Before the Minnesota Office of Administrative Hearings
In the Matter of Proposed New Rules Governing Reporting and Fees by Manufacturers Upon Submission of Required Information about Products Containing Per-and polyfluoroalkyl substances (PFAS),
Revisor's ID Number R-4828, OAH Docket No. 5-9003-40410

Comments of the Chemical Users Coalition

The Chemical Users Coalition ("CUC")[1] appreciates the opportunity to provide our comments on the Proposed Permanent Rules Relating to PFAS in Products: Reporting and Fees (the "Proposal"). 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 other activities relating to the Minnesota Pollution Control Agency's ("MPCA") efforts to implement Amara's Law.

CUC appreciates MPCA's efforts to implement a balanced reporting requirement that would gather information and data on products that contain PFAS while not overburdening those who need to report. We are providing comments on a section-by-section basis in the more detailed comments below. We offer these initial general comments as well.

General Comments

In the Statement of Need and Reasonableness for the Proposal (the "SONAR"), MPCA states that the reports to be received containing PFAS-in-products information will have utility both for MPCA and consumers. Specifically, it notes that "Informed consumers are key to reducing PFAS exposure and pollution. By providing clear, accessible information on which products contain intentionally added PFAS, the proposed rule empowers consumers to make educated purchasing decisions."

CUC believes that the goal of educating and informing consumers to make educated purchasing decisions is not met with this reporting requirement. As discussed further below, the information to be gathered by the proposed reporting requirements will not provide the state, nor consumers, with information which is informative of the potential risks of the specific PFAS which might be present in products, nor the likelihood of PFAS being released in a meaningful way from a

[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 Corporation, Sony Electronics, Inc., and TDK U.S.A. Corporation.

product about which information is being gathered. Unfortunately, the regulations proposed will impose reporting burdens on submitters and administrative burdens on state government officials who will need to collect and process information being submitted.

The adoption of the class-wide approach to regulating PFAS reflected in this Proposal fails to recognize that (as defined) the term "PFAS" comprises 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.

The simple reporting of data on thousands of unique substances and the products in which they appear, even in some minute quantities, fails to inform the consumer that there are significant differences among the unique substances included within the broad definition of PFAS the legislation provides and that many PFAS may not pose any risk of harm to human health or the environment. Furthermore, there may be extremely limited to no exposure to consumers from the PFAS within reported products, as the PFAS may not be present on a product's surface nor migrate into the environment. The reporting requirement provides no scientific context for any of the information provided and will not truly inform or educate consumers in a meaningful way. The information being gathered will be subject to misinterpretation and will be likely to exaggerate risks.

CUC notes that the scope of the regulation is impractically large. CUC recommends that reporting should be implemented as a phased approach. Instead of requiring reporting on all products, whether for industrial or consumer use, and for all PFAS, at one time, the focus of an initial round of reporting could be limited. It could provide for reporting on both a specific subset of PFAS and product categories, namely those of highest concern, and the scope of subsequent reporting could be revisited thereafter. By limiting the initial scope and breadth of PFAS and products for which reporting requirements are initially imposed, MPCA can provide a more reasonable and practical opportunity for suppliers of products and components that are incorporated within complex articles to determine the presence of PFAS in their supply chain and to begin evaluating opportunities to phase out certain uses of PFAS where possible. This also will permit the development and submission of more accurate reporting.

Furthermore, CUC recommends that MPCA adopt a reporting threshold, similar to those Environment and Climate Change Canada adopted for their 71(b) PFAS reporting requirement.[2] This would ensure that the entities that are selling products with significant quantities of PFAS are those that report and would ease the burden on manufacturers whose PFAS use is negligible.

Our comments on specific provisions in the Proposed Rule follow.

