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Client Alert: PFAS in Consumer Products: Developing a Proactive and Strategic Game Plan

Publications

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Per- and polyfluoroalkyl substances (PFAS) in consumer products continue to be in the regulatory and litigation spotlight in 2023. Manufacturers and downstream businesses should be actively preparing to comply with the continually evolving patchwork of federal and state PFAS laws, as well as taking steps to minimize litigation risks. Below, our team of attorneys offers strategic advice for manufacturers and downstream businesses with respect to how regulatory and litigation PFAS developments may apply to them and best practices for minimizing regulatory and litigation risk with respect to same.

State Consumer Product PFAS Laws

Consumer products that are currently the subject of state PFAS laws include carpets, rugs, and fabric treatments, children's products, cookware, cosmetics, food packaging, furniture, oil and gas products, ski wax, and textiles and apparel, but this is a continually evolving list. Businesses that manufacture and sell these and similar products should be carefully evaluating whether these products contain PFAS, in which states the products are or will be manufactured, distributed, or sold, and what the PFAS laws and regulations are in those states. State PFAS laws can be categorized by the PFAS they regulate, the requirements they impose, and other notable nuances.

1. Regulated PFAS

Thousands of PFAS have been identified by the US Environmental Protection Agency (EPA),[1] but PFAS laws may not apply to all. Thus, when reviewing their applicability, businesses should consider how PFAS laws define PFAS and whether they apply broadly to all PFAS or only a specific subset of PFAS. Businesses should also consider whether there are specific threshold concentrations or whether the regulations are triggered by the presence of any PFAS in the product. Lastly, businesses should consider whether the laws only apply to "intentionally" added or introduced PFAS that serve an intended function. Each of these are discussed, in turn, below.

A. PFAS Defined and Specific Subsets

State PFAS laws generally broadly define PFAS as a class of fluorinated organic chemicals containing at least one fully fluorinated carbon atom.[2] Some laws apply to PFAS generally. For example, California's Chemicals of Concern in Food Packaging, Juvenile Products, and Textile Articles laws prohibit "regulated" PFAS, and their definitions of "regulated" do not narrow their prohibitions' coverage to a specific PFAS subset.

In contrast, other laws only apply to a specific subset of PFAS. These narrower laws may identify the regulated PFAS themselves or refer to chemicals designated or listed by a state regulatory agency. For example, Maryland's Cosmetic Products law specifically lists thirteen specific PFAS that fall within its regulatory purview. Similarly, Maine's Toxic Chemicals in Children's Products law applies to "priority chemicals," and perfluorooctanesulfonic acid (PFOS) is the only PFAS that the Maine Department of Environmental Protection has currently designated as such. Importantly, PFAS chemicals that are not subject to prohibitions now may fall victim in the future. Thus, businesses that choose to continue using unregulated PFAS in their products may find themselves forced to adjust their ingredient lists down the road.

B. Threshold Concentrations

In addition to identifying the regulated PFAS, businesses should consider whether state PFAS laws specify threshold concentrations that trigger their requirements as these may influence compliance obligations.

For example, Oregon's Toxic-Free Kids Act imposes disclosure requirements on manufacturers of children's products that contain a high priority chemical but only if the chemical is "in an amount at or above a *de minimis* level." For an intentionally added chemical, the *de minimis* level is the "practical quantification limit" (PQL), which means the lowest concentration of a chemical that can be reliably measured within specified limits during routine laboratory operating conditions. The Oregon Health Authority has defined the PQL for intentionally added PFOS as 0.001 parts per million. For a chemical that is a "contaminant," which is defined as trace amounts of chemicals that are incidental to manufacturing and that serve no intended function in the product component, the *de minimis* level is 100 parts per million (see more on unintentional PFAS below).

