Before the
Minnesota Pollution Control Agency
Request for Comments
Planned New Rules Governing Reporting by Manufacturers Upon Submission of Required Information about Products Containing Per-and polyfluoroalkyl substances (PFAS), Revisor's ID Number R-4828

Comments of the Chemical Users Coalition

The Chemical Users Coalition ("CUC") appreciates the opportunity to provide our comments on the Planned New Rules Governing Reporting by Manufacturers Upon Submission of Required information about Products concerning PFAS (the "Planned Rule") that will be promulgated by the Minnesota Pollution Control Agency (the "MPCA" or the "Agency") pursuant to Minnesota Statutes 116.943, subdivision 2 ("Amara's Law"). 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.[1] 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.

The MPCA, in the Request for Comments, specifically requested comments on the following questions:

1) Are there definitions in subdivision 1 for which clarification would be useful to understanding reporting responsibilities?
2) Are there terms or processes in subdivision 2 for which clarifications will help reporting entities determine reporting status or data-gathering process?
3) How should the MPCA balance public availability of data and trade secrecy as part of the reporting requirements?
4) Are there any terms used in subdivision 3 that should be further defined or where examples would be helpful?
5) Are there specific portions of the reporting process that should not be defined through guidance or the development of an application form?
6) Other questions or comments relating to reporting or the process of reporting.

CUC appreciates the MPCA's efforts to gather information and identify issues on reporting prior to issuing a draft rule implementing the reporting requirements. We are providing comments on a question-by-question basis in the more detailed comments below. We also have these general comments as well.

CUC recommends that the MPCA consider a "phased in" approach whereby different product categories are considered for initial reporting on the basis of the category's likelihood to cause contamination of the environment in Minnesota. This "staggered reporting" approach will allow for both MPCA and the regulated

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

community to adjust to the new requirements and learn from any implementation issues that arise. It will reduce reporting and administrative burdens on both the entities subject to the final regulations and MPCA personnel. It will also allow for more orderly and complete reporting.

CUC recommends that the MPCA consider collaborating with agencies in other states where similar PFAS reporting requirements are being implemented. Subdivision 3 of Amara's Law clearly grants MPCA that ability, and to consider information and technology sharing efforts to do so. 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 the MPCA carefully consider the importance of maintaining uniformity of regulation from state to state. Specifically, the MPCA should carefully learn from the experience with Maine's Act To Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution. Collaboration with Maine is encouraged, so that Maine's experience can aid the MPCA in crafting a rule that is workable and achieves stated policy objectives.

In addition, although the MPCA current solicitation of comments relates solely to Amara's Law reporting requirements, CUC urges the MPCA to initiate as soon as possible its planning for how it will determine whether the use of PFAS in a product is a "currently unavoidable use" that will be exempt from the 2032 prohibition on any product containing intentionally added PFAS. It is important that stakeholders have an opportunity to provide input on this aspect of Amara's Law and for the MPCA to provide clear guidance on the procedures that will be followed and the substantive criteria that will be applied.

The following are CUC's responses to the specific topics on which the MPCA requested input.

1) **Are there definitions in subdivision 1 for which clarification would be useful to understanding reporting responsibilities?**

- Amara's Law currently defines "Intentionally added" PFAS as "PFAS deliberately added during the manufacture of a product where the continued presence of PFAS is desired in the final product or one of the product's components to perform a specific function." CUC recommends that the MPCA clarify that the definition does not include manufacturing byproducts and impurities that might be unintentionally present in a product in commerce, PFAS degradants that might be formed during product manufacturing but also be considered unintended components, and PFAS that is reasonably believed to be present in the final product as a contaminant.

- Amara's Law defines "Manufacturer" as "the person that creates or produces a product or whose brand name is affixed to the product." 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 notification requirement. The Agency should clarify which entity has the primary obligation to report.

- Amara's Law defines "product component" as "an identifiable component of a product, regardless of whether the manufacturer of the product is the manufacturer of the component." The MPCA needs to clarify the intent behind the "identifiable components." In a complex manufactured item, such as a fabricated product known as an 'article', many components are not visible due the manner in which the product is assembled. Additionally, often individual components are assembled from other distinct components. It is not clear as to what "identifiable" means in this context. Articles are particularly challenging as downstream users are often removed by multiple layers in the supply chain, thus may not be aware of the presence of PFAS-containing parts or components. Given the broad definition of PFAS in the law, [predicated on a structural definition,] it will be imperative that downstream users of articles are protected against the undisclosed presence of PFAS by an upstream supplier. CUC strongly recommends that *safe harbor* provisions be granted to downstream users of articles and sufficient time be granted in the event of subsequent discovery of PFAS.

2) Are there terms or processes in subdivision 2 for which clarifications will help reporting entities determine reporting status or data-gathering process?

