

PFAS: LEGISLATIVE LITIGATION LANDSCAPE & PREVENTATIVE MEASURES FOR COSMETICS COMPANIES

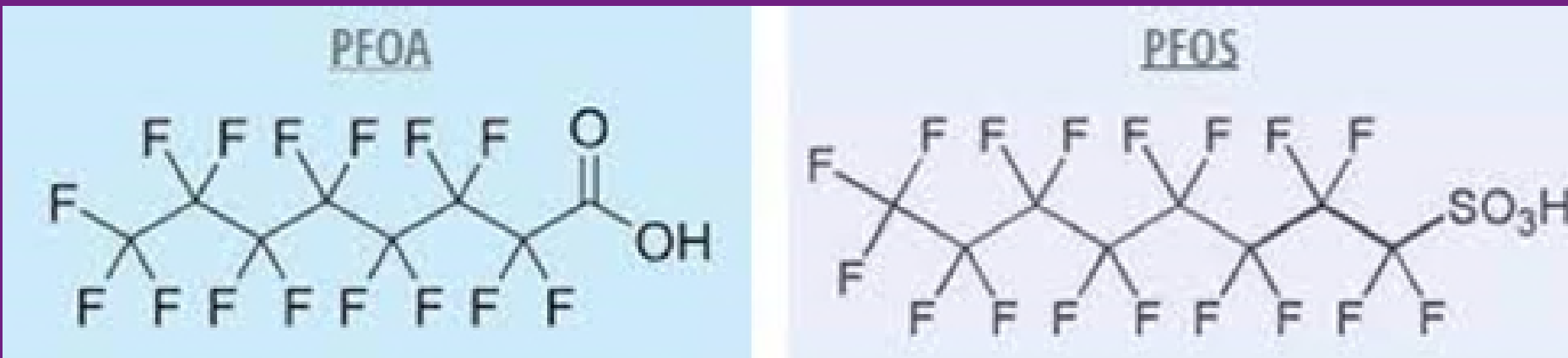
Independent Beauty Association:
FDA Cosmetics Regulations Workshop
September 22, 2022

DENTONS

Understanding PFAS

Per-and Polyfluoroalkyl Substances (PFAS)

- A class of more than 12,000 man-made chemical compounds used in a wide range of products.
- Commonly called “Forever Chemicals” because they cannot naturally break down, so they accumulate in their environment.
- Some PFAS chemicals have been more widely used and studied as opposed to others.
- The two most widely used PFAS chemicals are Perfluorooctanoic Acid (PFOA) and Perfluorooctane Sulfonate (PFOS), both long chain PFAS.



PFAS Are Commonly Used In:

- PFAS have been used in industry and consumer products worldwide since the 1950s.
- These chemicals have been used products like:
 - Water Resistant Containers
 - Non-Stick Cookware
 - Stain Resistant Fabrics and Carpets
 - Some Cosmetics
 - Some Firefighting Foams
 - Some Products that Resist Grease, Water, and Oil

Where PFAS Are Found



Potential Health Effects

Peer-reviewed scientific studies have shown that exposure to **certain levels of certain types of PFAS** may lead to:

- Reproductive effects
- Developmental effects
- Increased risk of cancer
- Reduced immune response
- Interference with hormones

Remember, there are more than 12,000 PFAS chemicals and not all PFAS chemicals are harmful.

Increased Federal Regulation Of Toxic Chemicals

- The Biden Administration is seemingly committed to designating PFAS as a hazardous substance under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). This would broaden federal authority to regulate the use of PFAS.
- On August 26, 2022, the EPA issued a proposal to designate two of the most widely used PFAS as hazardous substances under CERCLA, or Superfund.
- The U.S. Senate introduced the No PFAS In Cosmetics Act 2021, which would direct the Food and Drug Administration (FDA) to issue a proposed rule banning the intentional addition of PFAS in cosmetics.

