AmericanCoatings ASSOCIATION℠

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Melissa Lavoie, Interim Executive Director
NEWMOA
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Submitted via e-mail: publiccoments@newmoa.org

Dear Mrs. Lavoie:

The American Coatings Association ("ACA")[1] appreciates the opportunity to submit comment regarding NEWMOA's Draft PFAS Prevention Model Legislation. We are committed to working with NEWMOA to help ensure an accurate understanding of PFAS in products and any associated risks to the public and the environment. The Association's membership represents 90% of the paint and coatings industry, including downstream users of chemicals, as well as chemical manufacturers. Our membership includes companies that manufacture a variety of formulated products including paints, coatings, sealants and adhesives and their raw materials that may be affected by reporting requirements, due to the broad set of chemicals covered by the requirement, regardless of associated hazards.

ACA submits the following comments as detailed below:

- NEWMOA does not accurately characterize hazards associated with PFAS.
- ACA recommends revising the definition of PFAS.
- NEWMOA should recognize the complexity of identifying PFAS substitutes.
- Timing of product bans is not feasible.
- The "Clearinghouse" requirements do not provide adequate trade secret protections.
- NEWMOA should exempt *de minimis* amounts from reporting.
- NEWMOA should specify the scope of due diligence required to identify reportable information.
- DEP should specify a method of detection for PFAS in products.

[1] ACA is a voluntary, non-profit trade association working to advance the needs of the paint and coatings industry and the professionals who work in it. The organization represents paint and coatings manufacturers, raw materials suppliers, distributors, and technical professionals. ACA serves as an advocate and ally for members on legislative, regulatory and judicial issues, and provides forums for the advancement and promotion of the industry through educational and professional development services. ACA's membership represents over 90 percent of the total domestic production of paints and coatings in the country.

- NEWMOA should remove unnecessary administrative requirements not clearly related to environmental protection, such as certificates of compliance, collection systems and jurisdiction review.

I. NEWMOA does not accurately characterize hazards associated with PFAS

PFAS encompasses a variety of fluorinated chemistries with very distinct physical and chemical properties, used in a variety of products. PFAS or fluorinated chemistries are generally known to be persistent, due to carbon-fluorine bonds, but have varying properties for toxicity and bioaccumulation. Generally, persistence alone is not an indicator of risk or potential for harm. Scientists consider persistence as one factor with toxicity and potential to bioaccumulate.

Because of these varying characteristics, NEWMOA's characterization of PFAS as a "persistent and toxic class of pollutants," in Section 2(a) is not an accurate description. Fluoropolymers, for example, are large, stable, inert polymeric molecules that are too large to cross biological membranes and therefore do not present significant concerns for toxicity or bioaccumulation. Fluoropolymers do not present the human health impacts associated with legacy PFAS chemicals. Fluoropolymers are not PFOA or PFOS or other long-chain PFAS, nor can they transform to those substances. Regulatory authorities in Europe and other jurisdictions have classified fluoropolymers as "polymers of low concern."[2]

Similarly, ACA recommends deleting subparagraph 2(o):

> In the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of [Jurisdiction] and require the following legislation as immediately necessary for the preservation of the public peace, health, and safety.

Considering that not all PFAS are toxic and/or bioaccumulative, this sentence over-states the need for PFAS legislation, elevating it to the level of a public health and safety emergency, making legislation necessary to preserve public peace. This is simply not true for all fluorinated chemicals. The statement should be removed.

II. ACA recommends revising the definition of PFAS

NEWMOA's adoption of a broad PFAS definition inevitably captures a diverse range of reportable chemicals that are not harmful to human health or the environment, in effect, distracting focus from fluorinated chemicals that are harmful while stopping the flow of beneficial products. One example of covered "PFAS" includes refrigerants that meet international and EPA requirements for mitigation of climate impacts. ACA suggests that NEWMOA modify its definition to limit these impacts implementing a definition of two or more fluorinated carbon atoms.

[2] For additional information regarding the toxicity potential of fluoropolymers and criteria for polymers of low concern, see:

- Henry, B J, et al., *A critical review of the application of polymer of low concern and regulatory criteria to fluoropolymers*, Integrated Environmental Assessment and Management, 14, 3, (2018).
- Korzeniowski, et al. *A critical review of the application of polymer of low concern regulatory criteria to fluoropolymers II: Fluoroplastics and fluoroelastomers*. Integrated Environmental Assessment and Management, 19, 2, (2022).

