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On July 15, 2021, Maine passed what was touted as the most aggressive PFAS bill related to products thus far in the country. While true that the Maine PFAS products bill is the most far-reaching PFAS bill in the United States to date in terms of the scope of products impacted by the legislation, it is also important to note that the bill will not completely curtail PFAS products sales in Maine. In fact, a closer look at the language in the bill shows that some over-broad or vague terms may provide companies with opportunities to permissibly continue selling PFAS-containing products within Maine. Nevertheless, it is critical for companies to immediately assess the impact of the Maine PFAS products bill on corporate practices, compliance with the language in the bill, and make decisions regarding continued use of PFAS in products, as opposed to substituting for other substances. At the same time, companies impacted by the Maine PFAS legislation must be aware that the bill poses risks to the companies involvement in PFAS litigation in both the short
Maine’s PFAS Products Bills – What Does It Aim To Do?

Several states have already taken steps to ban PFAS use in certain specific products, including firefighting foam, food packaging, and ski wax, to name a few. The Maine PFAS products bill (LD 1503), however, goes well beyond carving out PFAS bans for individual products. Instead, the bill bans PFAS from all products of any kind. The far-reaching approach makes Maine the first state in the United States to take this type of all-encompassing approach to regulating PFAS.

The PFAS ban is segmented into various deadlines in order to give industries time to adapt. Carpets, rugs and fabric treatments will have PFAS phased out first, with a January 1, 2023 deadline for phase out. From there, Maine’s legislation requires manufacturers that use PFAS in products to file certain information with the state by January 1, 2023, so that the state can determine the products that will be phased out next. Maine intends for the entire process and phase outs to be complete by 2030.

More specifically, Maine’s PFAS products bill requires companies to provide it with the following information:

1. A description of the product;
2. The purpose for PFAS use in the product;
3. The amount of each type of PFAS used in the product; and
4. Contact information for the manufacturer.

The law enables the Maine DEP to levy fines, grant extensions, give permission to report on a product category instead of individual products and collaborate with other jurisdictions to obtain disclosures. The department may also waive all or part of the notification mandate if it finds the same information is already openly available.

Issues That Could Arise

As with many state bills that have passed seeking to ban PFAS from various products, Maine’s bill uses language that bans “intentionally added PFAS” from products. But what is an “intentionally added” PFAS? In some instances, this may be obvious. The Maine PFAS product bill includes a brief definition of the term: “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 byproducts of PFAS.” Many products, though, do not have “intentionally added” PFAS, so would seemingly not fall within the ban imposed by Maine. For example, a toy manufacturer who purchases a PFAS-containing paint product from another company to coat the toys. The PFAS used by the toy manufacturer was not “intentionally added.” It may have been by the paint manufacturer, but will the state be able to enforce the ban against the toy manufacturer if the company did not utilize the PFAS for one of the reasons in
Maine’s definition of “intentionally added”? Hundreds, if not thousands, of examples like this abound in commerce, and there is not yet a clear answer on this. In the short term, this many lead to company uncertainty and confusion over compliance. In the long term, it could result in legal challenges to the law.

In addition, Maine provides a carve out for PFAS uses in products that the state deems that the PFAS use is “unavoidable.” This term is not defined in the statute and it is left to the state to make case-by-case determinations as to what are avoidable versus unavoidable uses. This will again create uncertainty among companies, and could in fact lead to varying results among very similar products – a result that could lead to legal challenges.

Finally, Maine’s PFAS products bill is the most far-reaching in that it seeks to regulate all 9,000+ types of PFAS in all products sold within Maine’s borders. No state aside from Maine has yet enacted a PFAS law that regulates all PFAS substances so broadly. It remains to be seen whether trade associations, such as the American Chemistry Council, will challenge the law in a legal setting.

Implications To Businesses From The Maine PFAS Legislation

It is of the utmost importance for businesses along the whole supply chain to evaluate their PFAS risk. Public health and environmental groups urge legislators to regulate these compounds. One major point of contention among members of various industries is whether to regulate PFAS as a class or as individual compounds. While each PFAS compound has a unique chemical makeup and impacts the environment and the human body in different ways, some groups argue PFAS should be regulated together as a class because they interact with each other in the body, thereby resulting in a collective impact. Other groups argue that the individual compounds are too diverse and that regulating them as a class would be over restrictive for some chemicals and not restrictive enough for others.

Companies should remain informed so they do not get caught off guard. Regulators at both the state and federal level are setting drinking water standards and notice requirements of varying stringency, and states are increasingly passing PFAS product bills that differ in scope. For any manufacturers, especially those who sell goods interstate, it is important to understand how those various standards will impact them, whether PFAS is regulated as individual compounds or as a class. Conducting regular self-audits for possible exposure to PFAS risk and potential regulatory violations can result in long term savings for companies and should be commonplace in their own risk assessment.

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