[2] Canada Gazette, Part I, Volume 158, Number 30: SUPPLEMENT, July 27, 2024, *Notice with respect to certain per- and polyfluoroalkyl substances (PFAS)*

7026.0010 Definitions

Subp. 2. ***Authorized representative.*** *"Authorized representative" means a person designated by a manufacturer to report on behalf of the manufacturer.*

CUC requests clarification from MPCA as to the intent of this definition. For example, MPCA could simply intend for an individual who is a representative of the manufacturer to report, or MPCA could intend for someone who has more direct or intimate knowledge of the actual product composition to be the authorized representative for reporting. If MPCA has no preference, it would be helpful if MPCA could explicitly indicate such.

Subp. 7. ***Component.*** *"Component" means a distinct and identifiable element or constituent of a product. Component includes packaging only when the packaging is inseparable or integral to the final product's containment, dispensing, or preservation.*

Complex finished products may contain a multitude of individual and potentially integrated components. For example, a passenger automobile/vehicle could have an air conditioning system that is charged with a PFAS refrigerant or refrigerant blend. The system may also have PFAS-containing seals, gaskets, nuts, bolts, wires, and hoses that are all individual components, but would be difficult to identify as distinct unless the system was completely disassembled. CUC requests that MPCA clarify the meaning of a "distinct and identifiable element or constituent of a product." Ascertaining whether every small component of a complex manufactured good may be impossible, and at a minimum would impose a significant burden on manufacturers.

The definition of "Identifiable element" makes understanding the meaning of a component even more confusing. "Identifiable element" is defined as "*an element that can be recognized, distinguished, or discerned, even when not visually evident, as in the case of a mixture or formulation.*" This appears to indicate that literally everything and anything is considered a "component." It may be impossible to discern the various substances in a mixture or formulation once it is complete. To categorize an element as "identifiable" simply because at one point in time it was separate and distinct from others renders the definition meaningless. If MPCA truly means that a manufacturer must account for literally every molecule of a product, breaking down the constituent components of every single drop of adhesive, coating, lubricant, colorant, solder, regardless of how much of the substance is present in the product, MPCA is placing a mammoth compliance burden - assuming it can actually be achieved - on manufacturers. CUC requests that MPCA reconsider this definition in light of the significant burden it would impose contrasted with the limited utility of information that would likely be gleaned from requiring such an evaluation.

Subp. 14. ***Manufacturer*** *"Manufacturer" means the person that creates or produces a product, that has a product created or produced, or whose brand name is legally affixed to the product. In the case of a product that is imported into the United States when the person that created or produced the product or whose brand name is affixed to the product does not have a presence in the United States, manufacturer means either the importer or the first domestic distributor of the product, whichever is first to sell, offer for sale, or distribute for sale the product in the state.*

There are circumstances when two different entities meet that definition: one may manufacture the product and the other may legally affix their name to the product. In such a circumstance, it is not clear who the "manufacturer" is and therefore which entity has the compliance obligation. MPCA should clarify which entity has the primary obligation to report.

7026.0020 PARTIES RESPONSIBLE FOR REPORTING

Subpart 1. ***Scope.*** *A manufacturer or group of manufacturers of a product sold, offered for sale, or distributed in the state must submit a report for each product or component that contains intentionally added PFAS.*

- CUC appreciates MPCA's effort to lessen the reporting requirements by allowing for groups of manufacturers to report together. This is evidenced by the allowance made in 7026.0030 for reporting groupings of similar products. However, as currently drafted, with the specific criteria needed to allow for "grouped" reporting, these allowances will have limited applicability and utility.

  Different manufacturers will often have different numeric codes assigned to their products, even if they are similar. This alone creates complexity as the same code cannot be provided in a joint submission. Furthermore, even for what may seem to be identical products from different manufacturers, suppliers of component parts and the material composition can differ. This is often the case even for single products from the same manufacturer: the supplier of components may differ during the course of any given year due to supply chain and economic issues, in which case "identical" product from one manufacturer may not be exactly "identical" as there may be slight variations in material composition – whether it be in the PFAS used or the quantity of a PFAS used - even within the same product.