Several state and federal authorities are developing or have implemented similar definitions. In October 2021, Delaware enacted a drinking water law (H.B. 8, 151st General Assembly), where PFAS is defined as:

> non-polymeric perfluoroalkyl and polyfluoroalkyl substances that are a group of man-made chemicals that contain at least 2 fully fluorinated carbon atoms, excluding gases and volatile liquids. "PFAS" includes PFOA and PFOS[3]

West Virginia's HB 3189 (2023) includes an identical definition of PFAS.[4]

At the federal level, EPA is finalizing a PFAS reporting requirement, based on a definition that encompasses two or more fluorinated carbon atoms, as follows:

> *Per- and polyfluoroalkyl substances* or *PFAS, for the purpose of this part,* means 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.[5]

EPA's reporting requirement has been submitted to the Office of Management and Budget for final approval and publication. EPA expects to publish the final version by August. A bipartisan bill in the Senate, addressing PFAS contamination, similarly focuses on chemistries with two or more fluorinated carbons and excludes fluoropolymers.[6]

III. NEWMOA should recognize the complexity of identifying substitutes

NEWMOA's proposal underestimates the importance of fluoropolymers for certain high performance products, while assuming that fluorinated chemistries are readily replaced. NEWMOA underestimates the time and expense to identify substitutes, modify all aspects of a formulated product and bring it to market, assuming a substitute is available. Formulated products do not have "drop-in" substitutes. All aspects of the formula have been developed and tested for optimum performance, often while minimizing environmental impacts. Fluorinated chemistries are sometimes necessary to meet high performance standards, often reducing raw materials and energy usage due to durability of the fluorinated product.

ACA recommends modifying the language in Section 2(k) to recognize the significant time and costs associated with identifying substitutes, and that in some instances non-fluorinated substitutes can have a greater environmental impact over the lifecycle of a product. NEWMOA's broad prohibition of fluorinated chemistries fails to account for nuances in evaluating environmental attributes of a product that would presumably occur with a more focused approach, evaluating fluorinated chemistries on a case-by-case basis.

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[3] Delaware, HB 8, 151st General Assembly, available online at: https://legiscan.com/DE/text/HB8/id/2413483

[4] HB 3189 is available online at: https://www.wvlegislature.gov/Bill_Status/bills_text.cfm?billdoc=hb3189%20intr.htm&yr=2023&sesstype=RS&i=3189

[5] EPA Proposed PFAS Reporting Rule, available online at: https://www.regulations.gov/document/EPA-HQ-OPPT-2020-0549-0001

[6] Carper / Capito PFAS Package Bill, available online at: 5759AB0088AF5D0C4BEA4DEBCB507C1F.pfas-bill-section-by-section-final.pdf (senate.gov)

In general, ACA supports NEWMOA's reference to "credible scientific evidence" in evaluating alternatives, requiring:

> 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.

ACA emphasizes the importance of conducting this process within the standards of the scientific community, rather than adopting an outlying study for publication in a government journal that would then set the standard for availability of a specified substitute.

IV. Timing of product bans is not feasible

ACA recommends deleting Section 6(a) banning PFAS within 3 years of enactment. Any product bans should be carefully considered on a case-by-case basis or a chemical-by-chemical basis. This would allow the state to focus legislative efforts on those chemistries associated with contamination, rather than inadvertently banning products that are beneficial and do not cause environmental or public health concerns.

In the alternative, ACA recommends extending the date of the blanket ban to harmonize with Minnesota's PFAS ban in 2032 or Maine's ban in 2030. This would allow time to identify products with PFAS, often in trace amounts, conduct research and development and begin the process of substitution, assuming that substitutes can be identified. Banning products within three years of enactment is simply not possible and will result in the withdrawal of products used as critical raw materials and other beneficial products. Such products enhance infrastructure maintenance, are used in medical equipment, etc.

V. The "Clearinghouse" requirements do not provide adequate trade secret protections

Section 4, establishing a "clearinghouse" of product-related information, would establish a broad set of publicly available data, without adequate protection of trade secret information. Because of the broad information set held in the "clearinghouse," it does not clearly serve the purpose of lowering PFAS-related contamination. Companies spend millions of dollars to develop products with unique characteristics and benefits. Section 4 does not provide any protections for trade secret information and is instead focused on blanket disclosures. ACA recommends reducing the data set recommended for the clearinghouse to only data necessary to track environmental contamination while adding language recognizing the importance of maintaining trade secrets.

