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PFAS UPDATE: MAINE ISSUES LONG-AWAITED PFAS IN CONSUMER PRODUCTS IMPLEMENTATION RULE

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SUMMARY

In July 2021, Maine enacted a [law](#) that requires the disclosure of any product that contains intentionally added PFAS, and eventually prohibits the sale and distribution of any product that contains intentionally added PFAS in the state (the “Law”). In response to feedback from industry groups and impacted entities the Maine Department of Environmental Protection (“MDEP” or “the department”) [issued a proposed rule](#) on February 14, 2023 (the “Rule”) designed to clarify the scope and implementation of the Law.

MDEP has scheduled a [public hearing](#) in Augusta, Maine, on April 20, 2023, and interested parties must submit **public comments by May 19, 2023**. If your business is impacted by the proposed rule, you should consider participating in the rulemaking process.

BACKGROUND ON MAINE’S PFAS LAW

The Law contains two key dates

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- Prohibits the sale of carpets, rugs, and fabric treatments containing intentionally added PFAS.
- Manufacturers of consumer products must report to Maine DEP all products (or product categories) that contain intentionally added PFAS, and include the type(s) of PFAS, and the reason for their inclusion.

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- A person may not sell or distribute any product that contains intentionally added PFAS unless MDEP has determined that the use of PFAS is unavoidable (e.g. there is no viable replacement).

Businesses that are subject to the Law have been raising concerns and questions with Maine DEP about how the Law is intended to be implemented, and how the reporting requirements should be interpreted. In response to those industry comments, Maine DEP granted extensions to certain businesses for the January 1, 2023, reporting deadline, and has now issued the proposed Rule to provide additional information, including many definitions, enforcement details, fees, and other provisions.

REVISED DEFINITIONS

The original Law included definitions for several key terms which are shown below in italics. The Rule expands some of these definitions, and added one new definition, all of which are outlined below.

- **Carpet or rug** *“means a fabric marketed or intended for use as a floor covering.”*
 - Carpet or rug also “means any consumer product made from natural or synthetic fabric marketed or intended to be used as a floor covering inside commercial, industrial, or residential buildings. This includes carpeted door mats intended for indoor use.”
- **Currently unavoidable use** *“means a use of PFAS that the department has determined by rule under this section to be essential for health, safety or the functioning of society and for which alternatives are not reasonably available.”*
- **Fabric** “means a textile made by weaving, knitting, or felting natural or synthetic fibers. For the purposes of this rule fabric includes leather and synthetic leather.” Notably, this definition only appears in the Rule and did not exist in the original Law.
- **Fabric treatment** *“means a substance applied to fabric to give the fabric one or more characteristics, including but not limited to stain resistance or water resistance.”* “Fabric treatments do not include fabric dyes.”
- **Intentionally added PFAS** *“means PFAS added to a product or one of its product components to provide a specific characteristic, appearance or quality or to perform a specific function. “Intentionally added PFAS” also includes any degradation by-products of PFAS.”*
 - Intentionally added PFAS also includes “any degradation byproducts of PFAS serving a functional purpose or technical effect within the product or its components. Products containing intentionally added PFAS include products that consist solely of PFAS. Intentionally added PFAS does not include PFAS that is present in the final product as a contaminant.”

- **Manufacturer** “means the person that manufactures a product or whose brand name is affixed to the product. In the case of a product imported into the United States, where the person that manufactured or assembled the product or whose brand name is affixed to the product does not have a presence in the United States, ‘manufacturer’ includes the importer or first domestic distributor of the product, whichever is first to sell, offer for sale, or distribute for sale the product in the State of Maine.”
- **Perfluoroalkyl and polyfluoroalkyl substances** or PFAS “means substances that include any member of the class of fluorinated organic chemicals containing at least one fully fluorinated carbon atom.”
- **Product** “means an item manufactured, assembled, packaged or otherwise prepared for sale to consumers, including its product components, sold or distributed for personal, residential, commercial or industrial use, including for use in making other products.”
 - Product “includes packages, packaging components, and food packaging as defined in 32 M.R.S. § 1732, when sold individually or in bulk and not used in marketing, handling, or protecting a product.”
- **Product Component** “means an identifiable component of a product, regardless of whether the manufacturer of the product is the manufacturer of the component.”

CLARIFIED NOTIFICATION REQUIREMENTS

Under the original Law and as further clarified in the Rule, a manufacturer of a product that contains intentionally added PFAS is required to provide MDEP with a notification. The notification should include the following components:

- A description of the product, including:
 - Global Product Classification (“GPC”) code or the United States International Trade Commission’s Harmonized Tariff System (“HTS”), if applicable;
 - The general type of the product; and
 - The intended use of the product.
- The purpose for which PFAS are used in the product, including PFAS in any product component;
- The amount of each of the PFAS substances as a concentration; and

- The contact information of the reporting manufacturer and responsible official for the manufacturer.