In a similar fashion, Maine's An Act to Stop PFAS Pollution imposes disclosure requirements on manufacturers of products with intentionally added PFAS. However, the Maine Department of Environmental Protection has suggested in its FAQs[3] that notification is only required if intentionally added PFAS are detectable when analyzing the product using a commercially available analytical method (above the PQL). The Department understands "commercially available analytical method" to mean any test methodology used by a laboratory that performs analyses or tests for third parties to determine the concentration of PFAS present.

Finally, California's Chemicals of Concern in Food Packaging and Juvenile Products laws, which prohibit "regulated" PFAS, specify that PFAS may be considered "regulated" if their presence is at or above 100 parts per million, as measured in total organic fluorine. California's Textile Articles

law provides a similar threshold concentration requirement, as does Vermont's Chemicals of High Concern to Children law.

Thus, compliance with state PFAS laws may require that businesses be able to reliably measure the concentration of PFAS (or total organic fluorine) in their final products, which will depend on the availability of commercially available testing methods. While EPA has developed approved methods for measuring PFAS concentrations in environmental matrices such as air, water, waste, and pesticides, these methods may not be specifically applicable for consumer products. Notably, the American Society for Testing and Materials (ASTM) has announced that it created a new subcommittee that will develop standards for measuring PFAS in consumer products. ASTM's efforts are ongoing.

Importantly, limitations in measuring capabilities may pose unique compliance challenges.[4] The traditional PFAS testing methods are liquid chromatography-tandem mass spectrometry (LC/MS/MS) or gas chromatography-mass spectrometry (GC-MS), but these methods target only a specific subset of PFAS—presently approximately 42 unique PFAS.

To address these limitations, there are numerous emerging technologies and methodologies. For example, to evaluate the presence of precursor molecules that can break down or transform into PFAS, total oxidizable precursors (TOPs) assay can be utilized as it was in a recent study to measure the presence of PFAS in a range of household items.[5] Other methodologies such as combustion ion chromatography (CIC), particle-induced gamma ray emission (PIGE), neutron activation analysis (INAA), and X-ray photoelectron spectroscopy (XPS), can be used to quantify total organic fluorine that some state regulators have elected to rely upon as a proxy for PFAS.[6] There are, however, significant risks in relying on total organic fluorine as a proxy for PFAS as numerous studies have documented limitations in this methodology.[7]

Businesses should be reviewing commercially available methods to measure the concentration of PFAS in their products, as well as be cognizant as to how these methods are evolving. Businesses may also want to consider seeking clarification from regulatory agencies on which methods are appropriate for specific consumer products.

C. Intentionality and Functionality

Many state PFAS laws only apply when PFAS are "intentionally" added or introduced to covered products for a specific purpose.[8] Notably, the introduction or addition of PFAS does not need to be direct. Intentionally adding or introducing product ingredients that are not regulated PFAS but break down or transform into PFAS in final products may render state PFAS laws applicable, too. Therefore, businesses should assess whether PFAS (or other chemicals that may serve as precursor molecules of regulated PFAS) are being used in their manufacturing process and for what purpose. Businesses that use PFAS or precursor product ingredients in their manufacturing process

for a specific purpose should evaluate the extent to which they can phase out these ingredients and find substitutes.

Some laws specifically exempt unintentional PFAS from regulation. For example, Connecticut's Cosmetic Products law clarifies that a person is not in violation of the law's PFAS prohibition if the product was manufactured through a process to comply with the law and contains a technically unavoidable trace quantity of regulated PFAS due to an impurity of a natural or synthetic ingredient, the manufacturing process, storage, or packaging.

However, other laws may not let manufacturers off the hook if the unintentional PFAS is above identified threshold concentrations. As discussed above, California's Chemicals of Concern in Food Packaging, Juvenile Products, and Textile Articles laws and Vermont's Chemicals of High Concern to Children law establish threshold concentration requirements.

