

ALSTON & BIRD

PFAS PRIMER

2024 Q1 Update



Federal Regulatory Updates

MARCH 2024

EPA Issues PFAS Test Order as Part of National Testing Strategy

In accordance with the EPA's National PFAS Testing Strategy, the EPA issued its fourth Toxic Substances Control Act (TSCA) test order requiring testing of PFAS. In the National PFAS Testing Strategy, the EPA assigned PFAS into smaller categories based on similarities in structure, physical-chemical properties, and existing toxicity data. The EPA is issuing test orders for PFAS in specific categories that it believes lack toxicity data to inform its understanding of the potential effects on human health and the environment.

FEBRUARY 2024

EPA Proposes Rules Requiring the Listing of Specific PFAS as Hazardous Constituents Under RCRA

The EPA published two proposed rules aimed at strengthening its ability to address PFAS contamination under the Resource Conservation and Recovery Act (RCRA) cleanup program. If enacted, the proposed rules would (1) modify the definition of "hazardous waste" as it applies to cleanups at permitted hazardous waste facilities; and (2) amend RCRA regulations to add nine PFAS compounds as hazardous constituents, becoming part of a list of substances identified for consideration in facility assessments and, where necessary, further investigation and cleanup.

JANUARY 2024

EPA Requires TRI Reporting for Seven Additional PFAS

The EPA added seven PFAS to the Toxics Release Inventory (TRI) list of chemicals. Of these seven PFAS, six were automatically added pursuant to the National Defense Authorization Act for Fiscal Year 2020, which provides a framework for the automatic addition of PFAS to the TRI list upon the EPA's finalization of a toxicity value. The remaining PFAS was added to the TRI list after its identity was declassified in a February 2023 update to the TSCA Inventory.

EPA Finalizes Rule Prohibiting Manufacture of Inactive PFAS

The EPA finalized a rule prohibiting companies from starting or resuming the manufacture or processing of 329 PFAS without a complete EPA review and risk determination. The final rule applies to all PFAS designated as "inactive" on the TSCA Inventory, which means that the substance has not been manufactured, imported, or processed in the United States since June 21, 2006. If a company wishes to use any of the 329 PFAS, it must notify the EPA. The EPA will then conduct a review of health and safety information under the TSCA and the EPA's current PFAS framework to determine if the new use may present unreasonable risk to human health or the environment, and will apply any necessary restrictions before use of the PFAS can resume.

State Updates

CALIFORNIA

January 2024: Introduced SB 903, which would ban all products containing PFAS beginning January 1, 2030 unless the Department of Toxic Substances Control determines that the use of PFAS is currently unavoidable. The bill would also require the department to adopt regulations.

COLORADO

January 2024: Introduced SB24-081, which would extend the current ban on PFAS to a wider range of products, including outdoor apparel, cleaning products, cookware, dental floss, menstruation products, ski wax, and textiles containing intentionally added PFAS beginning January 1, 2026. The bill would also prohibit the installation of artificial turf containing intentionally added PFAS starting July 1, 2026.

HAWAII

January 2024: Introduced HB1896, which would prohibit the manufacture, sale, offer for sale, distribution for sale, and distribution for use of any food packaging, food service ware, cosmetic, or personal care product that contains intentionally added PFAS, with certain exceptions.

MARYLAND

February 2024: Introduced HB 1190, which would prohibit the sale of any pesticide that has PFAS chemicals listed as active ingredients on its label, beginning June 1, 2025. The bill would also prohibit the use of any pesticide with PFAS chemicals listed as active ingredients on its label, beginning December 31, 2025.

MASSACHUSETTS

January 2024: Introduced S.2564, which would prohibit the sale or distribution of children's products containing PFAS. Manufacturers must disclose chemicals of concern present in children's products; the Department of Environmental Protection must establish a list of chemicals of concern that will be updated as necessary (and at least once every three years).

