

## **PFAS Ban For Food Packaging Proposed**

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On November 18, 2021, the [Keep Food Containers Safe from PFAS Act \(“Act”\)](#) was introduced in the Senate and House, which proposes a PFAS ban for food packaging in the United States. The bill, while incredibly brief, would accelerate efforts already underway by the food packaging industry to develop feasible substitutes for PFAS in its products. Food packaging companies, though, should not assume that a ban on PFAS in food packaging or a voluntary phase out of PFAS will result in protection from future lawsuits.

### **PFAS Ban In Food Packaging Proposal**

The body of the bill introduced in the House and Senate a few days ago reads: “To amend the Federal Food, Drug, and Cosmetic Act to prohibit the introduction or delivery for introduction into interstate commerce of food packaging containing intentionally added PFAS, and for other purposes.” On its face, the bill is simple in its intent, although the “intentionally added” language may cause unforeseen issues.

As with many state bills that have passed legislation seeking to ban PFAS from various products, the lack of a definition in the Act for “intentionally added PFAS” opens the door to future debate about what constitutes “intentionally added PFAS” and how intent can be proven if a company were to claim that the presence of PFAS were due to unintentional acts on its part. Further, “intentionally added” by who? The U.S.-based manufacturer of the food packaging only? What is the company sources materials from overseas, PFAS is not disclosed to the American company, and the company produces a product and sells it in the United States? Intentionally added PFAS, or no? Dozens, if not hundreds, or machinations of this same hypothetical could easily be developed, but the Act itself provides no clear answer. In the short term, if the Act were to pass, this may lead to company uncertainty and confusion over compliance. In the long term, it could result in legal challenges to the law.

### **PFAS Ban Does Not Equal Shield From Lawsuits**

Companies may assume that if a PFAS ban in its product type were to pass, the PFAS would naturally not be utilized any further and the company would not have to be concerned about future PFAS litigation. This is a grossly over-simplified view that ignores two very likely future PFAS litigation trends – CERCLA cleanups of landfills and products liability lawsuits.

According to the EPA, the United States has 3,091 active landfills and over 10,000 closed landfills. Certainly, it would be fair to assume that quite a number of these landfills have food packaging waste in them, some of which likely contains PFAS. With the [EPA just recently signaling](#) that it intends to designate at least some types of PFAS as “hazardous substances” under CERCLA, and once a chemical is listed as a “hazardous substance” under CERCLA, the EPA has the authority to order responsible parties to cleanup sites contaminated with the designated chemicals, with the cost being born entirely by the responsible parties. Alternatively, the EPA can clean up the site on its own and then seek payment of the costs from responsible parties. Either way, the cleanup of so-called Superfund sites can be costly – anywhere from a few hundred thousand dollars for a small parcel of land to hundreds of millions of dollars. The primary targets for these federal enforcement actions and lawsuits are the landfill owners; however, the downstream result is lawsuits filed against companies that utilized the landfills or whose products ended up in the landfills for contribution to the costs for the site cleanup. Thus, food packaging companies producing PFAS-containing products now or any time in the past face certain risks to become embroiled in PFAS lawsuits, even if they cease using PFAS in their products.

Further on the horizon (although not as far as some might think) are the PFAS products liability lawsuits that will be filed as more regulations and cancer-causing statements are made by the EPA and other regulatory agencies. Just last week, the EPA indicated that its data showed that certain PFAS may be injurious to human health at [much lower levels than ever believed](#), with at least one PFAS being considered for a “likely carcinogen” designation. The carcinogen designation could be the match that lights the fuse for PFAS products liability lawsuits, with food packaging being an easy first-round target given the large amounts of food packaging that consumers encounter daily and the potential for ingestion through food consumption from the food packaging product.

## **Conclusion**

Food packaging companies need to pay attention to not only the bill introduced to ban PFAS in food packaging, but also to the long-term effects that legacy use of PFAS in the end consumer product may have. A future CERCLA designation could trigger costly lawsuits, and as PFAS products liability lawsuits begin to occur, the food packaging industry may find itself at the forefront of the lawsuits that are to come.

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