



Insights: Publications

11 Key Takeaways | Emerging PFAS Regulation of Consumer Articles

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Written by **Alexander M. Bullock**

11 KEY TAKEAWAYS

Emerging PFAS Regulation of Consumer Articles

Kilpatrick's [Alex Bullock](#) and [Jeff Davidson](#) recently joined another industry leader at the "[2023 RCG Summit](#)" to present on "Emerging PFAS Regulation of Consumer Articles." This event features members of Kilpatrick's Retail and Consumer Goods Industry Team leading discussions on current issues and topics that impact retailers and consumer goods manufacturers and suppliers in the marketplace.

Mr. Bullock and Mr. Davidson offer these key takeaways from their presentation:

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Per- and Polyfluorinated Substances ("PFAS") chemicals have become a renewed and vigorous focus for the Biden Administration. On November 13, 2023, the United States Environmental Protection Agency's ("USEPA") new regulation governing PFAS under the Toxic Substances and Control Act ("TSCA") became effective. (40 C.F.R. § 705).

The USEPA defines PFAS as "synthetic organic compounds that do not occur naturally in the environment. PFAS contain an alkyl carbon on which the hydrogen atoms have been partially or completely replaced by fluorine atoms." PFAS chemicals are ubiquitous in the environment.

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Over the past few years, a number of states have enacted regulations that either ban PFAS chemicals in future uses, or, at a minimum, require that manufacturers report the amount of PFAS chemicals that they inject into the stream of commerce.

USEPA has enacted new regulations, effective November 13, 2023, that require "manufacturers" that imported certain categories of PFAS chemicals for each calendar year starting January 1, 2011, to make a one-time report of information regarding the uses, production volumes, byproducts, disposal, exposures, and existing information on environmental or health effects.

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For most manufacturers, the reporting deadline will be May 13, 2025. For certain small manufacturers, as defined in 40 CFR 704.3, the deadline will be November 13, 2025.

The definition of “manufacturers” is broad, and includes any importers of articles containing PFAS chemicals are considered manufacturers as well and subject to the same requirements.

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While USEPA is in the process of developing a list of substances that it has determined meet the structural definitions, the list will not be all inclusive. If a chemical is not on the list but nonetheless has one of the covered structures, it is still a covered “PFAS”.

These regulations cover multiple NAICS codes including the manufacture of textiles including textile (fabric) dyes and textile finishing and impregnating/surface treatment products. The list of codes includes: construction (NAICS code 23); manufacturing (NAICS code 31 through 33); wholesale trade (NAICS code 42); retail trade (NAICS code 44 through 45); and waste management and remediation services (NAICS code 562). The standard of investigation would require that submitters conduct a reasonable inquiry within the full scope of their organization (not just the information known to managerial or supervisory employees).

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This standard may also require inquiries to entities outside the organization to fill gaps in the submitter’s knowledge. Such activities may, though not necessarily, include phone calls or email inquiries to upstream suppliers or downstream users or employees or other agents of the manufacturer, including persons involved in the research and development, import or production, or marketing of the PFAS.

If the manufacturer has no actual information regarding the amount of PFAS chemicals in the product, it must engage in a process to estimate the amount of PFAS chemicals used. The rule states that the company should consider whether it can develop “reasonable estimates” which includes such approaches as conducting “mass balance calculations, emissions factors,” or “best engineering judgment.”

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If the manufacturer is unable to either report actual usage or reasonable estimates for PFAS usage in its products, the rule contains an option to report “Not Known or Reasonably Ascertainable” (“NKRA”). Using this category will require the manufacturer to demonstrate due diligence in attempting to develop this information.

For more information, please contact:
Alex Bullock, abullock@ktslaw.com

www.ktslaw.com

Jeff Davidson, jdavidson@ktslaw.com

Susan Richardson, srichardson@ktslaw.com

Related People



Alexander M. Bullock

t 202.824.1416

abullock@ktslaw.com



Susan H. Richardson

t 404.815.6330

srichardson@ktslaw.com