  In order to provide a substantive easing of the compliance burden on manufacturers, MPCA should consider allowing for greater latitude in whom and what could qualify for joint reporting. For example, for "similar" products, MPCA could allow a report to contain multiple entries for PFAS used or multiple concentration ranges to cover all permutations. The report would indicate that PFAS is present in the products, providing MPCA with this basic information, and the need for multiple reports would be eliminated, easing the compliance burden on manufacturers.

  Additionally, CUC believes that any "grouping" of reporting, whether of manufacturers or products, would reduce the burden on MPCA of reviewing and processing reports, as there will be fewer reports. It therefore would be product for MPCA to incentivize the use of the group reporting provisions. However, as mentioned above, it seems unlikely that manufacturers will be able to utilize group reporting. In fact, with the proposed provisions that penalize all manufacturers that report together for the failure of one of the parties, there is a significant disincentive for manufacturers to form a group to report. CUC believes that, as suggested above, greater flexibility should be added so that the efficiencies of group reporting can be realized by MPCA.

7026.0030 REPORT; REQUIRED INFORMATION

Subpart 1. Report Required

- The Proposal requires that a report be submitted on or before January 1, 2026. This date for reporting is not practical given that the reporting rules and information technology processes are not yet finalized. The initial reporting timeline should be delayed sufficiently to provide for *at least* 12 months after the Minnesota reporting rule and reporting process and platform have all been finalized.

- The Proposal provides that the report must be submitted before the product can be sold, offered for sale or distributed in commerce. It is likely that there will be products containing PFAS that were distributed to retailers or other entities operating in the state for months if not years prior to the effective date of the reporting requirement. The manufacture and placing of these products in the Minnesota market may have ceased. Such manufacturers may not even know that these products are still in stores. CUC requests clarification that in this scenario, manufacturers do not have any obligation to report despite the fact that the product may be sold, offered for sale or distributed to an end user after January 1, 2026.

- The Proposal is unclear on when the reporting obligation is triggered when a new product will be sold into Minnesota beginning after January 1, 2026. If a product will be sold into Minnesota starting June 2027, would a report be required at that time, or would the manufacturer wait to file until the beginning of 2028? Assuming they must notify in June 2027, would they still need to submit a certification in 2028, which is only a few months later? CUC requests that MPCA clarify the application of the reporting obligation.

- The Proposal provides that the report must be submitted before the product can be sold, offered for sale, or distributed in the state. CUC requests that MPCA clarify whether approval of the report is required prior to sale, offering for sale or distribution in the state, or simply that the report and accompanying fee be submitted and then sale can commence.

- For many products, there may be a lengthy manufacturing period once an order is placed by the customer. A customer may place the order, may tender a deposit, and manufacturing commences. During the time of manufacture, the composition of components varies due to available parts and suppliers. CUC requests that MPCA provide guidance on when the "sale" of such an item occurs and at what time the obligation to report is triggered. If the obligation to report is triggered when the order is placed, as that commences the "sale," it is possible that PFAS presence in a component may not be contemplated. CUC therefore recommends that MPCA only require reporting in such a scenario at the time of final delivery to the customer in Minnesota.

- The Proposal lists a number of specific pieces of information that must be reported, such as the specific PFAS used, its function and its concentration range. In many situations, it

will be challenging for a manufacturer to provide the exact PFAS (by name and CAS), its function, and the concentration range. Complex supply chains make this type of information challenging to obtain. For example, while PFAS are not typically on an SDS for formulations, identifying PFAS becomes even more challenging for manufacturers of complex goods. Furthermore, in complex supply chains, thousands of global suppliers provide hundreds of thousands of parts, and it may take many years to track down this information, if possible. CUC recommends that the MPCA allow for reporting of general information, such as simply that PFAS is present, as that will provide MPCA with the information that there is indeed PFAS in a specific product.

- The proposal provides that the concentration of PFAS chemicals in a product or components of a product made up of homogenous material must be provided within a range, or one can indicate PFAS is present but amount or concentration range is unknown, or the total organic fluorine (TOF) if the amount of PFAS is not known. It is unclear if MPCA is requiring that TOF testing be performed if the exact amounts cannot be ascertained, or that is an alternative to simply report~~ing~~ if it cannot be ascertained. CUC requests that this be clarified.

