

# PFAS in Consumer Products

## *Concerns for Manufacturers in Patchwork Legislation & Threat of Litigation*

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# PFAS in Consumer Products

- PFAS may be present in a variety of consumer products
  - Food Packaging
  - Cookware
  - Textiles, Fabrics and Apparel
  - Carpets, Rugs and Upholstery
  - Cosmetics and Personal Care Products

# Landscape for Product Manufacturers

- Increasing state legislation/regulation - patchwork of inconsistent product categories, effective dates, and definitions
- Limited federal regulation, but that could change soon
- Consumer plaintiff litigation focused on deceptive/misleading marketing claims and alleging dangers of PFAS that may not be well-established
- Decisions to be made on product assessment, labeling disclosures, and marketing claim review



# Food Packaging and Cookware



- Grease resistance
- Oil, water resistance
- Non-stick surfaces
  
- Packaging includes paper and paperboard wraps, liners, plates, pizza boxes
- Non-stick cookware

# Textiles, Apparel and Carpet



- Stain resistance
- Water resistance and repellance
- Water proof outdoor apparel
- Stain resistant upholstery and carpet



# Cosmetics and Personal Care



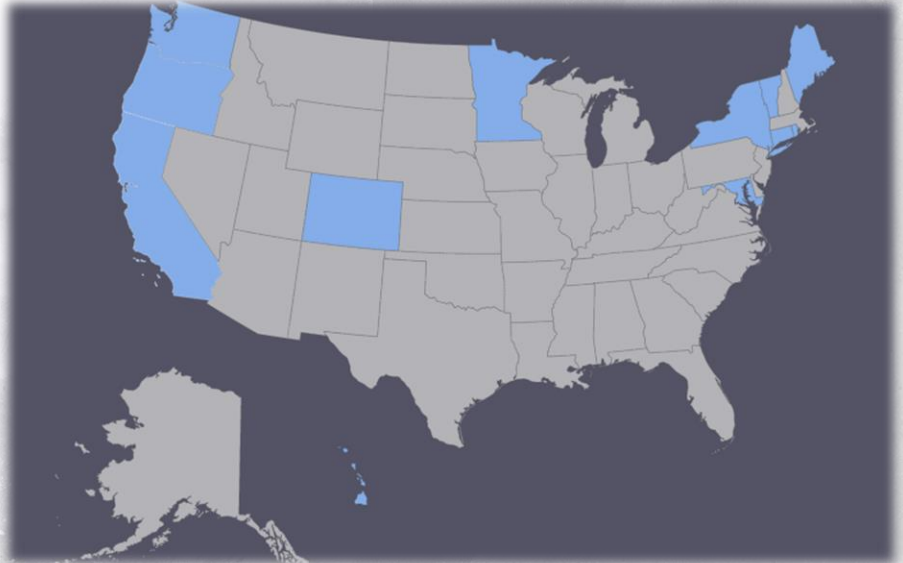
- May be used in cosmetics and personal care products for water resistance or product texture/consistency



- FDA has emphasized that there is only limited research on absorption of PFAS through cosmetics and health risks

# State Regulation

- Many states have started regulating PFAS presence in consumer products
- 12 states with enacted legislation regulating PFAS in consumer products
  - California, Colorado, Connecticut, Hawaii, Maine, Maryland, Minnesota, New York, Oregon, Rhode Island, Vermont, Washington



# State Regulation

- Legislation covers food packaging, cookware, children's products, cosmetics, textiles, rugs & carpets, and upholstered furniture
- A few states requiring disclosures
- Many more bills proposed
- No enacted restrictions in Wisconsin on PFAS in consumer products
  - Wisconsin Senate Bill 361 introduced last year would restrict intentionally added PFAS in food packaging beginning in 2025



# How States are Defining PFAS Prohibitions

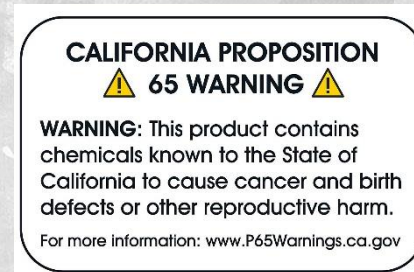
- Focus of state legislation is on regulating products with “intentionally added” PFAS, typically defined as having a technical or functional effect on the product
- Some states may set a threshold of presence
- Some states may limit application of prohibition to circumstances in which no safer alternative has been identified as readily available

