MCTA
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July 25, 2023

The Honorable Marjorie Decker
House Chair, Joint Committee on Public Health
State House, Room 130
Boston, MA 02133

The Honorable Julian Cyr
Senate Chair, Joint Committee on Public Health
State House, Room 111
Boston, MA 02133

RE: Comments of Massachusetts Chemistry and Technology Alliance on H2197 and S1356 *An Act to Protect Massachusetts Public Health from PFAS*

Dear Chair Decker, Chair Cyr, and members of the committee:

On behalf of our members, the Massachusetts Chemistry & Technology Alliance (MCTA) would like to make the following comments relative to H2197 and S1356 *An Act to Protect Massachusetts Public Health from PFAS* which are currently in your committee.

PFAS (Per- and polyfluoroalkyl substances) are a class of fluorinated substances that have been used in industry and consumer products worldwide for decades. PFAS are used in nonstick cookware, water-repellent clothing, stain resistant fabrics and carpets, cosmetics, firefighting foams, and other products that resist grease, water, and oil. They are also critical to the manufacture of pharmaceuticals, semiconductors, aerospace engines, renewable energy components, chemical-resistant equipment in manufacturing facilities, and a host of other products that power the Massachusetts economy, advance the state's climate goals, and protect the health and safety of its residents.

Many uses of PFAS, particularly in consumer products like cookware and personal care products, have already been or are in the process of being phased out. At the same time, researchers and scientists are aggressively pursuing and testing alternatives to PFAS that are in other products and processes.

MCTA is the professional organization representing manufacturers, users, and distributors of chemistry in the Commonwealth. Our membership ranges from small, multi-generational family-owned businesses operating with a handful of employees to large global companies employing thousands. More than 96% of all manufactured goods – from solar panels and turbine blades to automotive parts and pharmaceutical products – are touched by chemistry.

The blueprint for this legislation came from recommendations contained in the Final Report of the *PFAS Interagency Task Force*, released in April 2022. MCTA attended all the stakeholder meetings of the Task Force and provided input during the Task Force's deliberation in 2021. Throughout the process MCTA appreciated the approach the Task Force Chairs took to engage and listen to all stakeholders.

The proposed legislation would, among other things, create a trust fund for PFAS contamination remediation, ban the manufacture and sale of some consumer products containing PFAS and phase out other uses of PFAS by 2030, unless the Department of Public Health grants a three-year use exemption for products where PFAS use is unavoidable. It also requires that any product containing intentionally added PFAS or containing a component with PFAS to be registered with the Department and added to a publicly accessible reporting platform or database. The public hearing for both bills was on June 21, 2023.

MCTA generally supports the intent of H2197 and S1356 to regulate PFAS in areas where its presence could result in unnecessary and preventable exposure, particularly in consumer products. However, sections of the bills are overly broad and unclear and will unintentionally impact numerous businesses in Massachusetts without any benefits in the way of exposure reduction. Since PFAS are used in many areas of our innovation economy, including the energy, pharmaceutical and electronics sectors, it could also hamper growth in those areas or make it difficult for these sectors to obtain raw materials or sell their products by potentially mischaracterizing their public health impact. This is particularly true as many of the products impacted are not made in Massachusetts, but pass through numerous manufacturers, subcontractors, suppliers, distributors, and retailers (including online), most located outside of Massachusetts or the country.

Therefore, any new law and regulations which address this important issue must be scientifically valid, practical, enforceable, and clear so the consumer can choose the right options. These approaches must also provide regulatory certainty and clarity so businesses can comply.

We believe changes could be made to this legislation that would meet the goals articulated in the *Task Force's* final report and at the same time minimize economic impact and avoid confusion from the regulation of and/or ban on PFAS-containing products that don't pose a threat to public health or the environment. This is a difficult balance to be sure, given the task of regulating thousands of widely used and needed products that contain PFAS, but one we urge that the committee strive to achieve.

Toward that end, we offer the following comments:

1. **The term "negligence" as it pertains to the PFAS Remediation Trust Fund should be eliminated or clarified so that it incorporates intentionality and does not unnecessarily penalize companies that used PFAS containing products responsibly.**

SECTION 1 creates a PFAS Remediation Trust Fund to mitigate the impacts of PFAS contamination in drinking water, groundwater, and soil in the commonwealth. MCTA does not oppose the creation of this trust fund. However, the term "negligence" in SECTION 1(d) is not defined and does not appear to incorporate intentionality. This may result in liability for companies and others that used products containing PFAS many years ago without intentionally

releasing it or even knowing it was a hazard. In fact, they may not even have known the product they were using contained PFAS.

Given the ubiquitous use of PFAS over the last 50 years, including in many consumer products made by companies out of state or no longer in business this "negligence" language will impact the viability of MCTA's smaller family-owned business that have operated in their communities for decades.