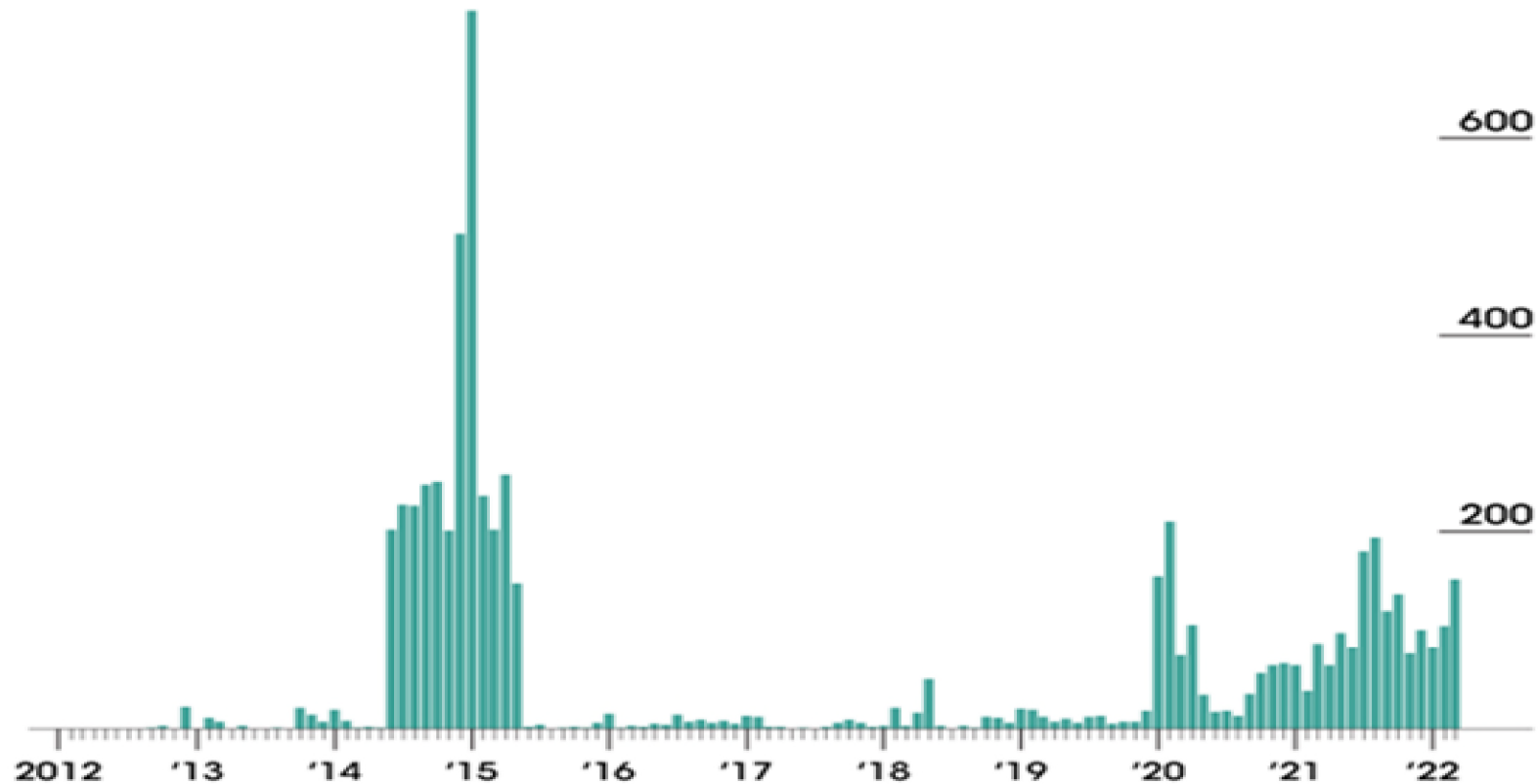
Increased Federal and State Regulation Of Toxic Chemicals

- In 2021, The Federal Agency for Toxic Substances and Disease Registry (ATSDR) recommended that citizens in Southern New Hampshire reduce their risk of further PFAS exposure by avoiding the use of certain consumer goods, including cosmetics.
- The Minnesota, New York, New Hampshire and Vermont state legislatures recently introduced bills to require reporting, disclosure or labeling of products containing PFAS.
- California has enacted PFAS restrictions, banning 13 types of PFAS in cosmetics, and has moved to extend the ban to 'all intentionally added' PFAS in cosmetics by 2025.

PFAS Litigation Landscape

A Decade of 'Forever Chemical' Litigation

Monthly PFAS Lawsuits Filed (January 2012 – March 2022)



Note: This graphic shows lawsuits filed beginning in 2012. There were 41 cases filed between 2005 and 2011.

Source: Bloomberg Law analysis of PFAS-related lawsuits filed in federal courts between July 2005 and March 2022.