# State Regulation - Disclosures

- Several states have proposed legislation requiring the disclosure of PFAS chemicals which have been intentionally added
- Only Colorado currently requires PFAS label disclosure, and only for cookware beginning in 2024
- California passed bill which would have required manufacturers to annually register the PFAS or PFAS-containing product in publicly accessible database
  - Vetoed by Governor Newsom out of concern for cost of oversight and deference to EPA rulemaking on PFAS reporting
- BUT: Proposition 65

# California Proposition 65

- Proposition 65 requires “clear and reasonable” warnings to be placed on products where exposure to a chemical on the Proposition 65 list would exceed a safe harbor level as a result of normal, foreseeable use of the product
- California first added both PFOA and PFOS chemicals to its Proposition 65 list in 2017 as substances that may have reproductive harm
- Since added PFOA, PFOS as carcinogens; others under review for reproductive harm





# Federal Regulation - FDA

- FDA regulates food contact applications and substances and food contact substances treated as additives requiring premarket authorization to insure they are safe for their intended use
- FDA authorizes certain PFAS for limited use in cookware, food packaging, and food processing:
  - Cookware: PFAS may be used as a coating to make cookware non-stick.
  - Parts used in food processing equipment: PFAS may be used as a resin in forming certain parts for food processing equipment for chemical and physical durability.
  - Processing aids: PFAS may be used as processing aids to reduce build-up on manufacturing equipment
  - Paper/paperboard food packaging: PFAS may be used as “grease-proofing agents” for fast-food wrappers, microwave popcorn bags, take-out paperboard containers, and pet food bags

# Federal Regulation - EPA

- EPA proposed rule for reporting and recordkeeping of PFAS under Toxic Substances Control Act (TSCA)
- Would require manufacturers of covered PFAS chemical substances to report PFAS uses, production volumes, disposal, exposures, and hazards
- Under proposed rule, articles containing PFAS, including imported articles containing PFAS, are included in the scope of reportable chemical substances
- Narrow exemptions - those subject to FDA Act and FIFRA
- Businesses that manufactured or imported a product containing a PFAS chemical could be subject to the rule

# Federal Regulation - FTC

- Federal Trade Commission regulates deceptive advertising
- Guides for Use of Environmental Marketing Claims (the “Green Guides”)
- FTC can bring an enforcement action on environmental marketing claims which are not truthful, are misleading, or are otherwise “not supported by a reasonable basis”
- Penalties per violation = substantial fines
- No FTC enforcement actions on marketing of products containing PFAS to date
- PFAS claims without qualification could be seen as misleading
- PFAS presence could undermine basis of other environmental marketing claims - “safe,” “non-toxic,” “biodegradable/compostable”



# Media Coverage

- Consumer safety groups, environmental advocates, and even lifestyle media are driving social media and mainstream media coverage.

## Dangerous PFAS Chemicals Are in Your Food Packaging

CR found 'forever chemicals' in bowls, bags, plates, and wrappers, even from some companies that say they've phased them out



Source: Consumer Reports

Source: ToxicFreeFuture.org

## InStyle

NEWS CELEBRITY BEAUTY LIFESTYLE FASHION WELLNESS SHOPPING ABOUT US

BEAUTY

## Scientists Found That 82% of Waterproof Mascaras Have Toxic Chemicals in Them – Here's What to Shop Instead

Everything to know about PFAS in makeup, and how to tell if your routine has them.