This provision also sidesteps additional concerns about intentionality. As written, companies that used PFAS-containing municipal water in their processes would be considered responsible parties. Farmers that used PFAS containing fertilizer would also be considered a responsible party. In fact, there have been suspected instances of PFAS contamination of wells from homeowner septic systems or from municipal use through fire-fighting foams or other uses, yet this "negligence" is likely to be assigned to the local company.

For example, a small member company, an agricultural product manufacturer in Central Massachusetts, was found to have PFAS in a well on their property although it had not used any PFAS containing product in over 40 years and when they did use it, it was not known to be hazardous. The small company is cooperating with MassDEP to determine the scope, source and extent of the contamination and providing water filtration systems and monthly testing to the impacted residences. As written, this law would expose the company to further liability for the historic use of a product that was not identified as hazardous when its use was phased out decades ago.

MCTA recommends that SECTION 1(d) be stricken from the bill or amended to read:

> *"The office shall adopt rules and include conditions to ensure that the applicant has made or will make reasonable efforts to obtain and use funds from any liable or potentially liable third party that intentionally used a PFAS-containing product or products which were known at the time of use to be hazardous or toxic, exempting public sector fire departments for the use of Class B firefighting foam in emergency response purposes, prior to and after receiving a grant."*

2. **The Legislation will require the review, registration, and fast-track phase-out of thousands of essential products and require the revelation of federal and state protected trade secrets on a publicly accessible database.**

H2197 and S1356 defines "Per- and polyfluoroalkyl substances" (PFAS) as a *"a class of fluorinated substances that contain at least one fully fluorinated methyl or methylene carbon atom."*

The manufacture, distribution, or sale of specific product categories are prohibited in SECTION 4(b)(1). SECTION 4(c)(1) regulates all other products not specifically listed where PFAS has been "intentionally added" requiring that these products be phased out by 2030, less than 7 years away, unless they are deemed an "unavoidable use," but this exemption is only issued in three-year increments and comes with onerous – and publicly accessible – reporting requirements.

Since there are nearly 12,000 compounds known to contain some PFAS under the definition contained in H2197 and S1356, the list of products that meets the criteria outlined in SECTION 4(c)(1) will likely total in the thousands, all of which will then have to be reported to the

Department of Public Health, reviewed, cataloged, and made available to the public. This is not only massively complex, but it may have serious implications relative to trade secrets or proprietary formulations counter to federal or state law for such disclosure.

As a result, MCTA urges deletion of SECTION 4(b).

Should the Committee not wish to delete this section entirely, we urge the following changes:

1. Clarification of "intentionally added."

   H2197/S1356 defines "intentionally added" as "*the addition of a chemical to a final product or product component for the purpose of providing a specific characteristic, appearance or quality or to perform a specific function in the product or product component, including PFAS that are intentional chemical breakdown products or derivatives of an added chemical that also have a specific function in the product or product component."*

   Given that fact that only a few types of PFAS are regulated on the federal level, it will be virtually impossible for any end user to know if a raw material or product contains PFAS unless the manufacturer or supplier (both likely to be out of state or even out of the country) discloses the content of PFAS chemistries in the formulation.

   Safety Data Sheets (SDS) do not often list PFAS, and many manufacturers will not identify legally protected trade secrets or confidential formulas. Many raw material formulations are either "proprietary" or "trade secrets" and are not likely to be disclosed or may be disclosed with so many caveats that any disclosure would be useless to the public or regulators. Article products also rarely require an SDS, removing even that potential for information on PFAS content to reach the buyer. If the manufacturer does not disclose the presence of PFAS there is no chance that the distributor or supplier or retailer will know without costly and unreliable analytical testing, considering that PFAS may be used in just one component of the product. This will establish liability and added costs and restrictions for in-state business that will not impact out-of-state businesses or on-line purchases.

   If this definition must remain in the legislation MCTA proposes the following definition, which comes from the law recently passed in Minnesota: *"Intentionally added" means 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."*

2. Clarification of "current unavoidable use."

   H2197/S1356 defines "Current unavoidable use" as a "*use of PFAS that the department has determined under this section to be essential for health, safety, or the functioning of society and for which alternatives are not reasonably available."*

   This definition lacks certainty and is entirely subjective. The Department of Public Health will be overwhelmed with petitions that will require extremely technical determinations of product design and use, alternatives for PFAS or even the product itself

and whether those alternatives meet strict performance or safety standards. In some cases, this analysis may be directed at minute uses of PFAS far upstream of the final product or located deep inside as a component of final product.

3. Create a pathway for exemption of PFAS-containing products, components or materials considered essential to health, safety, and the environment.

   The US Environmental Protection Agency (EPA) addressed this challenge head on when it announced in late June a new framework for addressing new PFAS and new uses of existing PFAS determined to be "essential." We recommend that the state adopt a similar approach.