MICHIGAN

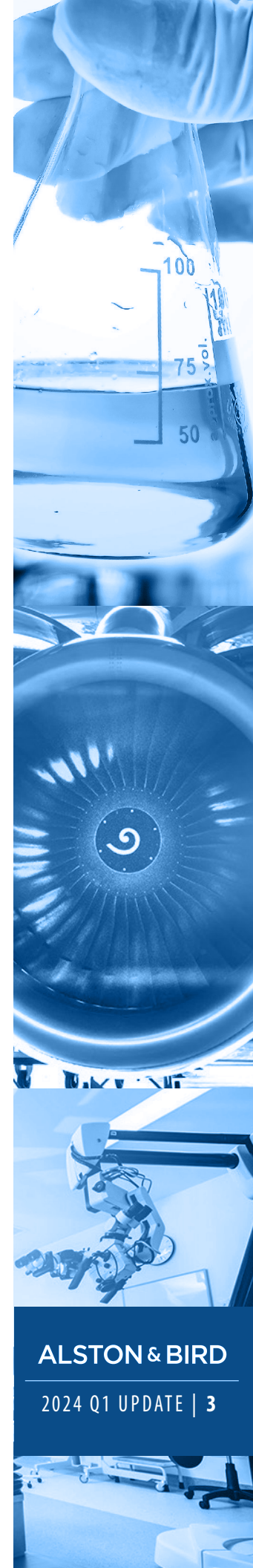
February 2024: Introduced SB 735, which would require notices and warnings for consumer products or packaging containing PFAS.

NEW JERSEY

January 2024: Introduced S1042 / A1421 as a carryover of S3177 / A4758 introduced in October 2022. The bill would require manufacturers of products for sale in the state that contain intentionally added PFAS to submit certain information about the product and the PFAS added to it to the Department of Environmental Protection; impose labeling requirements on cookware with intentionally added PFAS; and two years after adoption would ultimately prohibit the same or distribution in the state of any cosmetic product, carpet or fabric treatment, or food packaging that contains intentionally added PFAS.

NEW YORK

March 2024: Introduced A9518, which would require the Department of Environmental Conservation to define PFAS as a high-toxicity air contaminant and establish a PFAS air emissions fence line monitoring program. The bill would become effective 180 days after enactment.



February 2024: Introduced A9005, which would require beginning January 1, 2026 manufacturers of products for sale that contain intentionally added PFAS to submit to the Department of Environmental Conservation a written notification including the purpose for which PFAS are used in the products and the amounts of PFAS in the products. The bill would also prohibit the sale of carpets, cookware, cosmetic products, fabric treatment, and personal care products containing intentionally added PFAS beginning January 1, 2027, and the sale of any product containing intentionally added PFAS beginning January 1, 2032. Violations are punishable by civil penalty up to \$10,000 for the first violation and up to \$25,000 for subsequent violations. The bill includes exemptions for products with PFAS that the department has deemed a currently unavoidable use.

March 2023: The governor signed S1322 / A994, which prohibits the use of intentionally added PFAS in apparel beginning January 1, 2025 and in outdoor apparel for severe wet conditions beginning January 1, 2028. Violations are punishable by civil penalties up to \$1,000 per day of the first violation and up to \$2,500 per day of a second violation and by injunction.

RHODE ISLAND

February 2024: Introduced HB 7619, which would ban the offer for sale of or for promotional purposes all food packaging with any amount of intentionally added PFAS by January 1, 2025. HB 7619 also delays the ban on PFAS in processing agents until July 1, 2027.

VERMONT

January 2024:

- Introduced H.544, which would prohibit the sale, manufacture, or distribution of certain products with intentionally added PFAS, including athletic turf fields, textiles, and apparel. The bill would also prohibit the sale or distribution of any consumer product to which one or more PFAS has been

intentionally added unless the Department of Health determines that the use of PFAS is currently unavoidable.