- Many companies provide products to downstream distributors/resellers, in which case the companies have ultimately no control as to when and where the products ultimately are distributed/sold. Consequently, CUC requests the effective date for reporting be based on the manufacture date so that previously manufactured products are exempt from the reporting (and prohibition) requirements.

- CUC recommends that the MPCA clarify how the notification requirements apply to multiple businesses in the supply chain for finished products that will be distributed with multiple PFAS-containing components. The MPCA must make it sufficiently clear whether the responsibility falls upon the maker of the PFAS-containing components, the brand owner, a brand licensee, an importer, or the company that is distributing the finished product when multiple parties fit into the definition of manufacturer.

- Amara's Law 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 common distinctions such as consumer use vs. commercial use; or for retail distribution vs. for wholesale distribution; or into product categories such as toy/consumer electronic/furniture etc.? Would it also include (as a requirement) the principal intended uses of the product? CUC recommends some level of standardization for the elements of the "description."

- Amara's Law provides that a description of the product, including a UPC, should be reported. The MPCA should take into consideration the amount of time/resources required to report based on UPC. A more generic classifier (such as those based on product category) is preferable. The MPCA should consider use of alternative code systems, including the Harmonized Tariff Schedule ("HTS"), which is widely used around the world. HTS will not, however, be an adequate replacement for all products since it is not required for products shipped domestically within the US and manufacturers therefore may not have this data readily available. An HTS determination is a complex process that requires detailed knowledge of both product and tariff schedule.

- The MPCA must recognize that manufacturers may not know if PFAS is contained in the products they sell. Testing all products to determine if PFAS is in the product is not viable or even possible. Consequently, many manufacturers will be turning to component suppliers (who will in turn also ask their upstream suppliers) for information concerning PFAS content. First, CUC asks that the MPCA adopt a reasonability standard for determining if any obligation to report exists. If a manufacturer can

reasonably ascertain, via documentation or supplier communications, 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. CUC recommends that the MPCA adopt a safe harbor provision (or equivalent) to protect downstream users against post-deadline discovery of PFAS. CUC asks that manufacturers not be 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 Minnesota after the effective date. Further, CUC members seek protection for the sell-through of OEM parts for use as replacement and spare parts, of original design and origin. Article manufacturers work within complex 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, certain upstream suppliers may claim that information related to the specific type and amount of PFAS substance(s) used are trade secrets and cannot be disclosed.

- Similar to the above, manufacturers may not know the purpose for which PFAS is added, and therefore would not be able to report on such information. CUC recommends that the "reasonability" standard discussed above apply as well to this reporting element.

- Amara's Law provides that notifications are required for products sold, offered for sale, or distributed in the state. CUC recommends that the MPCA exempt previously manufactured products (existing stocks produced before the final rule's effective date), and spare/replacement parts for 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 Minnesota 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.

- Amara's Law requires that the notification contain the amount of each PFAS by name and CAS number. CUC has significant concern with this requirement. Amara's Law 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 the MPCA address this extremely likely scenario. Utilizing a "reasonability" standard, as discussed earlier, is an option the MPCA should seriously consider, and it should be within the MPCA's discretion to provide such clarification and guidance. Additionally, CUC suggests that the rule 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 be made available.

- Should the MPCA allow reporting by concentration, CUC suggests that the MPCA establish a concentration range for PFAS reporting, similar to that used by the IC2 High Priority Chemicals Data System (HPCDS) for Oregon Toxic-Free Kids Act (TFKA) and the Washington Children's Safe Products Act (CSPA). Using such a construct, all products that are the same type / model (under the

same Harmonized Tariff Schedule Code) containing the same PFAS within the same concentration range established by the MPCA could be grouped together for reporting instead of individual product reporting.

- 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. CUC recommends that the MPCA make clear that manufacturers may reasonably rely on information provided by their suppliers, provided they can document that inquiries have been made to suppliers and reasonable efforts have been made to obtain information regarding the use of PFAS.

- Amara's Law sates that the quantity of PFAS be reported using "commercially available analytical methods." That term is not defined. CUC recommends that the term be clarified to only include methods that have been "validated" by at least one federal and state regulatory authority (e.g., US EPA) in addition to being commercially available.

- CUC recommends that the MPCA clarify how it will expect the reporting entities to calculate ranges for the amount of PFAS that will be reported for products.

- CUC recommends that 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.

- Amara's Law provides that information submission is required whenever there is a "significant change in the information." CUC recommends that the MPCA define this term. Right now, the requirement could be read such that changes in company personnel or their contact information at a particular reporting entity could trigger a notification of a "significant change." The identity of corporate officers and directors, as well as their contact information, can change frequently, and requiring notification for each such occurrence is burdensome and should not be considered a "significant" change.

