

What Counsel Should Know About PFAS Regulation and Litigation

By Simone Jones and Bonnie St. Charles

Sidley Austin's Simone Jones and Bonnie St. Charles analyze regulatory and legal movement to tighten scrutiny of PFAS chemical use in everyday products across the US, with implications for corporations that use these substances in manufacturing.

Fluorine-carbon bonds enable more than 5,000 PFAS chemicals to reduce friction and repel oil, water, grease and stains, and high temperatures. Given their strength and broad applicability, per- and polyfluoroalkyl substances have been used in manufacture of everyday items since the 1940s.

PFAS chemicals are now subject to intense focus from regulators and, not surprisingly, the plaintiffs' bar—spurring new regulations and ballooning litigation. In response, companies should implement risk management strategies to best position themselves to ensure PFAS-related compliance and weather the risks.

Regulatory Developments

PFAS are ubiquitous—they are in clothes, car seats, personal protective equipment, food packaging, protein powder, and more. Because of their widespread use and claims about their function, states have begun to introduce new or stricter laws and regulations governing their use and distribution.

Two notable examples come from states that are considered aggressive when it comes to the chemicals regulation. Specifically, California enacted phase-outs of PFAS in juvenile products (AB 652), cosmetics (AB 2771), food packaging (AB 1200), and apparel (AB 1817). New York similarly prohibits use of PFAS in apparel, especially for PFAS that are “intentionally added”—as distinguished from PFAS resulting from manufacturing processes or environmental degradation.

The Environmental Protection Agency also has ramped up its oversight—released a 2021 PFAS [strategic roadmap](#) with plans to “research, restrict, and remediate” PFAS. The agency followed up in 2022 with a proposal to designate the two most widely studied PFAS—PFOA and PFOS—as hazardous substances under the Comprehensive Environmental Response Compensation and Liability Act. This proposed rulemaking is the first time the EPA has used its power to designate new chemicals as “hazardous substances” under CERCLA since the law's enactment in 1980.

On March 14, the EPA proposed its long-anticipated National Primary Drinking Water Regulation, which would impose maximum contaminant levels for six types of PFAS—PFOA, PFOS, PFNA, PFHxS, PFBS, and Gen X chemicals. This regulation would require public water systems to actively monitor and reduce the amount of the six targeted PFAS in drinking water. If finalized, it would be the first-ever federal PFAS drinking water standard.

In the same rulemaking, the EPA also proposed a maximum contaminant level goal for the six targeted PFAS. Although non-enforceable, its goals may be followed by states enacting their own drinking water regulations. This is particularly notable given that the MCLGs are not tied to contaminant detection or treatment technology effectiveness, and therefore are sometimes set at levels that are not yet technologically feasible.

This patchwork regulatory regime between the federal and state governments and the states themselves means in-house lawyers and compliance officers need to carefully monitor what is happening at the federal level, but also the changing laws of states where they operate.

Litigation

Changing state laws are not the only PFAS issue that lawyers and compliance officers should watch: PFAS litigation continues to accelerate. Since 2005, thousands of PFAS-related suits were filed. They run the gamut from consumer class actions against clothing manufacturers to personal injury claims against chemical manufacturers—in which plaintiffs allege that exposure to PFAS increased their risk of various illnesses, such as cancer and reproductive diseases.

Recent trends indicate that putative consumer class actions are increasing in size and number and targeting those far outside the chemical manufacturing business, including fast-food companies and cosmetic manufacturers. States have been involved in litigation, too, and this is likely to continue. Attorneys general in Illinois, Wisconsin, California, and Colorado—among others—have filed suits against private companies related to PFAS use.

Finally, while these lawsuits have typically been focused on the makers and users of PFAS, coverage disputes between insurers and policyholders have also been increasing. Courts in North Carolina, Michigan, and Texas have held that insurers have a duty to defend policyholders in PFAS actions, while New York decided the question the other way. Insurers may be attempting to write PFAS-specific exclusions into both general liability and director and officer policies.

Risk Management Strategies

It is more important than ever for companies that use or sell PFAS to conduct a thorough risk analysis and implement risk controls, from directors to employees, to minimize and control existing and potential future risk related to PFAS. This includes ensuring board members have appropriate PFAS expertise or access to such expertise. Companies also should implement information systems to ensure accurate information about PFAS is available, and generally make sure that board and, if relevant, committee documents are evidencing appropriate attention to PFAS-related risks.

Even companies that do not themselves use or sell PFAS must implement risk management strategies, and have a firm handle on their supply chains, and specifically whether PFAS are added to their products at any step of the way.

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Author Information

[J. Simone Jones](#) is an environmental partner at Sidley Austin. Her practice focuses on environmental and toxic tort litigation and product liability matters.

[Bonnie St. Charles](#) is an associate in Sidley Austin's litigation practice.