

# Developing Environmental Regulatory and Litigation Risks for Finished Products

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Winston & Strawn partners Jonathan Brightbill and Eleni Kouimelis, along with Ross Nova, L.L. Bean's Head of Global Compliance, presented at the 2022 Retail Law Conference for the Retail Industry Leaders Association in October. Their presentation, "Developing Environmental Regulatory and Litigation Risks for Finished Products," discussed the risks retailers face from increasing regulatory scrutiny of chemicals of concern contained in finished products. What follows is a summary of the presentation.

## Background

Environmental regulation of chemicals can create legal risks for retailers in a variety of ways. Direct regulation can come from both EPA and states. EPA directly regulates many chemicals through the Toxic Substances Control Act (TSCA) of 1976. What's more, EPA regulation can spur or contribute to other legal risks. Using EPA regulatory standards and statements, private parties might pursue toxic tort lawsuits for alleged injuries. In addition, EPA or other government regulatory actions might create the basis for consumer-deception and false-labeling cases. For example, plaintiffs have pursued claims alleging unfair or insufficient labeling of products sold as "sustainable" or "environmentally friendly," alleging that retailers have overstated environmental benefits or failed to disclose potential environmental harms.

## Key Chemicals to Watch

Presently, there are a number of chemicals used in finished products that may represent legal risk for certain retailers.

**Per- and polyfluoroalkyl substances (PFAS).** PFAS is a term used to refer to a large number of synthetic chemical substances used in many finished products. These long-chain molecules are used as waterproofing for apparel, stain repellants for furniture, anti-stick coatings for cookware, and firefighting foam. EPA has established health advisory levels for certain PFAS compounds (4 parts per quadrillion for perfluorooctanoic acid, 20 parts per quadrillion for perfluorooctanesulfonic acid).

Beyond the EPA regulation, many states have passed or are pursuing bans on intentionally added PFAS in consumer products. Federal and state regulatory activity has been a leading indicator of private-party litigation against retailers, as well.

On October 28, 2022, a PFAS consumer-fraud class-action lawsuit was filed in Washington state against Recreational Equipment, Inc. (REI). The suit alleges that certain of REI's waterproof clothing contains PFAS, despite labeling indicating the products were "sustainable." Testing conducted by the environmental group Center for Environmental Health (CEH), and referenced in the complaint, alleged that REI's "waterproof rain jackets for kids and adults could expose individuals to [PFOA] and [PFOS]." The class alleges numerous violations and breaches, including alleged violation of Washington state's Consumer Protection Act, breach of implied warranty, breach of express warranty, fraud, and numerous other counts.

**1,4-dioxane.** This chemical is a by-product present in many retail goods, including paint strippers, dyes, greases, antifreeze and deicing fluids, and in some foods and consumer products (deodorants, shampoos, and cosmetics). In December 2020, an EPA final risk evaluation found unreasonable risks to workers and occupational non-users from 13 conditions of use. Nevertheless, EPA found no unreasonable risks to the environment, consumers, bystanders, or the general population. In June 2021, EPA announced its intention to re-open the risk evaluation to consider additional uses (not to revisit previously considered uses). Therefore, more regulation may follow.

**Bisphenol A (BPA).** BPA is commonly used in manufacturing polycarbonate plastics or epoxy resins. BPA can also be found in windows, eyewear, water bottles, plastic food containers, paper products (notably, receipt paper, paper towels, and toilet paper), metal food cans, bottle tops, and water supply pipes. Due to BPA's prevalence in food-related applications, the Food and Drug Administration has been the federal lead on its regulation. Nevertheless, EPA is also assessing whether there are human health risks outside of the FDA arena worthy of further scrutiny and potential regulation under the TSCA to identify BPA on the Concern List as a substance that may present an unreasonable risk of injury to the environment.

**Chromium VI/Hexavalent Chromium.** This chemical is primarily associated with products that have been chrome-plated. It is also used in leather tanning and wood preservatives. EPA is expected to publish a draft health evaluation for public review and comment in the coming months.

**Formaldehyde.** Formaldehyde is naturally found in many household products sold by many retailers, including glues, permanent-press fabrics, paints and coatings, lacquers and finishes, and paper products. It is also found in cosmetics and other consumer products such as dishwashing liquids and fabric softeners. EPA designated formaldehyde as a high-priority substance in December 2019, and published its risk evaluation scope in August 2020. Public comment on the risk evaluation scope was recently re-opened, with the comment period ending December 31, 2022.

## Practical Tips

Federal and state laws and regulations are evolving and have created a patchwork of regulations that are not necessarily consistent. To manage these risks, retailers should establish internal systems and work with counsel to do the following:

- **Gather Information**—Keep apprised of EPA, state, and local generation of chemical risk information as part of the regulatory process
- **Product Diligence**—Gather information regarding chemicals of concern as part of the product diligence process to assess alternatives, negotiate better contractual protections from suppliers, and participate in the regulatory process
- **Supplier Contracts**—Closely review the indemnity provisions in supplier contracts to determine coverage for claims related to labeling and product content
- **Worker Protection**—Ensure workers are adequately protected against, and informed of any risks associated with, chemicals of concern contained in consumer products

- **Keep Doing It**—Continue engaging in this process as new products are considered and as the regulatory process evolves

For further information or answers to questions about developing environmental regulatory and litigation risks for finished products, or potential impacts on your business, please contact Jonathan D. Brightbill (Partner, White Collar, Regulatory Defense, and Investigations/Environmental Litigation), Eleni Kouimelis (Partner, Environmental), or your Winston relationship attorney.

*Please note that government orders on the federal, state, and local levels are changing every day, and the information contained herein is accurate only as of the date above.*

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