  Furthermore, the requirement for TOF testing is impossible in most scenarios. As discussed, if MPCA is requiring that every single "component" be accounted for, TOF testing cannot be performed on a finished product, particularly complex manufactured goods, to ascertain if any PFAS is present in any component. CUC requests that MPCA allow the reporting of TOF values as an alternative to PFAS concentration ranges, when feasible, and that if the concentration range/amount is unknown, that fact can be reported in satisfaction of the requirements.

- CUC recommends that reporting not be required for 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 to ascertain PFAS content due to the lapse of time since manufacture. A parts supplier, if required to report, may simply decide not to provide these parts to customers in Minnesota, due to the compliance burden. The availability of spare/replacement parts allows for the continued use and maintenance of existing products, thereby preventing the accumulation of unnecessary waste including e-waste.

7026.0040 REPORTING UPDATES.

The Proposal requires that by February 1 of each year, manufacturers must either update reports to reflect changes to information previously submitted or recertify the previously submitted report.

While CUC understands a need to update information when what MPCA has on record changes, the requirement to recertify is unnecessary and only serves to add a compliance burden, creating another opportunity to find a violation - and an opportunity to collect a fee – on those attempting to do business in Minnesota. Once there is an affirmative obligation to ensure that the information MPCA has been provided is (and remains) accurate, annual recertifications are not necessary. CUC requests that this requirement be eliminated and that updates be required only when a material change in a product's PFAS composition has occurred.

7026.0050 WAIVERS.

The Proposal allows for the commissioner to waive all, or part of the information required if substantially equivalent information is publicly available. As MPCA is aware, EPA will be moving forward with its own PFAS reporting under Section 8(a)(7) of the Toxic Substances Control Act. To ease the reporting burden and reduce duplication of effort, CUC recommends that MPCA issue a blanket waiver for all manufacturers that will be reporting information to EPA to comply with that reporting requirement.

7026.0070 TRADE SECRET DATA REQUEST.

The Proposal provides for procedures to maintain confidential business information, or "trade secret data," as "not public." However, the SONAR states that MPCA anticipates utilizing the Interstate Chemicals Clearinghouse (IC2) High Priority Chemicals Data System, an application that allows manufacturers to submit data on chemicals in products, and for participating states and the public to access that reported data from the required reporting. As this database is shared by multiple states, CUC requests that MPCA explain how information trade secret data submitted will indeed be protected when other jurisdictions will have access to this very information.

The procedures by which MPCA will process trade secret claims must be clearly stated and known to all manufacturers who will need to report. Substantiation standards and submission requirements must be articulated, and the review process must be transparent and predictable. Trade secret data is of vital importance to manufacturers, and CUC believes that MPCA must recognize this and make the efforts needed to ensure that the data protection system is robust.

7026.0080 DUE DILIGENCE.

The Proposal states that "(a) manufacturer or group of manufacturers must request detailed disclosure of information required in part 7026.0030 from their supply chain until all required information is known." The SONAR explains that "(i)t is reasonable to require manufacturers or a group of manufacturers to continue to request information from their supply chain until the reporting requirements can be fulfilled because PFAS can be present at various stages of product manufacturing and may be introduced at different points within the supply chain. By ensuring that manufacturers trace PFAS usage through multiple tiers of manufacturers in the supply chain, the MPCA can gather comprehensive and accurate data on PFAS in products, thereby preventing gaps in reporting that could undermine the rule's effectiveness."

CUC believes that such an approach fails to acknowledge the complexity of global supply chains, particularly for complex manufactured goods. As previously discussed, for complex manufactured goods, the number of components, and specifically using the definition for "components" in the Proposal, can be in the thousands. The number of companies involved in the manufacture of any constituent part can be numerous, difficult if not impossible to track, and even if they could be identified, many suppliers globally may simply refuse to cooperate. It is simply naïve to believe that repeated requests for information – assuming the parties can be identified - will actually result in the provision of information so that all required information is known.

