The Complexity of Finding a Balanced Approach in PFAS Legislation

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Across the United States, there has been a concerted effort to confront the pervasive issue of per- and polyfluoroalkyl substances (PFAS) through legislative measures that ban the use and/or sale of PFAS-containing products that are meant to safeguard public health and the environment, but at what cost? SB-903 represents California's latest effort to regulate the use of PFAS in products, driven by the state's attempt to address environmental and public health concerns. If the bill is enacted, beginning on January 1, 2030, the State of California would prohibit the distribution, sale, or offering for sale of any product containing intentionally added PFAS, unless conditions are met that warrant an exception. These conditions include the following: the unavailability of safer alternatives; the indispensable role of PFAS in the product's functionality; and the critical necessity of its use for public health, safety, or societal well-being.

The Department of Toxic Substances Control (DTSC) would be tasked with determining whether the use of PFAS in a product category is currently unavoidable. SB-903 requires that DTSC adopt regulations by January 1, 2027, to administer its provisions. Any violations of the prohibition or failure to comply with the requirements may result in civil penalties. The bill establishes the PFAS Penalty Account, where civil penalties are deposited and used for the administration and enforcement of the legislation. Overall, the stated purpose of SB 903 is to phase out the sale of products containing avoidable PFAS to mitigate further contamination of the environment and protect public health from the alleged adverse effects associated with exposure to these chemicals.

Wisconsin is similarly attempting to outlaw the use and sale of PFAS-containing products. According to Wisconsin Public Radio's report, on March 1, 2024, State Sen. Brad Pfaff and State Rep. Jill Billings unveiled a new bill that would bar the sale of specific PFAS-containing products by 2028 and outlaw all PFAS products by 2034. Similarly, to SB-903, Wisconsin's Department of Natural Resources would have authority to grant exemptions for products where PFAS use is deemed unavoidable.

Two states—Maine and Minnesota—previously enacted legislation that would similarly ban all PFAS-containing products. Maine's statute, 38 M.R.S. § 1614.1, mandates that manufacturers disclose PFAS use in their products by January 1, 2025, with prohibitions on certain PFAS-containing products effective January 1, 2023, and a complete ban on such products by January 1, 2030, unless deemed a currently unavoidable use (CUU). The law also establishes enforcement measures and outlines the Department's responsibilities in managing PFAS regulation and reduction efforts.

Minnesota enacted HF2310, which prohibits the sale or distribution of various items containing intentionally added PFAS by 2025, including carpets, cleaning products, cookware and cosmetics. Additionally, it mandates manufacturers of other PFAS-containing products to report their usage to the Minnesota Pollution Control Agency by January 1, 2026. A broader ban on PFAS in products is set for 2032, with exemptions to be determined by the agency based on forthcoming rulemaking.

These states are learning, however, that such laws result in a number of unintended consequences that make the laws difficult to enforce. Two critical questions arise from this context 1) what viable alternatives to PFAS are available and 2) what economic ramifications might these alternatives pose for the respective states?

Manufacturers and industry groups have raised concerns regarding the difficulty of finding substitutes for PFAS,

especially in critical sectors such as electric vehicles and semiconductor manufacturing. For example, Ford warned Maine state officials that there is currently no commercially available technology capable of replacing a PFAS-containing thermoplastic used in electric vehicle batteries. Similarly, the US Defense Department emphasized the importance of PFAS in various applications critical to national security, such as weapons systems and information technology. The Semiconductor Industry Association also expressed concerns about the challenges of replacing PFAS in the chip making process, which could have significant implications for the semiconductor sector in the US and EU.

The absence of feasible alternatives to PFAS has necessitated the inclusion of exceptions within the legislative frameworks implemented in Minnesota and Maine. These states include provisions allowing exemptions for certain uses of PFAS deemed "unavoidable" by regulatory agencies. This unintended consequence underscores the complexity of transitioning away from PFAS.

Another layer of complexity that created the inclusion of exceptions within Minnesota and Maine's PFAS banning bills was the potential harm that it could cause to the economies of each state. Industries that rely heavily on PFAS, such as manufacturing, may face increased costs and operational challenges as they seek alternatives or adjust their processes to comply with the ban. This could lead to job losses or reduced competitiveness in these sectors, affecting the overall economic output of the states. It also impacts the state's attempts to promote a green economy, as wind turbines and heat pumps are just a couple of the environmentally friendly products affected by the ban.

Furthermore, businesses in other industries that use products containing PFAS may also be affected, through either increased costs or limited product availability. The implementation of bans could also result in legal and regulatory uncertainties, which may deter investment and innovation in affected industries. Additionally, if alternative products are more expensive or less effective, consumers may face higher prices or lower-quality goods, impacting their purchasing power and overall economic activity.

As a result, we are already seeing Maine legislators walking back some regulations, as they realize the negative impacts on the Maine economy. For instance, just last week Maine lawmakers endorsed a plan to push back Maine's PFAS ban two years—to 2032—as well as exempt certain manufacturing industries from the sales ban, including medical devices, electric vehicles, semiconductors and HVAC equipment.

As Maine has demonstrated, policymakers in other states, including California and Wisconsin, must recognize the practical limitations of finding substitutes for PFAS in certain applications and have a balanced approach that considers health and environmental concerns, as well as the economic implications of a complete ban of these chemicals.

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