VI. NEWMOA should exempt *de minimis* amounts from reporting

Manufacturers of formulated products rely on disclosures from upstream actors to identify fluorinated chemicals and their amounts in raw materials. Amounts below disclosure thresholds typically are not disclosed on SDS (Safety Data Sheets). ACA suggests that NEWMOA adopt a *de minimis* threshold for reporting of 1% in mixture, harmonizing with federal OSHA SDS disclosure requirements. ACA further suggests that NEWMOA clarify that downstream manufacturers can rely on disclosures made on an OSHA mandated SDS. Alternatively, NEWMOA could mandate that companies only need to report those

PFAS chemicals identified on an OSHA mandated SDS. In effect, companies would not have to report chemicals in trace amounts below SDS disclosure thresholds.

Downstream formulators face significant barriers to identifying amounts in mixtures when not disclosed. Such information is not readily supplied to downstream users upon request. Because of complexities in the supply chain, suppliers often do not know this information or simply do not want to disclose information about small amounts, even when known. Downstream users often struggle to identify a point of inquiry from a supplier for reportable information. Even if inquiries are submitted, obtaining a response is rare.

NEWMOA's draft has no exemptions for *de minimis* amounts. *De minimis* thresholds are common for federal chemical reporting rules. EPA's Chemical Data Reporting Rule (CDR), for example includes a *de minimis* threshold of 25,000 pounds per year or 2,500 pounds per year for certain regulated chemicals. Exemptions based on concentration thresholds are common under international systems. For example, under EU REACH, the European chemicals management law, companies manufacturing or importing an amount below 0.1% are exempt from reporting requirements.

ACA suggests that a percentage threshold based on the OSHA SDS disclosure threshold would allow for expeditious gathering of reportable information. OSHA requires disclosure of chemicals based on a chemical's hazard classification, at 1% for chemicals classified with physical hazards and some health hazards and 0.1% for chemicals associated with certain other health hazards (e.g. carcinogenicity and reproductive toxicity). Because fluorinated chemicals are such a diverse group of chemicals, fluorinated chemicals vary in hazard classification. As such, some may be disclosed at the 0.1% threshold while others will be disclosed at the 1% threshold.

With a 1% threshold, a reporting entity can rely on the SDS to identify all hazardous fluorinated chemicals in concentrations above that amount. With a lower reporting threshold, at 0.1% for example, a formulator may not have knowledge of fluorinated chemicals in mixtures at the 0.1%-1% range. The SDS would only disclose those fluorinated chemicals identified with health hazards requiring disclosure at 0.1%, for example carcinogens or reproductive toxicants. Fluorinated chemicals at 0.1%-1% range that are not carcinogens may not be disclosed on the SDS. In effect, a downstream formulator would not know of the presence of a fluorinated chemical, absent further testing, assuming test methods are available and accurate for small amounts. This is not always the case for complex products.

Alternatively, DEP could stipulate that a downstream formulator is only required to report those PFAS chemicals disclosed on an OSHA mandated SDS, regardless of whether the chemical is disclosed at the 0.1% or 1% threshold. This approach would capture those chemicals disclosed at the 0.1%, without being unduly burdensome.

VI. NEWMOA should specify the scope of due diligence required to identify reportable information

ACA requests that NEWMOA specify the degree of due diligence required in attempting to identify fluorinated chemistries in raw materials used by downstream product formulators and manufacturers. Due diligence parameters are necessary due to the broad scope of this reporting requirement, at any amount in a chemical mixture. Downstream companies must also identify fluorinated chemicals with CAS numbers in raw materials even when a manufacturer has withheld CAS number disclosure to protect a trade secret mixture.

In effect, the reporting requirement inevitably requires downstream companies test raw materials to identify reportable chemicals. Companies that conduct testing can still violate the rule due to the inadequacy of commercially available analytical test methods and limits of detection of any available methods. NEWMOA should take note that most commercially available analytical methods are designed to test air or water for contamination. These are not designed for products or chemical formulations.

NEWMOA must adopt a standard of due diligence to provide a pathway towards compliance and minimize unintentional non-compliance. ACA recommends adoption of EPA's due diligence standard. For chemical reporting rules under TSCA, including EPA's proposed PFAS reporting rule, EPA typically requires companies report all information "known to or reasonably ascertainable by" the reporting entity, as further described in the 2011 revisions to the Chemical Data Reporting Rule.[7] The standard requires:

- A reporting entity must conduct a thorough review of internal records for relevant information.
- A reporting entity must identify relevant records held by subcontractors and subsidiaries.
- A reporting entity does not need to conduct broad external surveys.
- A reporting entity does not need to make targeted inquiries outside of the company, if internal documents suggest an external information source.
- A reporting entity must provide records or reasonable estimates of any information a similarly situated company would be expected to have.