- Introduced H.601, which would prohibit the sale, manufacture, or distribution of any packaging, packaging component, or reusable packaging that contains any high-priority material, including PFAS. The bill would also give the Agency of Natural Resources authority to demand and receive information from product and packaging manufacturers on the chemical composition of packaging materials and the identification of chemicals and chemical classes used as processing aids or additives.

Litigation Updates

Wisconsin Court Voids State's Hazardous Substance Designation for PFAS

Wisconsin Manufacturers and Commerce Inc., et al. v. Wisconsin Department of Natural Resources, et al., No. 2022AP718 (Ct. App. Wis. Mar. 6, 2024).

The Wisconsin Department of Natural Resources (DNR) had a policy of treating "emerging contaminants" including PFAS as falling within the definition of "hazardous substances" under a state law pertaining to spills, without specifying which emerging contaminants or levels could trigger the spills law. The DNR's policy was struck down by a Wisconsin state appeals court, which "conclude[d] that the DNR's regulation of emerging contaminants as hazardous substances, and at certain concentrations, amounts to unlawfully adopted rules" that were promulgated without the proper procedures. The appeals court underscored the "fundamental principle" that laws "must give fair notice of conduct that is forbidden or required."

Health-Ade Kombucha Faces PFAS Suit

Morton v. Health-Ade LLC, No. 7:24-cv-00173 (S.D.N.Y. Jan. 9, 2024).

Like an increasing number of companies, Health-Ade has been hit with a lawsuit challenging the health claims of products allegedly found to contain PFAS. It is facing a putative consumer class action in the Southern District of New York alleging that Health-Ade falsely markets its kombucha as healthy when the products allegedly contain PFAS. The products' labels include phrases such as "happy gut" and "organic." The plaintiff used results from "independent laboratory testing" of five different Health-Ade products for PFAS to support her claim that the products contain PFAS (and therefore pose a health risk). She asserts New York General Business Law and unjust enrichment claims on behalf of nationwide and New York putative classes.

Science Updates

Combined Adsorption and Electrochemical Oxidation of Perfluorooctanoic Acid (PFOA) Using Graphite Intercalated Compound

February 17, 2024

[Environmental Science and Pollution Research](#)

This study used graphite intercalated compound (GIC) flakes to adsorb and degrade PFOA through electrochemical oxidation and found that the electrochemical process can potentially break down or transform the PFAS compounds into less harmful substances through oxidation or other reactions.

A Deep Insight into Perfluorooctanoic Acid Photodegradation Using Metal Ion-Exchanged Zeolites

February 15, 2024

[ACS ES&T Engineering](#)

This study investigated metal ion-exchanged zeolites as adsorbents and photocatalysts for PFOA treatment and found that combinations of pre-enrichment and photodegradation processes are promising solutions.

PFAS Ghosts: How to Identify, Evaluate, and Exorcise New and Existing Analytical Interference

January 27, 2024

[Analytical and Bioanalytical Chemistry](#)

This paper addresses the issue of false positives in PFAS monitoring. It provides commentary on how to identify and eliminate analytical interference in PFAS analyses.

Contributors



[Meaghan Boyd](#)
Partner



[Jeffrey Dintzer](#)
Partner



[Matt Wickersham](#)
Partner



[Greg Berlin](#)
Senior Associate



[Jay Repko](#)
Senior Associate



[Andrew Boyer](#)
Associate



[Hannah Hess](#)
Associate



[Sheena Hilton](#)
Associate



[Ytran Hoang](#)
Associate



[Kate Kostel](#)
Associate



[Samantha Van Winter](#)
Associate



[Kalina Zhong](#)
Associate

Go to the [PFAS Primer](#) for more information about PFAS and regular updates on the latest regulations, litigation, and science involving PFAS.

Learn more about our [Perfluoroalkyl & Polyfluoroalkyl Substances \(PFAS\) Team](#) and how we can help you stay ahead of the curve.

ALSTON & BIRD

Atlanta | Beijing | Brussels | Charlotte | Dallas | London | Los Angeles | New York | Raleigh | San Francisco | Silicon Valley | Washington, D.C.