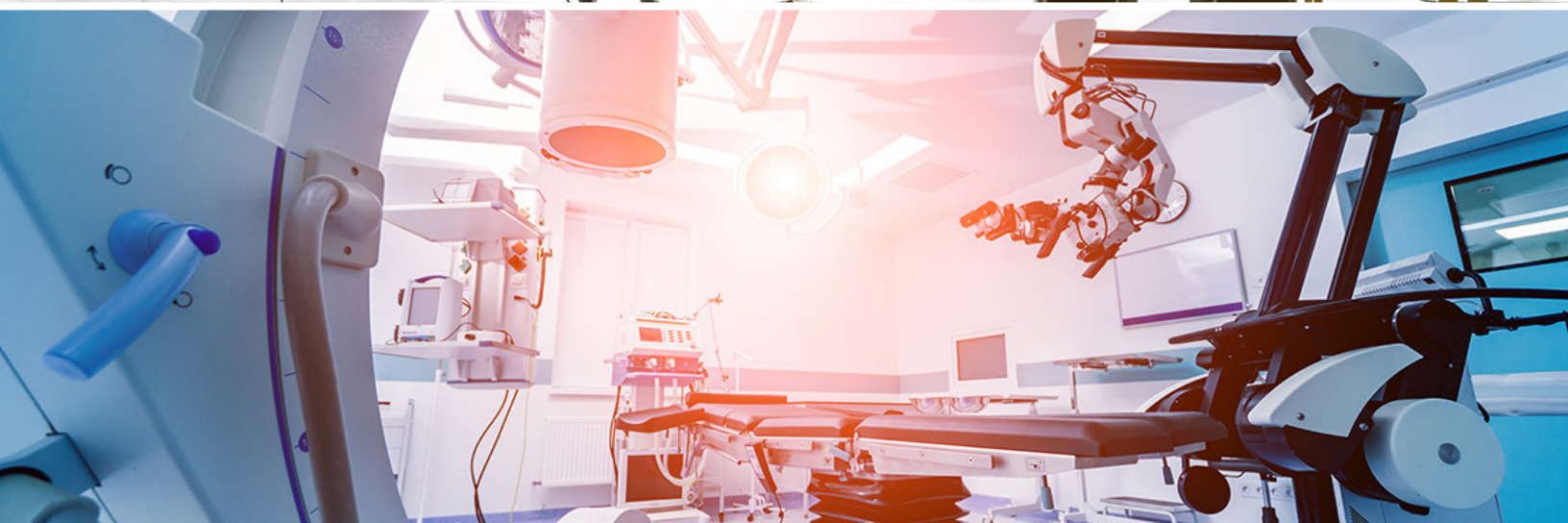


ALSTON & BIRD

PFAS PRIMER

2024 Q2 Update



Federal Regulatory Updates

APRIL 2024

EPA Announces Final National Primary Drinking Water Regulations for Six PFAS

The EPA announced the final National Primary Drinking Water Regulations (NPDWR) for six PFAS in drinking water. The regulation sets limits for five individual PFAS: PFOA, PFOS, PFNA, PFHxS, and HFPO-DA (known as GenX Chemicals). The EPA is also setting a hazard index level for a mixture of two or more of four PFAS: PFNA, PFHxS, HFPO-DA, and PFBS. Public water systems with PFAS levels above the maximum contaminant levels are required to comply over the next five years with the new standards to provide safe and reliable drinking water to their communities.

EPA Designates Two PFAS as Hazardous Substances Under Superfund Law

The EPA released a final regulation under CERCLA designating PFOA and PFOS as hazardous under the nation's Superfund law. The regulation requires (1) facilities to immediately report any release of PFOS or PFOA that meets or exceeds the default reportable quantity of one pound within any 24-hour period to the National Response Center and to community emergency coordinators; (2) facility owners to provide notice of releases of these chemicals through publication in the local newspaper; (3) facilities to provide follow-up reports within 30 days to community emergency coordinators; (4) federal agencies that sell or transfer property to provide notice of storage, release, or disposal of PFOS and PFOA on the property; and (5) the Department of Transportation to begin regulating PFOS and PFOA under the Hazardous Materials Transportation Act.