Bloomberg Law

PFAS Litigation Landscape

- There have been more than 6,400 PFAS related lawsuits in federal court between 2005 – 2022.
- Historically, PFAS manufacturers and purchasers were the primary parties sued for PFAS use.
- The most common legal claims against them were based on exposure to PFAS and included: medical monitoring, personal injury, and diminished property values.
 - For example, by 2014, there was a growing number of individual lawsuits against DuPont for PFOA related diseases, and by 2015, there were approximately 3,500 pending lawsuits brought against DuPont.

PFAS Litigation Landscape

- There has been a spike in 2020-2022, representing the new generation of PFAS lawsuits that target companies that allegedly did not disclose the presence or use of PFAS.
- There are currently hundreds of such cases pending.
- **Consumers frequently sue companies for failing to disclose their use of PFAS or for misrepresenting products with PFAS as “safe,” “pure,” “healthy”, or similar descriptive terms or claims.**

PFAS Litigation Landscape

“These litigation and regulatory developments led us to conclude “with these developments, our prediction that cosmetics is the number two target for PFAS litigation issues behind water rings true.”

- John Gardella; *Cosmetics and PFAS: Industry Lawsuits a Lesson For ESG*

Companies Recently Sued for Allegedly Undisclosed PFAS Use



Examples of PFAS Allegations

- “Defendants [The Clorox Company and The Burt’s Bees Products Company] represent that the Products are safe and effective for their intended use, and reasonable consumers expect that cosmetic products marketed and sold to be applied to a person’s face and skin, and especially near the eyes and on lips, will not contain dangerous, humanmade chemicals like PFAS. Contrary to Defendants’ representations, the Products are not safe because they contain PFAS, which have a negative impact on the health of humans.” *Gruen v. The Clorox Company and The Burt’s Bees Products Company*.
- “L’Oreal USA, Inc. intentionally fails to disclose to consumers that its popular waterproof mascara products contain Per and Polyfluoroalkyl Substances, or “PFAS,” despite the fact that L’Oreal knew or should have known that this information is material to consumers.” *Vega v. L’Oreal USA, Inc.*
 - The allegations stem from the Defendant’s claim that they provide “the best ingredients, formulation, and performance,” while these products contain PFAS chemicals.
 - The allegations also stem from the Defendant’s failure to disclose their PFAS use, either in the ingredients list or on packaging or labeling.

Examples of PFAS Allegations

- A group of plaintiffs filed a class action lawsuit in New York against Shiseido alleging that its bareMinerals brand of cosmetics falsely advertised its products as “clean and conscious”, “pure” and “free of harsh chemicals,” when they actually contained PFAS. The plaintiffs alleged that the presence of PFAS is not disclosed anywhere in Shiseido’s packaging or marketing. Plaintiffs even alleged that the brand name ‘bareMinerals’ has created the impression that the products are “bare” of any harmful ingredients. *Onaka et al v. Shiseido Americas Corporation*.
- Toxin Free USA (a non-profit) filed a lawsuit against CoverGirl and Coty, Inc., alleging that the companies falsely advertised some of its cosmetics as safe and environmentally friendly when they contained PFAS. Unlike the Shiseido lawsuit, the CoverGirl lawsuit is not a class action and is narrowly focused on protecting consumers from CoverGirl’s alleged false advertising. Toxin Free USA is not seeking monetary damages, “it seeks to end the unlawful conduct directed at D.C. consumers....” *Solis v. CoverGirl Cosmetics et. al.*