Even if PFAS are not being used to manufacture the product itself, they may still end up in the final product. One way this may happen is through leaching from the product packaging. For example, EPA studies have revealed that PFAS from fluorinated high-density polyethylene (HDPE) container walls of pesticide products can leach into the contents of the containers. In fact, EPA has recently initiated enforcement action against a company that utilized fluorine gas in the manufacture of plastic containers from which EPA claims PFAS are leaching into the products stored in these containers.

In sum, even if businesses do not use PFAS in their manufacturing process, they would be wise to carefully audit their supply chains to minimize the risk of PFAS winding up in their final products. Moreover, as explained further below, businesses with PFAS in their products, even if their presence is unintentional and not in violation of any specific federal or state regulation, may still be subject to private party litigation.

Finally, although not the primary focus of this client alert, businesses should consider the downstream pathways of their products and other equipment that may contain PFAS because releases into the environment may trigger Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) reporting requirements and liability once perfluorooctanoic acid (PFOA) and PFOS (and other PFAS down the road) become designated as CERCLA hazardous substances (see more on remediation demands below).[9]

2. Requirements

Requirements fall into two categories: disclosures and prohibitions. While some state PFAS laws directly impose requirements, others give regulatory agencies the authority to. Below is a collection of consumer product categories and state PFAS laws, including the types of requirements imposed and their effective dates.

While some laws are already in effect, others will take effect later this year. For example, Vermont's prohibitions on intentionally added PFAS in carpets and rugs, food packaging, and ski wax, and

California's prohibition on regulated PFAS in children's products, will take effect on July 1 of this year. Connecticut's and New York's prohibition on intentionally added PFAS in food packaging and apparel, respectively, will take effect on December 31. Other laws won't take effect until 2024 or beyond.

State PFAS Laws/Regulations Targeting Consumer Products

Product Category	**States, Type of Requirement, Effective Date**
Carpets/Rugs/Fabric Treatments	- California: Disclosure (effective). - Maine: Prohibition (effective). - Maryland: Prohibition (effective). - Vermont: Prohibition (July 1, 2023). - Colorado: Prohibition (Jan. 1, 2024).
Children's Products	- Oregon: Disclosure/eventual prohibition (effective). - Maine: Disclosure (effective). - Vermont: Disclosure (effective); potential prohibition: businesses should closely follow regulatory developments (see here). - Washington: Disclosure (effective). - California: Prohibition (July 1, 2023). - Colorado: Prohibition (Jan. 1, 2024). - New York: Potential disclosure/eventual prohibition if PFAS are added to Dangerous Chemicals List. Businesses should closely follow regulatory developments (see here).
Cookware	- California: Disclosure on website (effective); disclosure on label (Jan. 1, 2024). - Colorado: Disclosure (Jan. 1, 2024).
Cosmetics	- California: Prohibition (Jan. 1, 2025). - Colorado: Prohibition (Jan. 1, 2025). - Maryland: Prohibition (Jan. 1, 2025).

Food Packaging	- California: Prohibition (effective). - Maryland: Prohibition (effective). - New York: Prohibition (effective). - Washington: Prohibition (effective). - Vermont: Prohibition (July 1, 2023). - Connecticut: Prohibition (Dec. 31, 2023). - Colorado: Prohibition (Jan. 1, 2024). - Minnesota: Prohibition (Jan. 1, 2024). - Rhode Island: Prohibition (Jan. 1, 2024). - Hawaii: Prohibition (Dec. 31, 2024). - Maine: Potential prohibition if Maine Department of Environmental Protection does so by rule. Businesses should closely follow regulatory developments (see here).
Furniture	- Colorado: Prohibition for indoor upholstered furniture (Jan. 1, 2025); prohibition for outdoor upholstered furniture (Jan. 1. 2027).
Oil and Gas Products	- Colorado: Prohibition (Jan. 1, 2024).
Ski Wax	- Vermont: Prohibition (July 1, 2023).
Textiles/Apparel	- New York: Prohibition (Dec. 31, 2023). - California: Prohibition (Jan. 1, 2025); disclosure for outdoor apparel for severe wet conditions (Jan. 1, 2025); prohibition for outdoor apparel for severe wet conditions (Jan. 1, 2028). - Colorado: Prohibition for indoor textile furnishings (Jan. 1, 2025); prohibition for outdoor textile furnishings (Jan. 1, 2027).
General	- California: Disclosure (effective). - Maine: Disclosure (effective); prohibition (Jan. 1, 2030); in the interim, potential prohibition if Maine Department of