State Updates

CONNECTICUT

June 2024: Enacted SB 292, which prohibits the sale or distribution of apparel, carpets or rugs, cleaning products, cookware, cosmetics, dental floss, fabric treatments, children's products, menstruation products, textile furnishings, ski wax, and upholstered furniture containing intentionally added PFAS beginning July 1, 2026.

ILLINOIS

February 2024:

- Introduced HB 4702, which would require owners or operators of certain water systems to monitor for PFAS on or before December 31, 2025.
- Introduced HB 5042, which would require manufacturers of products that contain intentionally added PFAS to submit certain information to the state EPA and allow the state Pollution Control Board to request testing. The bill would also restrict the sale of specified products containing intentionally added PFAS, including carpets or rugs, cleaning products, cookware, cosmetics, dental floss, fabric treatments, juvenile products, menstrual products, intimate apparel, textile furnishings, ski wax, upholstered furniture, food packaging, and compostable products, beginning January 1, 2025.

January 2024: Introduced HB 4627, which would require manufacturers of PFAS or products or product components containing intentionally added PFAS to register the PFAS or the product or product component containing intentionally added PFAS with the state EPA. The bill would exempt certain products from these requirements.

MAINE

April 2024: Enacted LD 1537, which prohibits PFAS in cleaning products, cookware, cosmetics, dental floss, juvenile products, menstrual products, textile articles, ski wax, and upholstered furniture beginning January 1, 2026; prohibits PFAS in artificial turf, outdoor apparel for extreme weather conditions, and certain refrigerants beginning January 1, 2029; and requires disclosure by manufacturers that seek an exemption from the ban on PFAS in all products beginning in 2032 unless they ask for a currently unavoidable use designation.

MICHIGAN

May 2024: Introduced HB 5657, which would prohibit the sale and distribution of products containing intentionally added PFAS by January 1, 2027, including cookware, cosmetics, and children's products. The legislation would also prohibit the discharge or use of PFAS-containing class A or class B firefighting foam by January 1, 2027.

NEW YORK

May 2024:

- Introduced A10510/S07136, which would require all manufacturers of class B firefighting foam with intentionally added PFAS to recall all such products. This requirement entails the collecting, transport, and disposal of the product within two years and the reimbursement of retailers or purchasers of the product.
- Introduced S9661, which would require the commissioner of health to establish maximum PFAS containment levels in drinking water. The bill would set the levels at 4 parts per trillion for PFOS and PFOA and 10 parts per trillion for PFNA, PFHxS, HFPO-DA, and PFBS and would go into effect one year after the bill becomes law.

- Introduced A10184, which would prevent the sale of adhesive bandages with intentionally added PFAS. Purveyors of adhesive bandages would not be found in violation of the statute if they relied in good faith on a certificate of compliance signed by the manufacturer. Civil penalties would be assessed for first violations not to exceed \$1,000 for each day out of compliance with the regulation, which would take effect December 31, 2025.

April 2024: Introduced S8932, which would prohibit manufacturers from selling playground surfacing materials containing intentionally added PFAS and require a signed certificate of compliance for sales of playground surfacing materials in the state. Manufacturers would be required to recall any playground surfacing materials discovered to contain more than 90 parts per million of PFAS and reimburse the retailer. The bill would also grant the Department of Environmental Conservation the authority to demand independent, third-party laboratory testing or manufacturer notification from retailers if the department has reason to believe the material violates the proposed law.

PENNSYLVANIA

April 2024: Introduced HB2238, which would ban the manufacture, sale, or offer for sale of covered products, including artificial turf, cleaning products, cosmetics, cookware, fabric treatment, food packaging, and oil and gas products, with intentionally added PFAS in the state, beginning January 1, 2027. The bill would allow the sale of outdoor apparel for severe wet conditions between January 1, 2027 and December 31, 2028 if the apparel contains a legible and easily discernible disclosure with the statement: "Made with PFAS chemicals"; and then ban the manufacture, sale, or offer for sale of such apparel with intentionally added PFAS beginning January 1, 2029.