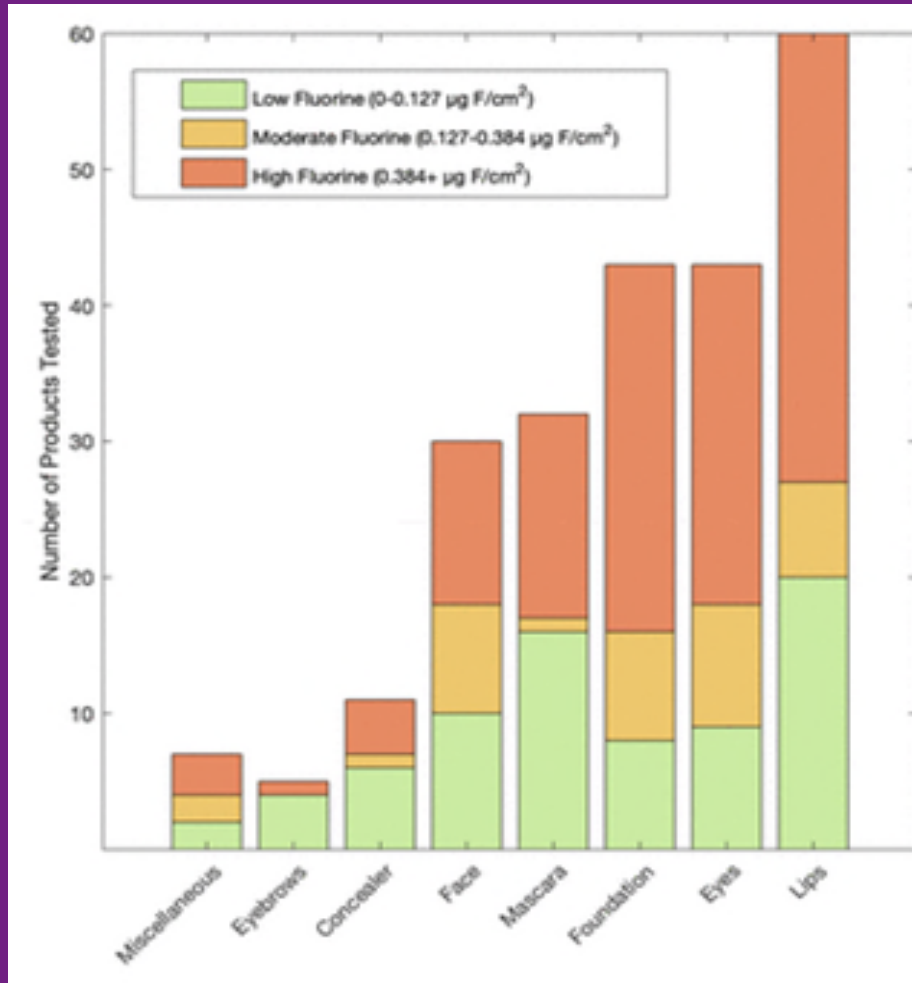
Cosmetic Companies With Products *Allegedly* Containing PFAS

- L=lips
- F=foundation
- E=eyes
- M=mascara
- Fa=face
- C=concealer
- Eb=eyebrows
- Mi=miscellaneous

Cited in *Shape Magazine*, June 16, 2016; *The Guardian*, June 15, 2021

Brand	Categories	Brand	Categories
Benefit	F,M	Maybelline	E,Fa,F,L,M
Burt's Bees	L	Merle Norman	F
Butter London	M	Milani	L
Buxom	E	MILK	F
Clinique	L,M,F	NARS	F,L
Cover Fx	F	Neutrogena	Fa
Covergirl	E,Fa,F,M	Nudestix	L
Dermablend	C,Fa,F	NYC New York City	L
Elf	C,E,Fa,F,L	NYX	Eb,E,Fa,L,F
Essence	L,M	Perricone	M
Estee Lauder	L,M	Physicians Formula	M
Fenty Beauty	F	Pur	C,E,F,Fa,L,M
Formula 10.0.6	Mi	Revlon	E,F,L
H&M	L	Rimmel London	E,L
Huda Beauty	F	Sally Hansen	Mi
IT Cosmetics	F	Sephora Beauty	F,C,M
Jeffree Star	L	Smashbox	C,Eb,Fa,F,L,M
John Frieda	Mi	Soap & Glory	Mi
Josie Maran	F	Stila	L
Juice Beauty	C,E,Fa,L,M	Tarte	C,Eb,Fa,F,L,M
Julep	L,M	theBlam	F
Juvias Place	F	Too Faced	E,Fa,F,L,M,Mi
Kat Von D	L	Ulta Beauty	E,Fa,L
L'Oreal	F,L	Urban Decay	Eb,E,F,L,M

Testing Cosmetics for PFAS



A recent academic study examined 231 cosmetic products sold in the United States and Canada. 52% of the products contained some level of PFAS. In addition, the study found 88% of the products did not disclose on their packaging that the products contained any PFAS.

The scope of the cosmetics studied included a variety of products, and each category of tested products had certain PFAS chemicals.

Fluorinated Compounds in North American Cosmetics;
Environ. Sci. Technol. Lett. 2021, 8, 7, 538–544

About Professor Peaslee

Peaslee was one of several researchers who uncovered the presence of PFAS in fast-food wrappers, leading to lawsuits against companies like McDonald's and Burger King.

Peaslee discovered that products with PFAS were also very high in fluorine.

