



PFAS in food packaging: What were the key developments in the US in 2023 – and what is expected in 2024?

Steptoe associates Joe Dages and Caleb Holland, together with Steptoe partner Joan Baughan, review regulatory activity surrounding PFAS in food packaging, and consider the outlook for the coming year

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Few issues garnered more regulatory attention in 2023 for the food packaging and chemical industry in the US than per- and polyfluorinated substances (PFAS). This broad class of chemicals, which includes in excess of 5,000 substances by some definitions, is subject to a myriad of restrictions. This article summarises regulatory and other related legal activity surrounding PFAS, and the outlook for the year ahead.

State level activity

State activity surrounding PFAS in food packaging continues to be a focal point, given that 12 states have already adopted laws banning or otherwise restricting the use of PFAS in food packaging. These states are California, Colorado, Connecticut, Hawaii, Maine, Maryland, Minnesota, New York, Oregon, Rhode Island, Vermont and Washington. Several of these state laws are already in effect, including those in California (1 January 2023), Colorado (1 January 2024), Connecticut (31 December 2023), Maryland (1 January 2024), Minnesota (1 January 2024), New York (31 December 2022), Vermont (1 July 2023) and Washington (1 February 2023).

It is critical to pay attention to the nuances and differences in these state laws. For example, although all the state laws apply a broad definition for PFAS to mean “a class of fluorinated

organic chemicals containing at least one fully fluorinated carbon atom”, and generally only apply to PFAS that are “intentionally introduced”, some of the state laws only apply to paper and plant fibre-based food packaging, while others apply only to packaging in direct contact with food.

A select recap of activity in some of the key states follows below.

California

The California law is noteworthy for a number of reasons: first, it is unique in that it includes a provision that paper and plant fibre-based food packaging is banned if it contains PFAS in the product at, or above, 100ppm, as measured in total organic fluorine; second, it represents the largest state market in the US; and third, California has a well deserved reputation for generating significant liability exposure for companies that do business in the state, both from the state government and private lawyers representing consumers.

Last year the state attorney general issued an enforcement advisory letter to industry, warning that enforcement of the PFAS ban in food packaging is a priority for the authorities. This advisory signals the risks of enforcement in California

are very real, and companies should take care to ensure compliance with the law.

Minnesota

The Minnesota law is noteworthy due to its broad scope. It applies to all food packaging, and it does not include any provisions purporting to limit its scope to packaging that is only in direct contact with food. The authorities in Minnesota held a webinar on 30 November, during which they stated there is no defined threshold concentration of PFAS that may trigger enforcement action by the state. The authorities specifically acknowledged the 100ppm action level in the California law, and further indicated they could act on an even lower level of PFAS detected in a product. This signals not only the authorities' willingness to test for total organic fluorine as a marker for PFAS, but also their willingness to be aggressive in testing and enforcement.

Maine

Maine is unique in that it has two separate laws that potentially ban or otherwise restrict the use of PFAS in food packaging.

A long-standing concern from industry focuses on the so-called "Chapter 16" law, which not only bans the sale of "any product that contains intentionally added PFAS" beginning 1 January 2030 but also contains a PFAS reporting requirement, commencing 1 January 2025. The Maine PFAS Chapter 16 law was amended on 8 June last year to provide an exemption for "[a] package, as defined in [Maine Revised Statutes, 32 § 1732(4)], except when the package is the product of the manufacturer". [1]

We understand that this language is intended to generally exempt food packaging from the notification requirement and the 1 January 2030 ban, but the language is somewhat vague, and may leave some companies with questions.

The compliance date for Maine's "Chapter 26" ban on the use of PFAS in food packaging is delayed until the Maine Department of Environmental Protection (DEP) determines a safer alternative to the use of PFAS in a specific food packaging application. The Chapter 26 ban will become effective two years after the date on which the department determines a safer alternative is available. At this time, the Maine DEP has not made any final determinations regarding safer alternatives, so there is no ban currently in effect under Chapter 26. However, on 23 October, Maine's DEP released a draft rule proposing to ban certain categories of plant and plant-fibre based food packaging. Maine's proposed rulemaking relies, at least in part, on safer alternative reports developed by the Washington Department of Environment

(DOE) as key elements in Maine's safer alternatives determination. Comments on Maine's proposed rule were due on 30 November.