RHODE ISLAND

June 2024:

- Enacted SB 2152 HB 7356, which will comprehensively ban PFAS in Rhode Island. The amended ban would be implemented in several phases:
 - By January 1, 2027, the bills ban manufacturing, selling, or offering for sale all covered products, including artificial turf, cookware, textile articles, and cosmetics (excluding cosmetic products with unavoidable trace quantities of PFAS attributable to impurities of natural or synthetic ingredients, among other things), that contain intentionally added PFAS. The bills also authorize the Department of Environmental Management (DEM) to require covered products manufacturers to certify that their covered products do not contain intentionally added PFAS or require the manufacturer to notify persons that violate the PFAS ban that the sale of any covered product is prohibited and provide the DEM director with the names and addresses of any persons notified.
- Beginning January 1, 2029, the bills ban manufacturing, selling, or offering for sale artificial turf with intentionally added PFAS and outdoor apparel for severe wet conditions with intentionally added PFAS unless the apparel is accompanied by a legible, easily discernible disclosure with the statement: "Made with PFAS chemicals."
- Enacted SB 2850 and HB 7619, which will ban the offer for sale or for promotional purposes of all food packaging with any amount of intentionally added PFAS, beginning January 1, 2025, and ban PFAS in processing agents, beginning July 1, 2027. The bills also prohibit the substitution of materials to replace a regulated chemical in a package or package component by a material that would create a hazard as great as or greater than the hazard created by the regulated chemical and require a certificate of compliance with an assurance to that effect.

VERMONT

May 2024: Enacted H.353, which prohibits a manufacturer from selling, offering for sale, distributing for sale, or distributing for use in the state any cosmetic or menstrual product containing certain chemicals or chemical classes, including PFAS, and imposes restrictions on the sale and distribution of previously unregulated consumer products containing PFAS, including artificial turf, incontinency products, juvenile products, cookware, and textiles.

VIRGINIA

April 2024: Enacted SB 243, which requires the state Department of Health to develop and implement a plan to conduct PFAS assessments to identify sources of PFAS in public water supplies and allows the department to require that any facility it deems to be a potential source of PFAS in the public water system's raw water source that discharges to a surface water under a VPDES permit or to a publicly owned treatment works under an industrial pretreatment program permit to report to the department its manufacture or use of PFAS.

Litigation Updates

JUNE 2024

Court Preliminarily Approves \$750 Million PFAS Settlement Between Tyco and Water Providers

In re Aqueous Film-Forming Foams Products Liability Litigation, No. 2:24-cv-02321 (D.S.C., June 11, 2024).

Johnson Controls subsidiary Tyco Fire Products LP—a manufacturer of AFFF, a firefighting foam that is alleged to contain or degrade into PFAS—agreed to a \$750 million settlement to resolve PFAS contamination claims brought by a class of public water systems in the AFFF MDL pending in the District of South Carolina. The district court issued its preliminary approval of the settlement, observing that the proposed settlement agreement was fair, reasonable, and adequate while also overruling a limited number of objections. The court scheduled the final fairness hearing for November 1, and in the meantime, public water systems can opt out of or object to the settlement.

Fourth Circuit Affirms EPA's Approach to PFAS Testing Under the TSCA

Center for Environmental Health v. EPA, No. 23-1476 (4th Cir. June 10, 2024).

Pursuant to the Toxic Substances Control Act (TSCA), several North Carolina-based citizens groups petitioned the EPA in 2020 to initiate testing of 54 individual PFAS. The EPA responded by agreeing to test seven of the PFAS and to potentially test nine more. The groups viewed this as a denial of their petition and, in 2021, sought judicial review pursuant to a TSCA provision. A North Carolina district court dismissed the groups' claims for lack of jurisdiction, and the groups appealed. The appeal was resolved when the Fourth Circuit affirmed the district court's dismissal. The

Fourth Circuit held that the EPA's agreement to test (and potentially test) a subgroup of PFAS constituted a "grant" of the groups' petition and therefore did not provide the groups with the right to judicial review under the TSCA.