Peaslee developed Plaintiff's Process for PFAS Testing:

- 1) Acquire consumer products
- 2) Test products for fluorine
- 3) Relate high volumes of fluorine to the presence of PFAS
- 4) Sue the product seller for PFAS use, **even without evidence that the product actually has PFAS or that anyone was harmed by using the product.**



Graham Peaslee
Professor
University of
Notre Dame

Dr. Graham
Peaslee is an

experimental nuclear physicist at the University of Notre Dame who has pioneered the development of the PIGE method to screen for PFAS in environmental samples. He has over 200 peer-reviewed publications in both basic and applied science - most with student co-authors.

Potential For Targeting By Plaintiff's Lawyers

- Any beauty brand selling skincare and makeup products, including lipstick, mascara, eyeliner, eyeshadow, and foundation are at risk of facing such allegations of being accused of including PFAS in their products.
- Further, brands that make general claims about the safety of their products and their transparent business practices could be at risk:

Being clean is about more than just switching to safer beauty—to us, it's a lifestyle. Meet the brands and businesses that inspire us daily with their commitment to transparency, quality, and integrity. Go ahead and get acquainted... we promise we won't be jealous.

Potential For Targeting By Plaintiff's Lawyers

The use of “clean” as a descriptor

Clean, skin-centric beauty.

We challenge the conventions of clean beauty to create something radically new—through safe, potent formulas that protect and revive your skin.

OUR CLEAN PROMISE

We say “yes, please” to powerful, effective and clean ingredients and “no thank you” to yuck-worthy additives

This clean, ultrafine talc-free translucent setting powder perfects every skin tone, imparting a flawless, airbrushed, and poreless finish without any harmful ingredients.

Potential For Targeting By Plaintiff's Lawyers

Describing ingredients as “natural” or “non-toxic”

Guaranteed
PURE

All 100% PURE™
formulations
adhere to strict
purity standards
and will never
contain harsh or
toxic ingredients

What does that mean? It means our products are made with non-toxic, non-irritating, good-for-you ingredients that you can pronounce. No fillers. No fragrances. No animal by-products. We're just here to make some high performance beauty products with a side of Good Clean Fun!

Affordable, luxury-quality offerings...without any (and we mean any) toxic ingredients.

Potential For Targeting By Plaintiff's Lawyers

Describing products as “safe”

Our Mission

To elevate product integrity by using safer ingredients with skincare quality and get safer cosmetics into the hands of more people through reasonable prices. To advocate for safer cosmetics through education, support and impact. To promote positive beauty and inspire self-confidence for everyone.

Preventative Measures

- Limit or eliminate use of PFAS as much as possible
- Ensure that all marketing claims are accurate, specific, and consistent
- Require and maintain supplier certifications re-PFAS use
- Require indemnity protections in supplier agreements
- Obtain insurance policies that could cover litigation costs
- Audit and test products for PFAS chemicals regularly
- **Disclose PFAS contained in products**
- **Disclose to consumers your understanding of PFAS and attempt to minimize their use**

Also, Keep An Eye Out For...

- **Sustainability** - A class accuses the Defendant of lying about the sustainability of its lobster and shrimp sources and making false promises about its environmental standards. - *Dezzi Rae Marshall v. Red Lobster Management LLC et al*, US Dist. Ct. for CD Cal.
- **Supply Chain** - The Plaintiff alleges the company's products are not "sustainably sourced" due to its use of "unethical labor" - *Renee Walker v. Nestle USA Inc.*, US Dist. Ct. for SD Cal.
- **Recycling** - Plaintiff claims the labels on Keurig's "K-cups" mislead consumers into believing that the plastic pods can be recycled, when they cannot. *Kathleen Smith v. Keurig Green Mountain Inc*, US Dist. Ct. for ND Cal.
- **'Natural' Claims** – A class is suing the maker of Kern's Nectar claiming the beverage's labels mislead consumers by claiming they are "100% natural" when they have artificial flavoring. *Gross et al. v. Vilore Foods Co. Inc.*, US Dist. Ct. for SD Cal.
- **Greenwashing** - Investors claim the company's shares are artificially inflated because the company has overstated demand for its products and engaged in "greenwashing." - *In Re Oatly Group AB Securities Litigation*, US Dist. Ct. for SD NY.

THANK YOU



Michael J. Duvall

michael.duvall@dentons.com

+1 213 892 2818



Chanell Botshekan

chanell.botshekan@dentons.com

+1 213 243 6143