS program with outsized significance nationally. A few points are worth noting.

First, the comment period is short. While many are trying to vacation in August, interested parties have only until **August 30** to weigh in, less than 30 days from the draft's posting. Maine notes this is an "informal" outreach process and that there will be another opportunity to comment on a proposed rule. That said, commenting after a concept is at least partially baked in is considerably more difficult to reverse.

Second, the process outlined for CUU determinations is interesting. As most recently amended in April, the law now requires notifications only for products covered by a CUU determination. Notifications are subject to a \$5,000 fee. Proposals for initial CUU determinations cannot be

submitted before 36 months prior to a sales prohibition, and no later than 18 months prior to the prohibition. Importantly, “proprietary information” can remain protected unless Maine determines “that there is insufficient publicly available information to justify a rulemaking.” As noted, Maine is plainly discouraging the assertion of confidential business information in CUU applications.

Third, the list of exemptions requires scrutiny. Interested parties are urged to review the list for items listed, the scope of each exemption, and what is not listed. Although the exemptions are in [An Act To Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution](#), as amended by [LD 1537](#), it is possible that the legislature will amend the statute further.

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National Law Review, Volume XIV, Number 220

Source URL: <https://natlawreview.com/article/maine-seeks-comments-concept-draft-language-pfas-products-rule>