	Environmental Protection does so by rule. Businesses should closely follow regulatory developments (see here). - Washington: Potential disclosure and/or prohibition if the Washington Department of Ecology does so by rule. Businesses should closely follow regulatory developments (see here).

3. Other Notable Nuances

Finally, state PFAS laws can be characterized by other notable nuances. For example, some laws provide defenses for sellers and distributors that rely in good faith on manufacturer certificates of compliance. Others provide exemptions for certain products or parties or provide a vehicle for regulatory agencies to extend deadlines. Businesses should carefully consider these nuances when evaluating their options.

Federal Consumer Product PFAS Regulations, Bills, and Liability

In addition to preparing to comply with the patchwork of state PFAS laws, businesses should be following and preparing to comply with evolving PFAS obligations at the federal level and seeking to understand and address potential liabilities. These include:

- **Reporting obligations under Section 313 of the Emergency Planning and Community Right-to-Know Act for facilities that manufacture, process, or otherwise use certain PFAS that have been added to the Toxic Release Inventory.** Notably, if EPA's December 5, 2022, proposed rule[10] takes effect, covered facilities will no longer be able to avoid PFAS reporting obligations under the "*de minimis* exemption," which allows facilities to evade reporting requirements with respect to mixtures or other trade name products containing PFOS concentrations below 0.1% and other covered PFAS concentrations below 1%. Covered facilities will also no longer be able to take advantage of other burden-reduction reporting options. Businesses should consider submitting comments on the proposed rule, which must be received on or before February 3, 2023.

- **Notification requirements associated with importing articles and carpets containing certain PFAS.** Specifically, EPA's Significant New Use Rule,[11] promulgated under the Section 5(a) of the Toxic Substances Control Act (TSCA), became effective on September 25, 2020, and requires persons to notify EPA at least 90 days before commencing the import of a subset of PFAS chemicals as part of a surface coating on articles and PFOS as part of carpets. The rule provides that examples of articles could include apparel, outdoor equipment, automotive parts, carpets, furniture, and electronic components.

- **Potential future reporting and recordkeeping requirements for manufacturers and importers of PFAS for PFAS manufactured in any year since January 1, 2011.** Under EPA's proposed rule,[12] proposed pursuant to Section 8(a)(7) of TSCA, articles containing PFAS, including imported articles containing PFAS (such as articles containing PFAS as part of surface coatings), are included in the scope of reportable chemical substances.

- **Potential future testing and reporting obligations for manufacturers or processors of certain PFAS that may be on the receiving end of TSCA Section 4(a) testing orders.** Under TSCA, the term "processor" includes persons who prepare chemical substances for distribution in commerce as part of articles.[13] These orders require recipients to test identified chemical substances to determine whether they have adverse health or environmental effects.

- **Keep Food Containers Safe from PFAS Act of 2021 (3169):** This bill was introduced in the US Senate on November 4, 2021, and would amend the Federal Food, Drug, and Cosmetic Act to, effective January 1, 2024, prohibit the introduction or delivery for introduction into interstate commerce of food packaging containing intentionally added PFAS, and for other purposes. The bill's sponsor is US Senator Margaret Wood Hassan of New Hampshire.

- **No PFAS in Cosmetics Act (2047):** This bill was introduced in the US Senate on June 14, 2021, and would require the Secretary of Health and Human Services to issue a proposed rule to ban the use of intentionally added PFAS in cosmetics no later than 270 days after the bill's enactment and finalize such rule not later than 90 days after issuing the proposed rule. The bill's sponsor is U.S. Senator Susan M. Collins of Maine.