  In addition, the removal of a PFAS could also be a trigger for a "significant change" notification. These types of changes are not pertinent to what CUC understands to be the underlying policy objectives of the reporting requirements (i.e., to identify products that contain PFAS and to identify which PFAS are contained in products). CUC suggests that the MPCA should minimize unnecessary reporting such as these changes. Thus, CUC recommends that the definition of "significant change" should not include the removal of a specific PFAS or a change in responsible official or contact information. CUC recommends that there be an option to provide notification of the removal of PFAS, but that such notification should be voluntary. CUC recommends that a "significant change" should be defined as the addition of one or more PFAS not previously reported or the material increase (i.e., one which reflects an increase of at least 10% by weight or greater) in the concentration of a previously reported PFAS that is present in a product. Notification of the removal of PFAS content or an immaterial increase or decrease should not be required.

3) How should the MPCA balance public availability of data and trade secrecy as part of the reporting requirements?

- It is anticipated that the state of Maine will start receiving notifications on PFAS content in products in January 2025. CUC recommends that such information submitted in Maine should be considered publicly available information for purposes of waiving the information submission requirements.

- CUC asks that the MPCA recognize that PFAS content could be classified as "Confidential Business Information" ("CBI"). To address the situation where PFAS content information cannot be obtained from a supplier due to CBI, trade secret, or non-responsiveness concerns, CUC suggests that the MPCA authorize and implement an optional 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 notification obligation by providing the supplier contact information. Further, CBI protection may be necessary for national security interests and Department of Defense concerns.

4) Are there any terms used in subdivision 3 that should be further defined or where examples would be helpful?

- CUC requests additional clarification on the waiver process. First, the MPCA should provide guidance on what constitutes "substantially equivalent information." The MPCA should set forth in detail the procedures for requesting and issuing waivers, including expected timelines for the waiver processing, and the expected timing required for the MPCA to answer waiver requests. The regulations also should provide that information submission is not required during the period when a waiver request is being processed. CUC also requests that waivers not be limited to instances where "substantially equivalent information is publicly available." CUC also recommends that the MPCA exercise its discretion to issue procedural regulations to allow manufacturers to request full or partial waivers (or extensions of time for notification submission) for other reasons, including because manufacturers may not receive specific information in regards to the PFAS used in their products for a variety of reasons (including proprietary reasons, etc.).

- The waiver provision provides that the MPCA may waive requirements for reporting multiple products or a product category. CUC recommends that a rule contain details concerning the process for proposing a category for reporting multiple products. Aside from the procedural elements of how a manufacturer formally proposes a category, the MPCA should elaborate on the criteria the Agency will use to determine whether the proposed category is reasonable.

- Products used for national security, space exploration, and defense purposes for which PFAS may be added should be categorically excluded or waived. CUC members that build and sell into this sector, often do not own or control the design criteria for new, replacement and spare parts.

5) Are there specific portions of the reporting process that should not be defined through guidance or the development of an application form?

- CUC believes that detailed guidance is needed for all aspects of reporting to ensure the process is predictable, open, and transparent and compliance is achieved with the least burden possible.

6) Other questions or comments relating to reporting or the process of reporting.

- The definition of PFAS used in Amara's Law is expansive and inclusive of a significant number of substances. Consequently, compliance with the requirements can be challenging, as many substances are implicated and for most there are no testing methodologies that can be used to identify them. Therefore, CUC recommends that the MPCA create a list of specific PFAS that are of concern for

health or environmental effects and require reporting only on products containing the listed PFAS.[2] Such a list should include the Chemical Abstract Services Registry 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 entities for reporting purposes.

- Furthermore, CUC requests that the MPCA 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.

- Under Subdivision 4, the MPCA has the authority to require testing. If the MPCA does require companies to provide test results, the MPCA should specify the test method to use. There are no internationally recognized test methods for "PFAS" in complex articles; therefore, CUC anticipates it will be very difficult to provide test results to the MPCA. Only a select number of PFAS substances are capable of being tested.

- Amara's Law states that if testing demonstrates that a product contains intentionally added PFAS, testing results and information must be provided. It is not clear how testing demonstrates that the PFAS was indeed intentionally added. The MPCA must provide guidance on how MPCA will make a determination based on testing that a PFAS is intentionally added and how such determination can be challenged.

- Duplicative reporting (submitting the same report to multiple jurisdictions) should be avoided. CUC encourages the use of a single system (such as IC2) that can be used by multiple states for reporting purposes and to increase transparency among the states that have reporting requirements.

Fees

- CUC acknowledges that the MPCA has requested comments on proposed fees as well. CUC recommends that fees, if they must be imposed, should be assessed by each report or product group instead of by individual product.

Conclusion

CUC appreciates the opportunity to submit the foregoing comments and reserves its right to submit additional or modified comments at a later date. We would welcome the opportunity to meet with the MPCA staff to address our comments and to assist in crafting implementing rules.

[2] See, for example, The European Chemicals Agency Forum for Exchange of Information on Enforcement *"Advice on PFAS restriction proposal,"* "To help enforcement authorities, the Forum suggests the developing of an indicative list of PFAS in a future guidance (with the chemical structure) covered by the restriction."