Coca-Cola Defeats PFAS-Related Claims

Lurenz v. Coca-Cola Company, No. 7:22-cv-10941 (S.D.N.Y. June 10, 2024).

Coca-Cola won a motion to dismiss claims alleging that the company's Simply Tropical Juice Drink—which the company advertised as "made simply" with "all-natural ingredients"—was falsely labeled because it purportedly contained PFAS. In granting Coca-Cola's motion to dismiss for lack of Article III standing, the district court emphasized that, while the plaintiff claimed that he conducted independent testing on a "sample" of the product in July 2022, the plaintiff did not test the product he actually purchased for PFAS. The court also noted that the plaintiff did not allege that the presence of PFAS in the product was so widespread that it was plausible that he purchased a mislabeled product. The district court granted Coca-Cola's motion, while granting the plaintiff leave to amend to address the pleading deficiencies.

Water Utilities Challenge EPA's New PFAS Drinking-Water Regulations

American Water Works Association v. EPA, No. 24-1188 (D.C. Cir. June 7, 2024).

Two water utility associations have petitioned the D.C. Circuit for review of the EPA's first national drinking-water rule for PFAS, claiming that is arbitrary and capricious, unreasonable, and unfeasible. In doing so, the associations allege that the EPA did not rely on the best available science, follow the process mandated by Congress, or properly assess the costs of implementation when finalizing the rule. The associations also conveyed their serious

concerns about the potential negative impact that the rule may have on low-income households. Manufacturing and chemical industry groups have also challenged the rule in a separate petition.

MAY 2024

EPA Orders U.S. Air Force and Arizona Air National Guard to Treat PFAS

In the Matter of The United States Air Force and Arizona Air National Guard, No. PWS-AO-2024-10, May 29, 2024.

In a rare step, the EPA issued a Safe Drinking Water Act (SDWA) Section 1431 unilateral administrative order to the U.S. Air Force and Arizona Air National Guard requiring them to conduct measures to abate the “actual and potential imminent and substantial threat to the health of persons presented by the presence of [PFAS] in groundwater underlying the Tucson Area Remediation Project (‘TARP’) water well field” that serves as a drinking-water source. The EPA required the submission of a PFAS water treatment plan within 60 days, which is unprecedented for PFAS. The agency previously issued an order for PFAS cleanup at the Pease Air Force Base in New Hampshire, but that was before the EPA adopted maximum contaminant levels for six PFAS and designated PFOA and PFOS as hazardous substances. The EPA’s action signals its intent to use its authority under the SDWA to order cleanups of PFAS when there is an “imminent and substantial endangerment to the health of persons” and when it believes local authorities have not acted sufficiently.

Proposed Class Action Filed Against BIC for Alleged PFAS-Containing Razors

Butler v. BIC USA Inc., No. 4:24-cv-02955 (N.D. Cal. May 15, 2024).

A group of plaintiffs filed a proposed class action against BIC, claiming that the company failed to inform its consumers that its shaving razors contain PFAS. With their suit, the plaintiffs assert claims—on behalf of a national class and a California subclass—for violations of California’s Unfair Competition Law, False Advertising Law, and Consumers Legal Remedies Act, as well as claims for fraud, unjust enrichment, and negligent failure to warn.

APRIL 2024

Plaintiffs’ Counsel Entitled to \$956 Million in Attorneys’ Fees and Costs in PFAS Settlements

In re Aqueous Film-Forming Foams Products Liability Litigation, No. 2:18-mn-02873 (D.S.C. Apr. 23, 2024).

As part of the settlements reached by 3M and Dupont in the AFFF MDL, a South Carolina federal judge approved an award totaling nearly \$1 billion for the plaintiffs’ attorneys’ fees and costs. The judge noted that plaintiffs’ counsel worked over 400,000 hours over four and one-half years to achieve the settlements against the two defendants.

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

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