Source: InStyle

# Litigation

- Increasing number of class actions regarding consumer products, alleging false and misleading product labeling based on the presence and nondisclosure of PFAS in their products
- Suits are not claiming specific bodily injuries
- Allegations of violations of state consumer protection statutes, violation of consumer fraud and deceptive business practices statutes, breach of express warranties, breach of implied warranties
- Focus on marketing claims about safety, health, sustainability

# Apparel

- **Lauren Lupia v. Recreational Equipment, Inc, Case No. 3:22-cv-02510 (N.D. Cal.).** Alleges that REI representation that rain jackets are “sustainable gear” is misleading due to the undisclosed presence of PFAS
- **Blenis v. Thinx, Inc., Case. No. 21-cv-11019 (D. Mass).** Alleges that absorbent underwear manufacturer’s representation that products are “safe and effective” is misleading due to the presence of PFAS
- **Rivera v. Knix Wear, Inc., Case No. 22-cv-2137 (N.D. Cal.).** Alleges underwear manufacturer’s representation that products are “safe, comfortable, and sustainable” is misleading due to the presence of PFAS



# Food Packaging

- **Azman Hussain v. Burger King Corporation, Case No. 22-cv-02258 (N.D. Cal.).** “Safe” and “sustainable” representations are false and misleading due to the presence of PFAS in packaging
- **Larry Clark v. McDonald’s Corporation, Case No. 22-cv-00628 (S.D. Ill.).** Food safety representations misleading due to the presence of PFAS in packaging
- **Little v. NatureStar North America LLC, et al., Case No. 22-cv-00232 (E.D. Cal.).** Compostable claim on disposable tableware products from Targer is false and misleading due to the presence of PFAS
- **Hamman, et al. v. Cava Group Inc., Case No. 22-cv-00593 (S.D. Cal.).** “Healthy” and “sustainable” representations of restaurant group are misleading due to the presence of PFAS in packaging

# Cosmetics and Personal Care

- **Spindel v. Burt's Bees, Inc., Case No. 4:22-cv-01928 (N.D. Cal.).** Claims that products are “100% Natural Origin” and “100% Natural” are deceptive due to the presence of PFAS
- **Anderson v. Almay, Inc., Case No. 1:22-cv-02722 (S.D.N.Y.).** Marketing that products use only “safe, effective ingredients and smarter formulas” which are “rigorously tested” is misleading due to the presence of PFAS
- **Davenport v. L'Oreal USA, Inc., Case No. 2:22-cv-01195 (C.D. Cal.).** Representation that products are safe, effective, high quality, and appropriate for use on eyelashes is misleading due to the presence of PFAS
- **Alan Dalewitz v. The Procter & Gamble Company, Case No. 7:22-cv-07323 (S.D.N.Y.).** Claim that Oral-B dental floss products are “Pro-Health” is false and misleading due to presence of PFAS.

# Obstacles for Plaintiffs

- **Pleading standard**
  - In two recent Central District of California cases (*Andrews v. Procter & Gamble Co.* and *Kanan v. Thinx Inc.*), court considered specificity of allegations of presence of PFAS in the product
  - *Andrews* relied on screening for fluorine content but not specifically for PFAS, was dismissed because plaintiff did not specifically allege PFAS in dental floss
  - *Kanan* survived motion because it specifically alleged PFAS presence, relying on third-party testing identifying PFAS in Thinx clothing material
- **Uncertain information on adverse health effects limits allegations of personal injury**
- **Establishing reliance**
  - Difficult to show that plaintiffs relied on nondisclosure of PFAS or general “green” statements indicating nonpresence of PFAS in purchasing product
  - But growing media attention to PFAS presence—with or without clear evidence of harm—may lessen that obstacle



# Suggested Practices

- Take steps to determine whether current or historical products contain PFAS chemicals
- Determine if those products will be subject to proposed EPA TSCA Section 8(a)(7) Reporting and Recordkeeping Requirements

# Suggested Practices

- Manufacturers of cosmetics and personal care products, food packaging, cookware, textiles, children's products monitor enacted and proposed state legislation
- Review California Prop 65 labeling - updated list at <http://oehha.ca.gov/proposition-65/proposition-65-list>
- Assess marketing claims that invite scrutiny from FTC and plaintiffs' bar - safety, health, sustainability

# Final Takeaways

- Evidence of health risk of PFAS consumer product exposure is still unsettled
- Risk on the litigation side is whether “reasonable” consumers interpret marketing claims to mean PFAS-free
- Growing discussion of PFAS content from lawsuits, consumer protection groups, and state legislation increases that risk
- Even if state/federal law does not yet require PFAS content disclosure, mitigating litigation risk may mean either qualifying marketing claims or disclosing PFAS content



# Questions?

## Thank You!

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