In US EPA's Initial Regulatory Flexibility Analysis (IRFA) and Updated Economic Analysis for the TSCA 8(~~a~~)(7) PFAS Reporting Rule, EPA noted that there are "various challenges companies expect from contacting suppliers (e.g., foreign suppliers not responding or refusing to give information, suppliers going out of business, etc.)." Furthermore, it was EPA's understanding that "many PFAS are used in such a way that their use is a trade secret or there is no requirement that their use be stated in a specific application." EPA also recognized that article supply chains are complex, and for certain instances testing would be needed to determine the presence of PFAS. Because of these and other factors, EPA significantly revised the cost of compliance with the TSCA 8(a)(7) rule from $10.8 million to $876 million. This estimate was for compliance with a rule that required reporting data that was "known or reasonably ascertainable," not utilizing the unrealistic due diligence standard in the Proposal. It is evident that attempting to secure PFAS related information from suppliers is a costly and time intensive endeavor with no guarantee of success.

It behooves MPCA to use a familiar and accepted due diligence standard that has been used for decades by EPA for reporting – that information be "known to or reasonably ascertainable." "Known to or reasonably ascertainable by" is generally defined to mean "all information in a person's possession or control, plus all information that a reasonable person similarly situated might be expected to possess, control, or know." This is a realistic standard with which industry is familiar and has been successfully used by EPA. Keeping the current due diligence standard will result in codification of an unachievable mandate and set manufacturers up for failure and non-compliance, even after valuable time and resources have been expended in efforts to comply.

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 MPCA authorize and implement a joint submission system. 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 reporting obligation by providing the supplier contact information.

7026.0100 FEES

The Proposal states that "*A manufacturer must pay a $1,000 fee to submit the initial report under part 7026.0030, subpart 1.*" As discussed above, 7026.0020 states that a manufacturer must submit a report for each product or component that contains intentionally added PFAS. The Proposal states further that "A manufacturer must pay a $500 flat fee for the annual update according to part 7026.0040, subpart 1, or annual certification update according to part 7026.0040, subpart 3."

Based on the plain read of the text, it is not clear if MPCA is requiring $1,000 per report or $1,000 per manufacturer, regardless of how many reports that manufacturer submits. The term "flat fee" is only used in connection with the annual update/recertification. That would imply that there is no flat fee for the initial report. Furthermore, the "initial report" is simply the first report submitted as opposed to the annual reporting. A manufacturer may need to submit numerous initial reports, as a report is needed for each product or component, and it appears that a $1,000 fee is required for each initial report.

The language in the SONAR addressing the requirement does not provide clarity. It states that "Subpart 2 establishes a $1000 flat fee per manufacturer for the initial report." The term "flat fee" is not used in the regulatory text. Furthermore, this language implies that MPCA is expecting a single initial report from a manufacturer, which is highly unlikely for many product manufacturers. If MPCA indeed is only requiring a single $1,000 fee for each manufacturer that reports, regardless of how many reports are submitted, MPCA must state that clearly and unequivocally.

CUC also requests clarification as to whether a manufacturer who has previously reported for a specific product needs to pay a fee if at some later point in time, a new product is introduced into commerce in Minnesota by that manufacturer. If indeed fees are imposed per manufacturer, fees would not need to accompany reports for new products introduced at later times.

7026.0090 REPORTING EXEMPTIONS.

The Proposal exempts a product for which federal law governs the presence of PFAS in the product in a manner that preempts state authority from the reporting requirements. CUC recommends that MPCA elaborate on this exemption and expand it by providing that the exemption would apply to products that are required to meet federal standards or requirements of the United States Department of Transportation, Federal Aviation Administration, the National Aeronautics and Space Administration, the United States Department of Defense or the United States Department of Homeland Security or are products that have been authorized or are subject to approvals issued by federal agencies such as the FDA (e.g., drugs and devices) and EPA.

Conclusion

CUC appreciates the opportunity to submit the foregoing comments. We would welcome the opportunity to meet with MPCA staff to address our comments and to assist in refining the proposal.