TASTING NOTES

ISSUE 14

Avoiding PFAS and Other Food Packaging Faux Pas: Navigating US and EU Regulations

The PFAS Strategic Roadmap was released in 2021 by the United States Environmental Protection Agency (EPA) and outlines the various approaches that the EPA will use to address per- and polyfluoroalkyl substances (PFAS). PFAS are man-made chemicals that include PFOA (perfluorooctanoic acid), PFOS (perfluorooctane sulfonic acid), and GenX chemicals. Both the United States and the European Union regulate chemical substances used in items that come in contact with food, although their approaches differ.

US REGULATION

- The amended Food, Drug, and Cosmetic Act defines a food contact substance as any "substance intended for use as a component of materials used in manufacturing, packing, packaging, transporting, or holding food if such use is not intended to have any technical effect in such food."
- To be used as a food contact substance, a substance must be authorized by: (1) Title 21 of the Code of Federal Regulations; (2) Generally Recognized As Safe status; (3) a prior sanction letter; (4) a Threshold of Regulation exemption request; or (5) an effective Food Contact Notification.

EU REGULATION

- The European Union ("EU") approach to chemicals in consumer and industrial products is fundamentally more conservative than in the United States.
- While EU rules require food contact materials to be sufficiently inert to not adversely affect people's health or the quality of the food, the EU has also moved to further restrict certain food contact materials. On October 14, 2020, the European Commission published its Chemicals Strategy for Sustainability, which applies to consumer products including food contact materials. On December 7, 2021, the World Trade Organization (WTO) announced a draft regulation from the European Union (EU) on its intention to set out new rules for food contact recycled plastics. See https://euobserver.com/green-economy/153922.
- The EU is also looking to establish a simpler "one substance one assessment" process for chemical risk and hazard assessment. Currently, the European Chemicals Agency assesses industrial chemicals under Regulation on Registration, Evaluation, Authorization and Restriction of Chemicals (REACH), while the European Food Safety Authority assesses chemicals used in food packaging, containers, and other food contact materials. Five EU members (Germany, Denmark, the Netherlands, Norway, and Sweden) are currently working on a proposal to restrict all PFAS.

PERKINSCOIE
Food & Beverage Group

ISSUE 14

PFAS IN THE MARKET

- PFAS have been used in food contact substances in the U.S. since the 1960s, including: non-stick cookware; food processing equipment (gaskets, o-rings, etc.); processing aids for other food contact substances (to reduce buildup on manufacturing equipment); and food packaging (for example, as a grease-proofing agent).
- In the early 2000s, scientific studies raised concerns about the safety of long-chain PFAS, finding they persist in the environment and animal tissue and have toxic effects on humans and animals. The FDA worked with some manufacturers to voluntarily stop their sale of food contact substances containing long-chain PFAS and revoked its regulations authorizing the remaining uses of various long-chain PFAS in food contact applications in 2016. Currently, the FDA still permits other PFAS to be used in food contact substances, but this may soon change, given the EPA's focus on PFAS. Several states have also moved to restrict the use of PFAS in food contact substances.
- The EU is moving towards regulating PFAS as a group and phasing out their use entirely, unless their use is essential.

For additional information, please contact Cassie Roberts (croberts@perkinscoie.com) and Andrea Driggs (adriggs@perkinscoie.com).