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# PFAS UPDATE: MINNESOTA SIGNIFICANTLY RESTRICTS PFAS IN CONSUMER PRODUCTS

Jun 07, 2023

On May 24, 2023, Minnesota enacted HF 2310, which includes a number of PFAS restrictions in consumer products. As discussed below, several categories of products can no longer contain intentionally added PFAS beginning on *January 1, 2025*, and all products containing intentionally added PFAS are banned beginning on *January 1, 2032* (subject to some limited exemptions). The bill also contains notification requirements, as well as giving the Minnesota Pollution Control Agency ("Agency") testing and enforcement powers.

We published a prior Client Alert analyzing the draft bill, but the analysis below confirms the requirements in the final law.

## BANNING INTENTIONALLY ADDED PFAS IN CONSUMER PRODUCTS

Significantly, there are both short-term and long-term prohibitions. With respect to short-term restrictions, beginning on *January 1, 2025,* a person may not sell, offer for sale, or distribute the following products in Minnesota if they contain intentionally added PFAS:

1. Carpets or rugs;

2. Cleaning products;

3. Cookware;

4. Cosmetics;

5. Dental floss;

6. Fabric treatments;

7. Juvenile products;

8. Menstruation products;

9. Textile furnishings;

10. Ski wax; or

11. Upholstered furniture.

Unlike many other state laws that have prohibited or required the disclosure of intentionally added PFAS in some of these product categories, there are no exemptions (e.g., exemptions for electrical components in children's products) or limitations on which product components need to be considered (e.g., specific focus on food contact surfaces or handles in cookware).

The Agency also has the authority to identify additional products that should not be sold or distributed if they contain intentionally added PFAS. This prohibition should be effective no earlier than *January 1, 2025*, and no later than *January 1, 2032*.

With respect to long-term prohibitions, beginning on *January 1, 2032*, a person may not sell, offer for sale, or distribute any product that contains intentionally added PFAS, unless the Agency has determined the use of PFAS in the product is a currently unavoidable use.

## DEFINITIONS

As with many of the recent state PFAS laws, the definitions of key terms are critical. These key terms include:

- **Currently Unavoidable Use**: "a use of PFAS that the commissioner 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."
- **Intentionally Added**: "PFAS deliberately added during the manufacture of a product where the continued presence of PFAS is desired in the final product or one of the product's components to perform a specific function."
- **Manufacturer**: "The person that creates or produces a product or whose brand name is affixed to the product. In the case of a product imported into the United States, manufacturer includes the importer or first domestic distributor of the product if 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."
- **Perfluoroalkyl and polyfluoroalkyl substances or PFAS**: "A class of fluorinated organic chemicals containing at least one fully fluorinated carbon atom."
- **Product**: "An item manufactured, assembled, packaged, or otherwise prepared for sale to consumers, including but not limited to its product components, sold or distributed for personal, residential, commercial, or industrial use, including for use in making other products."

## NOTIFICATION PROCESS

On or before *January 1, 2026*, a manufacturer of a product sold, offered for sale, or distributed in Minnesota that contains intentionally added PFAS must submit information to the Agency that includes:

- A brief description of the product, including a universal product code (UPC), stock keeping unit (SKU), or other numeric code assigned to the product;
- The purpose for which PFAS are used in the product and/or product components;
- The amount of each PFAS substance;
- Contact information for the manufacturer; and
- Any additional information requested by the Agency.

A person may not sell, offer for sale, or distribute a product in Minnesota containing intentionally added PFAS if the manufacturer has failed to provide the information required above.

Notably, the law allows the Agency to approve single submissions for groups or categories of products. Additionally, the Agency may grant a waiver if "substantially equivalent" information is publicly available, or the Agency may extend the manufacturer's submission deadline if additional time is needed to comply with the submission requirements.

## TESTING PROCEDURES

If the Agency has reason to believe that a product contains intentionally added PFAS, the Agency may direct the manufacturer of the product to provide the Agency with testing results within 30 days that "demonstrate the amount of each of the PFAS, identified by its [CASRN] number, in the product, reported as an exact quantity."

- If testing demonstrates that the product does not contain intentionally added PFAS, the manufacturer must provide the Agency with a certificate attesting that the product does not contain intentionally added PFAS.
- If testing demonstrates that the product contains intentionally added PFAS, the manufacturer must provide the Agency with the testing results.

The significant challenge for businesses under these requirements is that there may be no way to provide the Agency with the information required. Based on the definition of PFAS in the bill, there are somewhere between 5,000 and 12,000 individual PFAS compounds that are applicable. By contrast, the most advanced testing labs are only able to test for slightly more than 100 individual PFAS compounds, and they only have that capability when testing water samples.

The complex and highly variable structures of consumer products significantly reduces the number of individual PFAS compounds that can be identified through testing. This means that businesses cannot provide "the amount of each of the PFAS … in the product." In addition, it is almost impossible to obtain PFAS test results for consumer product samples within 30 days, especially if a business needs to develop a testing plan, hire a qualified lab, and ship samples within those 30 days.

## FEES AND ENFORCEMENT

With respect to fees, the Agency may require a manufacturer to "cover the agency's reasonable costs" to submit the necessary information. The Agency may deposit the fees obtained into an environmental fund.

With respect to enforcement, the Agency is authorized to use Statute 115.071 (Criminal and Civil Penalties) and Statute 116.07 (Administrative Penalties). Specifically, criminal penalties include misdemeanor violations for any person who "willfully or negligently" violates any measure adopted by the Agency. The civil penalties shall be no more than $10,000 per day of violation, and no more than $25,000 per day of violation if the violation is determined to be hazardous waste.

## EXEMPTIONS

There are three exemptions that apply throughout the entire bill:

1. **Preemption**. A product by which Federal Law governs and preempts state authority;
2. **Certain Products**. A product regulated under Statute 325.072 (Firefighting Foam) or Statute 325F.075 (Food Packaging); and
3. **Used Products**. The sale or resale of any used products.

Additionally, the prohibition and testing provisions do not apply to any medical devices or drugs that are used in a medical setting or are regulated by the United States Food and Drug Administration.

## CONCLUSION

Minnesota's PFAS bill is very robust in the breadth of its prohibitions. There is only one other state – Maine – that has a similar provisions, but the timeline for certain products is not as aggressive as the one adopted in Minnesota. This bill will present numerous compliance challenges, so businesses should begin the process of evaluating how it will impact their products to give themselves enough time to, if necessary, plan and reformulate.

## MEET THE TEAM

**Thomas S. Lee**

San Francisco

tom.lee@bclplaw.com
+1 415 675 3447

**Emma R. Cormier**

St. Louis

emma.cormier@bclplaw.com
+1 314 259 2160

**John R. Kindschuh**

St. Louis

john.kindschuh@bclplaw.com
+1 314 259 2313