VII. DEP should specify a method of detection for PFAS in products

ACA is concerned that NEWMOA has not identified a viable test method for detection and reporting of fluorinated chemicals in products, leading to disparity in reporting methods and inaccurate reports. Currently, manufacturers are not aware of standardized analytical methods for PFAS identification in articles and chemically formulated products. EPA's test methods are not designed for products. NEWMOA's reporting requirement would inevitably require third-party testing and development of analytical techniques by a third-party. This is cost prohibitive for many downstream formulators, especially considering that a company would need to identify the specific fluorinated chemical at issue. Any analytical methods for products will be developed by a laboratory and will be specific to the product at issue. These will not be commercially available methods.

On its PFAS webpage, EPA identifies analytical methods identifying PFAS in water and air. EPA explains that it is currently developing test methods for PFAS to understand PFAS contamination across other environmental media. Notably, EPA has not developed analytical methods for PFAS in products, and it has not identified existing analytical methods for products. As explained on EPA's PFAS webpage:

> EPA scientists are developing validated analytical methods for drinking water; groundwater; surface water; wastewater; and solids, including soils, sediments, biota, and biosolids, which may eventually become standard methods or research methods.

[7] 76 Fed. Reg. 50816,50829 (August 16, 2011), available online at: Federal Register, Volume 76 Issue 158 (Tuesday, August 16, 2011) (govinfo.gov).

> ACA requests DEP to clearly identify analytical methods for reporting of PFAS in chemicals, formulated products, articles and other types of products.[8]

Considering that commercially available analytical methods are not available for formulated products, product formulators can rely on calculations based using data from upstream suppliers, but this information can be too inadequate to meet the PFAS reporting requirement, absent further due diligence parameters. Hence, product formulators need additional guidance about due diligence steps required to comply with the law when available information is inadequate.

VIII. Additional Administrative Requirements – Certificates of Compliance, Collection System and Jurisdiction Review

Several administrative requirements are unduly burdensome and seem to be designed to place administrative barriers to bring products to market, based on the assumption that all PFAS are, "persistent and toxic" and causes a public health and safety emergency. These broad provisions do not serve to reduce those products associated with PFAS contamination only.

a. Certificates of Compliance (Section 7)

Considering that the Certificate of Compliance program, described in Section 7, applies to products where the state has granted an exemption, the certification program is unnecessary and difficult to administer. State agencies will already maintain a list of products subject to exemptions. As such, having product manufacturers issue a Certificate of Compliance serves no purpose, and implements an additional administrative burden.

b. Collection System is Unworkable (Section 9)

The proposed collection system for products with currently unavoidable use is not feasible for several types of products, for example, a coating that might have a trace amount of a fluorinated chemistry. Such a product might be OEM applied and developed to last for several years. It would not be designed for use and then take back. Further, considering the amount of products with trace levels of PFAS, developing take back programs for such a wide range of products is not feasible.

c. Jurisdictional Review (Section 14)

Section 14 requires:

> The [agency] shall review the effectiveness of this Act in consultation with the Interjurisdiction Clearinghouse no later than 4 years after its adoption and shall provide a report based upon that review to the Governor and the legislature.

This section is prone to misleading reports and evaluations, since the expertise and composition of the Interjurisdictional Clearinghouse is not clearly defined. Further, considering the broad scope of products at issue, it is unlikely that Clearinghouse staff have the requisite expertise to understand and evaluate complex industrial and/or consumer products. Similarly, an agency may not have the requisite expertise to make similar determinations. Any such analysis must be through consultation with industry, having knowledge about its products, performance characteristics and feasibility of substitutes.

[8] See additional information here: PFAS Analytical Methods Development and Sampling Research | US EPA

IX. Conclusion

ACA appreciates the opportunity to comment regarding NEWMOA's proposed draft model PFAS prevention law. ACA suggests the following:

- Remove language characterizing all PFAS as "toxic."
- Revise the definition of PFAS to encompass non-polymeric compounds of two or more fluorinated carbons.
- Revise the descriptions related to identification of substitutes to recognize the considerable time and expense and the possibility that substitution is not always possible and could result in products with greater environmental harm.
- Remove proposal to ban all products with PFAS within three years of enactment.
- Focus data maintained in the clearinghouse to information needed to minimize contamination while enhancing trade secret protections for data in the clearinghouse.
- Exempt *de minimis* amounts from reporting, provide a due diligence standard and specify testing requirements for chemical identification.
- Remove unnecessarily burdensome administrative requirements that are not appropriate for all products with PFAS, such as Certificates of Compliance, collection systems and the jurisdiction review process.

Please contact me if I can provide any additional information.

Sincerely,

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