- **Safe Drinking Water Act (and state) regulatory developments and remediation demands:** EPA is developing a National Primary Drinking Water Regulation (NPDWR) for PFOA and PFOS, which will lead to the establishment of Maximum Contaminant Levels (MCLs) for these PFAS.[14] In the interim, EPA has developed[15] non-regulatory health advisory levels for PFOA and PFOS, as well as final health advisory levels for other PFAS. EPA is also evaluating additional PFAS and considering regulatory actions to address groups of PFAS. For example, EPA's Fifth Contaminant Candidate List[16] includes a group of PFAS, which may lead to a NPDWR for these PFAS down the road. Also, the Fifth Unregulated Contaminant Monitoring Rule[17] requires certain public water systems to collect samples of 29 PFAS between 2023 and 2025. Notably, in addition to these federal developments, several states have established MCLs and notification requirements for certain PFAS. To comply with these regulatory developments, public water systems may detect and remediate PFAS in drinking water and target nearby consumer product manufacturers or downstream businesses with PFAS in their products to try to force them to pay remediation costs.

Litigation

Finally, businesses should proactively stay ahead of new PFAS litigation trends in the consumer product context.

1. Current Litigation

As consumer interest in PFAS increases, there is a corresponding increased focus on reporting of PFAS in consumer products. Perhaps not surprisingly, this reporting has spawned litigation.

For example, after a 2022 Consumer Reports review discussed PFAS in packaging products from restaurants and grocery chains, companies named in the report, including Burger King, were sued. In a similar fashion, after Toxic-Free Future published a report on the use of PFAS in water or stain-resistant textiles, one of the companies in the report, Recreational Equipment, Inc. (REI), was sued in California in April 2022, with a second lawsuit filed in Washington in October 2022. Personal care brands and cosmetic manufacturers such as L'Oreal and Cover Girl are facing similar lawsuits, the L'Oreal lawsuit citing a June 2021 Notre Dame research study that investigated the use of PFAS in 231 cosmetic products.

The lawsuits generally allege breaches of express or implied warranties, fraudulent concealment, unjust enrichment, and consumer protection act violations and track similar themes, targeting a business for touting its product as "sustainable," "safe," or "green" when the product allegedly contains PFAS known to be harmful. Statements of "transparency" in product ingredients have also been targeted where the use of PFAS was not clearly stated. Unjust enrichment claims tend to allege a company saved money by using PFAS-coated products instead of more expensive, but safer, alternatives. Injury claims, such as in the REI cases, allege that a consumer was led to believe they were spending money on a premium, environmentally friendly brand versus lower-cost competitors.

At least one lawsuit has already been defeated. For example, on November 30, 2022, a district court in Pennsylvania dismissed a lawsuit against Artsana USA, Inc., commonly known as Chicco, that alleged a failure by Chicco to disclose the use of PFAS in its KeyFit 30 children's car seat in either its packaging, labelling, or ingredients list. The plaintiff, who did not allege any health impacts, instead alleged that she overpaid for the product thinking it was PFAS-free based on Chicco's omissions and misrepresentations. The plaintiff also pointed to a Chemical Policy on Chicco's website that claimed the KeyFit 30 to be PFAS-free.

On a motion to dismiss, the court held that the plaintiff did allege an injury-in-fact by paying a price premium for a product the plaintiff believed to be PFAS-free. However, the court also held that the plaintiff failed to state a claim for which relief could be granted because Chicco is not required to disclose the chemicals it uses to treat its car seats and because the plaintiff did not rely on the Chemical Policy when purchasing the car seat. The court further held that the plaintiff failed to follow statutory requirements to notify the defendant of a breach of express or implied warranty.