The Rule provides clarity on when MDEP will waive the notification requirement if “[substantially equivalent information](#)” is publicly available. Substantially equivalent information must all be in a single document or location, and it may include an existing notification by a person who manufactures a product when the same product is offered for sale under multiple brands.

The Rule states that the manufacturer must also update the notification information whenever there is a significant change or when requested to do so by MDEP. A “[significant change](#)” happens if the following things occur:

- A change in the composition of a product which results in the addition of a specific PFAS;
- A change in the amount of PFAS of more than a 10% increase above the analytical method used; or
- A change in responsible official or contact information.

In addition, the Rule explains that in some cases the person importing the product is required to submit the notification information to MDEP. The Rule states the following: “If a product is imported directly into the State of Maine from outside the United States ... and the manufacturer has not submitted notification of the product to the Department, it is the responsibility of the person importing the product into the State of Maine to submit notification of the product to the Department.”

EXCEPTIONS

As articulated in the Rule, there are three exceptions to the law’s ban on PFAS which goes into effect in 2030:

- When a federal law or regulation controls the presence of PFAS in a product in a manner that pre-empts state authority;
- Products subject to [Title 32, §26-A, Reduction of Toxics in Packaging](#); and
- Products subject to [Title 32, §26-B, Toxic Chemicals in Food Packaging](#).

MDEP has recently clarified that PFAS substances in food packaging was not to be included in this notification law. Specifically, the second and third exemptions apply to different statutes involving food packaging. [MDEP’s website](#) states the following two conclusions:

- “All products and product components sold in Maine for personal, residential, commercial, or industrial use are subject to this program. If a product is offered for sale in Maine for one of

those purposes, the **Manufacturer** of the product must report the amount of PFAS in their product. The packaging of a product is **not** required to be reported.” (emphasis in the original)

- “The statutory exemption of products subject to [Title 32, §26-A, Reduction of Toxics in Packaging](#), and [Title 32, §26-B, Toxic Chemicals in Food Packaging](#), applies to all packing, packing components and food packaging as defined in as defined in [32 M.R.S. § 1732](#) regardless of whether the Department has specifically regulated such items. These exemptions apply only when items are actually used as packaging, packing components, or food packing, intended for marketing, handling, or protection of products.”

This Rule also carves out some exceptions for “used” products.

- “Used” is defined by the [Rule](#) as “the condition of a product having been installed, operated, or utilized for its intended purpose by at least one owner or operator. Used does not apply to a product that has been returned to a retailer or that is otherwise offered for resale without the product having been installed, operated, or utilized.”

CERTIFICATES OF COMPLIANCE

While not revised by the Rule, it is worth noting that the Law includes certificate of compliance provisions. For example, if MDEP believes that a product sold in Maine contains intentionally added PFAS, MDEP may direct the manufacturer to:

- Provide MDEP with a certificate of compliance attesting that the product does not contain intentionally added PFAS; or
- Notify persons who sell or distribute that product that the sale of that product is prohibited in Maine, and to provide MDEP with a list of the names and addresses of those notified.

FEES

The Rule explains that a manufacturer that submits a notification must pay an initial \$250 that covers up to the first three notifications, and \$50 for each additional notification thereafter. “For the purposes of calculating fees, each submission of all the information required in Section 3(A)(1), which has not been waived, for either an individual product or product component or a group thereof reported as a single category will be considered a separate notification.”

The group disclosure concept is an important feature of the Rule. It provides that “[r]eporting multiple products or product components together under a single GPC code or HTS number under subsection A above is allowed, so long as;

1. All products to be so reported fall within the same GPC brick code or HTS number,
2. The same PFAS are present in every product, and

3. Each PFAS is present in every product, either:
 - a. In a substantially similar amount as determined by a commercially available analytical method, or
 - b. If reporting by range of concentration is available, within the same concentration range.”

In situations where a GPC code or HTS number are not applicable, companies can propose their own categories which will then be reviewed by MDEP. Utilizing categories and groups for the disclosures is an effective way to minimize both the administrative burden of preparing the reports, as well as the administrative fees.

ENFORCEMENT AND PENALTIES

The Rule directs MDEP to adopt further rules as necessary to enforce these requirements. Any violations are subject to MDEP’s enforcement authority under 38 M.R.S. §§ [347](#) – [349](#). Specifically, civil penalties can range from \$10,000 to \$25,000 per day of violation, and there are also criminal penalties available.

CONCLUSION

Maine’s proposed Rule provides some of the clarifications that industry groups have been asking for in response to the Law, but continued industry participation in the rulemaking process is anticipated to attempt to address unresolved issues.

For more information on PFAS chemicals, and the regulatory and liability risks that they pose, please visit our [PFAS webpage](#). If you have a question about how to manage PFAS risk in any jurisdiction, contact Tom Lee, John Kindschuh, Emma Cormier, Brittainy Cavender, or any other member of our PFAS team at Bryan Cave Leighton Paisner LLP.

RELATED CAPABILITIES

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