Rhode Island

The Rhode Island law banning PFAS in food packaging, as originally enacted, was scheduled to come into effect on 1 January this year. However, the legislature amended the law in 2023 so it will now come into effect on 31 July. [2]

One reason for this amendment to the enforcement date is continued concerns regarding a unique provision in the Rhode Island law, which states that "the use of [PFAS] as a processing agent, mold release agent, or intermediate is considered intentional introduction for the purposes of this chapter where the [PFAS] is detected in the final package or packaging component". No other state law explicitly calls out processing aids to consider them an "intentional introduction" of PFAS. If left unchanged, this provision may induce liability exposure for stakeholders that use PFAS processing aids, and such companies will need to switch to new processing aids in advance of the 31 July deadline.

Activity at the federal level

The US Food and Drug Administration (FDA) regulates food packaging materials at the federal level under its authority in the Federal Food, Drug, and Cosmetic Act (FFDCA). In general, the FDA continues to take a more narrowly tailored and risk-based approach to regulating the presence of PFAS in food packaging and in chemicals used as components of food packaging, at least compared with the approach many states have taken. As a result, the FDA's regulation of PFAS in food packaging is (to date) more limited in scope. For example, the FDA has required companies to stop marketing only two specific classes of PFAS compounds that were authorised by way of food contact notifications (FCNs) for use as grease-proofing agents in paper and paperboard. These include the so-called "long-chain" and "short-chain" compounds.

Outside of these targeted efforts, the FDA has not revoked its clearances for many other compounds that meet the definition of PFAS under state law. In 2022, the FDA requested data and other information about the use of certain fluorinated polyethylene articles currently authorised for use in food-contact applications under 21 C.F.R. § 177.1615, "Polyethylene, fluorinated", but the agency has not taken any formal steps to revoke the clearance in Section 177.1615. [3]

Separate and apart from the data call-in, a group of NGOs submitted a food additive petition (FAP) to the FDA in September 2023. The FAP calls on the FDA to revoke outright the existing clearance for all food packaging authorised under

Section 177.1615. However, at the time of writing, the FDA has not accepted the FAP for filing, a step that is required before the FDA's review obligations and timelines for FAPs under Section 409 of the FFDCFA are triggered.

The FDA also continues to operate a research, testing and analysis programme of PFAS in food, and has published its findings from this work over the past several years on its website. [4]

What should industry expect in 2024?

With several state laws already in effect, the legal landscape is clearly evolving as we enter the enforcement phase. Companies doing business in the states with laws already in effect will need to ensure they have worked with suppliers, as needed, to ensure their food packaging materials are free of intentionally added PFAS.

Companies will also need to think critically about the potential for liability exposure from entities that may test their products for the presence of total organic fluorine, under the premise that the presence of the organic fluorine is PFAS. Regardless of the merits of this approach, it will continue to present problems for the food packaging value chain. Although it may be difficult, companies also will need to keep an eye on rollout of regulations in all of the 12 states with laws on the books. Government agencies at the state level will leverage those regulations in enforcement actions, and strict compliance with the regulations themselves, in addition to the statutes, is critical.

Finally, companies will need to keep an eye on federal regulatory and legislative activity. Although the FDA has taken a comparatively measured approach to PFAS regulation thus far, there is no guarantee the status quo will continue. Additionally, Congress should not be forgotten as a potential player. Even if Congress stops short of passing a federal law banning or otherwise restricting the use of PFAS in food packaging, its ability to influence the FDA and companies in the food packaging value chain should not be underestimated.

Footnotes

1. See [HP 138 - LD 217](#), signed into law on 8 June 2023
2. See [SB 724](#), signed into law on 22 June 2023
3. See *Fluorinated Polyethylene Containers for Food Contact Use; Request for Information*, 87 Fed. Reg. 43274 (20 July 2022), available [here](#). The FDA specifically stated it is "seeking scientific data and information on current food contact uses of fluorinated polyethylene, consumer dietary exposure that may result from those uses, and safety of certain per- and polyfluoroalkyl substances that may migrate from fluorinated polyethylene food containers"
4. See *Per- and Polyfluoroalkyl Substances (PFAS)*, US FDA, available [here](#)

FURTHER INFORMATION

[Steptoe article summarising state activity in 2022 →](#)

[Enforcement advisory letter, state attorney general, California, 17 October 2023 →](#)

[Chapter 16 Law, Maine →](#)

[Chapter 26 Law, Maine →](#)

[Maine DEP draft rule proposing to ban certain categories of plant and plant-fiber based food packaging →](#)

[Environmental Defense Fund, Breast Cancer Prevention Partners, Center for Food Safety and Environmental Working Group, Food Additive Petition →](#)

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