

# What are the top US food contact legal and regulatory issues to watch in 2022?

Joseph M Dages, associate with law firm Steptoe, looks at what the industry should expect this year

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The US food contact industry is facing several major legal and regulatory challenges in the year ahead, with issues ranging from plastic recycling to potential lawsuits over additives. The following are the issues that the Steptoe team expect will probably have the greatest impact.

## FDA plastic recycling guidance?

There is every reason to think that the focus on using more recycled plastic in food contact materials (FCMs) will continue in 2022. Some international regulatory bodies have already reacted to this focus. For example, the EU recently issued a new draft regulation addressing the use of recycled plastic in food contact applications. However, the only FDA guidance document on the issue has not been substantively updated since 2006. That document, while helpful, has limitations because it was written with at least a partial focus on the recycling of polyethylene terephthalate (PET), and stakeholders are now looking to use a much wider variety of feedstocks.

### What to watch for:

We understand that FDA is working on revisions to its existing guidance, though it is not clear where those revisions stand. This is an important development to watch out for, as understanding the provisions in the new guidance document will be critical for all companies in the food and food contact industries.

## FTC Green Guides revisions?

The emphasis on using sustainable packaging materials and the interest in making so-called “green” or “environmental” claims for products will certainly continue into 2022. This means that the Federal Trade Commission’s (FTC) “Green Guides” will continue to be an important compliance consideration for companies. The guides exist to help companies avoid making environmental marketing claims that are unfair or deceptive under section 5 of the Federal Trade Commission (FTC) Act. While they only express the Commission’s current thinking on such claims, and are an administrative interpretation of the law, they are nonetheless important and a key compliance consideration.

### What to watch for:

The Green Guides were first issued in 1992 but have not been updated since 2012. The FTC announced in 2021 that it intends to initiate a review of the Green Guides in 2022.

The current guides are based, at least in part, on the results of studies conducted in 2009 regarding consumer reaction and interpretation of various common claims such as “made with recycled materials” or “made with renewable materials”. Since many years have passed, it will be interesting to see whether the FTC considers how consumer perceptions about common green claims have changed, and the impact that may have on the updated guides.

## Gras still under attack?

For several years, the exemption to the food additive definition in the Federal Food, Drug and Cosmetic Act (FDCA) for substances that are generally recognised as safe (Gras) has been the subject of much scrutiny. Why? Because substances that are Gras are exempt from premarket review by the FDA. In 2017, a group of NGOs filed a lawsuit arguing that the FDA had violated the law by not requiring this premarket review. A federal judge issued an [opinion](#) in September 2021 that sided against the NGOs, finding that all their causes of action lacked merit under the applicable law.

### What to watch for:

The court's ruling dealt a strong blow to the NGOs' attempts to remedy their complaints through the judicial system and the time has now passed for the lawsuit to be appealed.

This means one can probably expect NGOs to use the ruling in 2022 to drum up additional support for a legislative amendment to the FDCA. Passage of such an amendment would be a significant undertaking, as the relevant provisions in the FDCA have not been amended since 1958, and it took Congress several years to debate those provisions before they were ultimately adopted.

One can also expect NGOs will attempt to apply pressure on the FDA on issues related to Gras in other ways. For example, a number of NGOs recently met with the FDA to discuss the citizens' petition they submitted in 2020. This petition calls on the FDA to ensure that the cumulative effect of chemically or pharmacologically related food additives (including Gras substances) in the diet are considered when assessing their safety. The FDA did ask for input in addressing some of the more technical questions raised by the petition, but the agency is under no binding legal requirement to respond, and some citizens' petitions languish for many years.

## More NGO petitions and a decision on phthalates forthcoming?

With the NGO community finding an unsympathetic ear in the courts over their grievances with the Gras exemption, it is fair to wonder whether these groups will pivot somewhat to focus on the submission of additional food additive petitions (FAP) to the FDA that call on it to revoke clearances for FCMs. This is a tried and true strategy for NGOs, and a number of such petitions have already been submitted and accepted for filing by the FDA – including a petition on approximately 30 phthalates, the largest such petition filed by the NGOs to date.

### What to watch for:

The FAP process can take years before a decision is reached by the FDA, a point highlighted by the lack of a decision by the agency on the phthalates petition that was filed in 2016. In December 2021, the NGOs sued the FDA to compel it to reach a decision on the phthalates FAP. Stay tuned for whether the FDA issues a decision this year. Such a decision could have wide-ranging impacts on the plasticised PVC market.

Although 2022 is barely a month old, a new FAP has already been submitted by a group of NGOs calling on the FDA to remove or significantly restrict existing clearances for bisphenol-A (BPA) in FCMs. This FAP was submitted in response to a draft safety assessment of BPA that the European Food Safety Authority (Efsa) published on 15 December.

## How will the sustainability and food contact policy debate evolve?

We saw a significant uptick in interest among the 50 states in 2021 with respect to sustainability issues focused on FCMs. This interest took various forms, ranging from legislation banning PFASs, requiring minimum recycling content in plastic beverage containers, plastic straw bans, state green chemistry regulatory initiatives, and even legislation designed to promote (or discourage) the use of various forms of recycling.

### What to watch for:

These efforts will continue in 2022, but it also bears watching whether our federal government steps up efforts along these lines too. Patchwork state laws make it difficult for companies to develop compliance programmes, and states often act on their perception that the federal government is not acting or responding to a problem in an adequate way.

*The views expressed in this article are those of the author and are not necessarily shared by Chemical Watch. The author transparency statement can be seen [here](#).*



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