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What California's PFAS Law Could Mean for the Cosmetics Industry Nationwide

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Per- and polyfluoroalkyl substances, or PFAS, is a blanket term describing thousands of synthetic chemicals historically added to a variety of everyday items for functional effects. In cosmetics, companies have used PFAS during manufacture to improve product performance, as it can make formulas easier to apply, more water resistant or more comfortable to wear or use. Recent studies have linked exposure to certain PFAS chemicals to various human health issues, however, and combined with the fact that some PFAS take a long time to be eliminated from the body or degrade in the environment – resulting in the nickname *forever chemicals* – state and federal regulators have increasingly focused their efforts on banning or severely curtailing PFAS in cosmetics and other consumer products.

Take, for example, California's Assembly Bill (AB) 2771, signed into law by Gov. Gavin Newsom on Sept. 30, 2022. It represents a significant expansion of AB 2762, a 2020 California bill banning the manufacture, distribution or sale of 13 specified PFAS chemicals in cosmetic products. Beginning Jan. 1, 2025, AB 2771 mandates that “no person or entity shall manufacture, sell, deliver, hold or offer for sale in commerce any cosmetic product that contains intentionally added perfluoroalkyl and polyfluoroalkyl substances (PFAS).”

As defined by AB 2771, PFAS means: “a class of fluorinated organic chemicals containing at least one fully fluorinated carbon atom.” In other words, all known PFAS chemicals. “Intentionally added PFAS” is defined to mean: “either . . . PFAS chemicals that a manufacturer has intentionally added to a product and that have a functional or technical effect on the product . . . [or] PFAS chemicals that are intentional breakdown products of an added chemical,” i.e., the bill covers both PFAS chemicals added directly during manufacture as well as “daughter compounds,” or PFAS chemicals that result from the degradation of other ingredients. A cosmetic product is defined as any product for retail sale or professional use intended to be applied to the human body for cleansing or cosmetic purposes.

In short, AB 2771 is a complete ban up and down the supply chain on the intentional inclusion of PFAS chemicals (or chemicals known to degrade to PFAS) in cosmetic products, and companies have a little under two years to prepare for and comply with the ban.

How to Comply

To ensure compliance with AB 2771, cosmetic companies, suppliers and retailers must investigate and understand “intentionally added” ingredients for the cosmetic products they manufacture, distribute or offer for sale in California. Since liability attaches under AB 2771 regardless of a company's position in the supply chain, companies should thoroughly understand both how and where the ingredients purchased for their products are manufactured. It is also strongly recommended they consider independent testing of both ingredients and consumer-ready cosmetic products for organic fluorine content or specific PFAS chemicals of concern. Distributors and sellers may even seek further certifications from manufacturers and component ingredient suppliers to ensure that the cosmetic ingredients and products they purchase are PFAS-free.

Manufacturers currently phasing out PFAS chemicals in ingredients or products should also begin to assess both the efficacy and potential toxicity of replacement compounds for PFAS, especially given the relatively short window of time until the bill goes into effect. This process should be documented carefully and, while doing so, incorporate understandings from existing human health and safety testing on PFAS

chemicals historically used in cosmetic products. Documentation of the process for testing and selecting replacement compounds is particularly important in case of future regulatory scrutiny of their safety.

In addition, it is suggested that companies review their relevant supply contracts for provisions ensuring compliance with environmental laws and regulations, as well as for indemnity provisions or other remedies for lack of compliance. To the extent renegotiation of existing contracts is on the table, companies should ensure they include protective provisions concerning PFAS liability going forward.

Take Extra Measures

The steps described are not an exhaustive list. As changes in the law on PFAS are rapidly developing across the United States and other countries, company compliance functions should be especially wary of a rapidly shifting legal landscape and jurisdictional disparities in laws restricting or banning the presence of PFAS chemicals in cosmetics.

Even ensuring compliance with applicable state and federal law has not shielded cosmetic companies in the United States from litigation, which is likely to be the primary area of PFAS risk for cosmetic companies in coming years. According to a recent Bloomberg Law analysis, more than 6,400 PFAS-related lawsuits across a variety of industries have been filed in federal courts since July 2005.

One of the most common types of PFAS lawsuits cosmetic companies have recently faced are putative class actions filed by consumers who allege that they were misled by a failure to disclose that a product contains PFAS, or who otherwise allege that a company misrepresented that a product containing PFAS was *clean, natural, healthy, safe, green-friendly, organic* or *sustainable*. In the event of such litigation, steps taken to remain compliant with PFAS laws and regulations like AB 2771 will inure to a company's benefit, including by potentially proving product purity or by demonstrating that a company acted reasonably to disclose and mitigate against any known risks.

Conclusions

Although it is not entirely possible to avoid potential litigation, companies can reduce their risk of suit by paying close attention to labelling, advertising and other representations about the safety, contents and ESG impacts of their products to ward off allegations of misrepresentation. More broadly, companies should carefully review their marketing materials and public statements about ESG to ensure they do not increase their exposure to an increasingly active, sophisticated and involved plaintiffs' bar in this space.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer or its clients. This article is for general informational purposes and is not intended to be and should not be taken as legal advice.

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