Other consumer product company defendants have similarly pushed to dismiss litigation. The disposition of these and related lawsuits will bring needed clarity to businesses with respect to how

they advertise their products.

2. Future Outlook

It is likely that plaintiff's firms will continue to aggressively pursue lawsuits in this area. With most lawsuits focusing on product representations, businesses should pay special attention to how they address PFAS in their consumer-facing descriptions.

Retailers can also expect increased pressure from consumers to remove PFAS-containing products from their catalogs. This, in turn, will put pressure on manufacturers and upstream suppliers to ensure products reaching retail are PFAS-free, as well as increase retailer and consumer demands directed at manufacturers and suppliers for product ingredient information.

Conclusion

Manufacturers and downstream businesses should be dedicating resources to comply with regulatory developments and minimize litigation risk. Our team of attorneys can help businesses examine how PFAS developments apply to them, as well as help businesses develop a proactive and strategic game plan.

Footnotes

[1] *See* PFAS Master List of PFAS Substances, EPA (Aug. 10, 2021), https://comptox.epa.gov/dashboard/chemical-lists/pfasmaster.

[2] Sometimes state PFAS laws use the language "all" or "any" members.

[3]While the disclosure requirements took effect January 1, 2023, the Maine Department of Environmental Protection is currently in the process of developing regulations. The Department's website notes that the answers in its FAQs are subject to change in response to feedback and changes in regulation.

[4] *Cf.* Kelsey L. Rodriguez et al., Recent Developments of PFAS-Detecting Sensors and Future Direction: A Review, Micromachines (Basel). 2020 Jul; 11(7): 667, at 2 (noting the limitations in the practical applications of traditional technologies used to measure PFAS in environmental matrices). For one example of regulatory-detection mismatch in the drinking water context, EPA's interim health advisory levels for perfluorooctanoic acid (PFOA) and PFOS, 0.004 and 0.02 parts per trillion, respectively, are below the level of both detection and quantitation for these chemicals.

[5] Kathryn M. Rodgers et al., How Well Do Product Labels Indicate the Presence of PFAS in Consumer Items Used by Children and Adolescents?, Environ Sci Technol. 2022 May 17; 56(10): 6294–6304.

[6] Lara Schultes et al., Total Fluorine Measurements in Food Packaging: How Do Current Methods Perform?, Environ. Sci. Technol. Lett. 2019, 6, 2, at 73–78.

[7] *See, e.g.*, Anna Brinch et al., Risk Assessment of Fluorinated Substances in Cosmetic Products, Ministry of Environment and Food of Denmark. 2018 Oct, at 31.

[8] PFAS are generally added to consumer products to impart water and stain resistance.

[9] *See* 87 Fed. Reg. 54,415 (Sept. 6, 2022).

[10] 87 Fed. Reg. 74,379.

[11] 85 Fed. Reg. 45,109 (July 27, 2020).

[12] 86 Fed. Reg. 33,926 (June 28, 2021).

[13] *See* 15 U.S.C. §2602(13), (14).

[14] In March 2021, EPA published Regulatory Determinations for Contaminants on the Fourth Contaminant Candidate List, which included a final determination to regulate PFOA and PFOS in drinking water. 86 Fed Reg. 12,272 (Mar. 3, 2021) (Regulatory Determinations); 81 Fed. Reg. 81,099 (Nov. 17, 2016) (Fourth Contaminant Candidate List).

[15] 87 Fed. Reg. 36,848 (June 21, 2022).

[16] 87 Fed Reg. 68,060 (Nov. 14, 2022).

[17] 86 Fed. Reg. 73,131 (Dec. 27, 2021).

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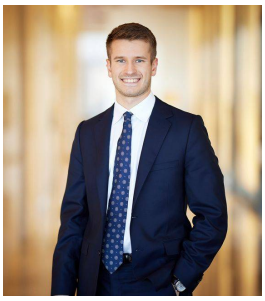

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