4. Lengthen the exemption period for products where PFAS use can be classified as "current unavoidable use."

   Given the thousands of products containing PFAS that will likely apply for this exemption, even with changes in the definition of "current unavoidable use" recommended above, the three-year review and exemption period is simply not enough time to review the product design or even consider product changes.

   MCTA could envision thousands of products submitted for review, the vast majority of which will have speculative or no health impacts. At a minimum MCTA suggest this exemption should be extended to 8-12 years. That will give time for the industry to identify, test and adapt products and processes. It will also give time for technology to progress, alternatives to become available and for the upstream suppliers and manufacturers to revise product specifications and develop alternatives. It is also consistent with what has been proposed in the European Union.

5. Change the definition of PFAS.

   H2197/S1356 defines PFAS as *"a class of fluorinated substances that contain at least one fully fluorinated methyl or methylene carbon atom."*

   This definition is overly broad, includes many substances which do not pose similar (or any significant) hazards to substances like PFOS and PFOA, and presents substantial hurdles for the production and sale of medical devices, pharmaceuticals, microchips, industrial and mechanical valves and gaskets, and components used in renewable energy.

   Medical product manufacturers and pharmaceutical companies are heavily reliant on products containing small but vital amounts of PFAS in the production of implants like vascular grafts, stent grafts, surgical meshes, catheter tubes and wiring, as well as heart patches and pacemakers. PFAS is essential for COVID vaccine distribution and testing and contained in prescription drugs used to combat inflammatory diseases, high cholesterol, and arthritis. It is also present in minute quantities in asthma inhalers and antidepressants.

   PFAS are a vital part of the semiconductor production process, primarily because of their chemical resistance and surface tension-lowering properties. The semiconductor industry has built decades of chip production work on the unique chemical properties of PFAS substances and is unable to manufacture modern chips without those substances. Efforts

to ban PFAS outright from all consumer products will exacerbate the already critical shortage of microchips and deal a blow to the viability of the state's vibrant electronics sector.

It would also adversely impact critical uses of technology that are important for the Commonwealth's broader sustainability objectives, including support for alternative energy. For example, lithium-ion electric vehicle batteries contain innovative technology using PFAS. PFAS also contributes to the functionality and longevity of wind turbines.

We do not believe that the proponents of this legislation intended it to impact these vital uses of PFAS. Therefore, MCTA urges the definition of PFAS to be amended to*: "Perfluoroalkyl and polyfluoroalkyl substances" or "PFAS" means, non-polymeric perfluoroalkyl and polyfluoroalkyl substances that contain at least 2 sequential fully fluorinated carbon atoms, excluding gases and volatile liquids."*

The revised definition would allow for the regulation and eventual ban of many problematic PFAS but will exempt others where there is little or no concern about potential hazards. This definition is based on numerous criteria including evaluation of molecular structure and elemental composition, resistance to physical, chemical, and biological transformation, and resistance to heat and other environmental stressors.

6. <u>Exempt certain industries from regulation.</u>

   The Committee could exempt certain industries or classes of use, including those already subject to federal regulation or approval.

   However, while that might be easy for some uses, such as those for pharmaceuticals or products regulated under the FDA or similar, MCTA urges that these types of such exemption be applied deliberately and not just to those products that fall into certain buckets of use, as such an exemption could create more problems. Product uses are often broadly classified, and some components used in federally approved and non-federally approved products are virtually identical. For example, a circuit board in a medical device and in a non-medical device could be identical, yet one would be regulated, and one would not. Some materials may also be subject to federal or state disclosure laws, particularly if those products have defense or other sensitive uses.

   Additionally, we do not believe the state serve as arbiter for what constitutes an essential use. Should this pathway be chosen, we urge the committee to establish a regulatory, not legislative process to allow a defined pathway for exemption for certain uses, with deadlines and an assurance that the existing product will not be regulated due to PFAS content until a petition is approved or denied.

Lastly, MCTA notes that the terms "Department," "Office," "Department of Environmental Protection," and "Department of Public Health" are used interchangeably in the legislation as written. While MCTA requests additional clarity, we also strongly recommend that MassDEP be designated the responsible agency. SECTION 4 (f)(1) appears to specifically grant DPH the authority to establish, maintain, and regulate the reporting platform while MassDEP has jurisdiction over establishing, regulating, and enforcing the other sections of the bill. MCTA suggests that that MassDEP, which established and regulates the Toxic Use Reduction Act filing

and reporting system and oversees PFAS water quality and PFAS site remediation regulations, be charged with implementation and enforcement of any legislation relative to PFAS.

Thank you for your consideration of the concerns raised by MCTA and our members. If you have any questions, please do not hesitate to call Katherine Robertson at 508-572-9113 or via email at katherine@masscta.org.

Respectfully,

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cc: Representative Kate Hogan