



PFAS: Navigating the Future of Policy, Compliance, and Phase-Out Webinar Follow-Up Q&A

Please note that this Follow-Up Q&A does not constitute legal advice.

Is PFAS only contained in the materials with DWR treatment?

PFAS can potentially be found in other materials in addition to those with DWR treatment. PFAS can be found in textiles with functional finishing treatments including DWR (water repellent), stain-resist/repel/release, and quick-dry. Waterproof membranes on textiles, in footwear, and in gloves can be made of PTFE (included in the PFAS category) or could have PFAS treatments applied to them. And there are other applications of PTFE including plastic resins and textile fibers.

How do I determine "least toxic alternative"?

Different laws define "least toxic alternative" differently--so it depends on the particular state law and accompanying regulations. For example, Maine defines alternative as "a substance or chemical that, when used in place of PFAS, results in a functionally similar product and that, when compared to a PFAS that it could replace, would reduce the potential for harm to human health or the environment, or has not been shown to pose the same or greater potential for harm to human health or the environment as that PFAS. Alternatives include reformulated versions of products, including versions reformulated by removal or addition of one or more chemicals or substances, that result in the reduction or removal of intentionally added PFAS from the product. Alternatives also include changes to the manufacturing process that result in the reduction or removal of PFAS from a product.

An alternatives assessment of chemical products comparing available toxicological data, and accounting for the risk of data gaps, is the typical approach for determining the safest or least toxic alternative. Other considerations can also be taken into account, such as availability, manufacturability, product performance, lifecycle impacts, and cost.

What about PFAS in used clothing sales?

It depends on the law. California's AB1817, for example, exempts used clothing (it covers "new, not previously used, textile articles").

It sounds like there are exceptions for apparel intended for extreme conditions, but what about mixed hard/softgoods such as packs and bags?

The extreme conditions exception in California's AB1817 only covers "outdoor apparel," defined as "clothing items intended primarily for outdoor activities, including, but not limited to, hiking, camping, skiing, climbing, bicycling, and fishing." That definition specifies "clothing items" which are further defined as "undergarments, shirts, pants, skirts, dresses, overalls, bodysuits, costumes, vests, dancewear, suits, saris, scarves, tops, leggings, school uniforms, leisurewear, athletic wear, sports uniforms, everyday swimwear, formal wear, onesies, bibs, diapers, footwear, and everyday uniforms for workwear." That list does not include packs or bags, which are instead included in the separate "textile articles" definition. For specific guidance, please feel free to reach out to James Pollack (jpollack@martenlaw.com).

Are manufacturers responsible for notifying retailers (especially e-retailers who ship across state borders)?

It depends on the particular law, but some state laws provide innocent retailer defenses. For example, Maine's second draft of its regulations to implement its notification law exempts retailers from liability unless they are notified that products do not comply with state law. For specific guidance, please feel free to reach out to James Pollack (jpollack@martenlaw.com).

Who is liable for selling existing (old) products that might exist in retail supply chains after different state bans come into effect?

The state laws generally regulate the sale of covered products after a certain date regardless of when they are manufactured. They do not provide sell-through provisions. As a result, manufacturers may still be liable for the later retail sale of their products. Ultimate liability will depend on the particular circumstances of your retailer agreements and the contours of the particular state law at issue. For one state law example, see the above answer on retailer notification. For specific guidance, please feel free to reach out to James Pollack (jpollack@martenlaw.com).

Can you provide more details on what California considers "Outdoor apparel for severe wet conditions?" For example, what does a ski bib sold at REI count as- general outdoor apparel or apparel for severe wet conditions?

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That feels like a product for an elite consumer for wet snow consumers but also it is for skiing which was listed as 'outdoor apparel' (not for severe conditions) in the bill.

Outdoor apparel for severe wet conditions is defined as “outdoor apparel that are extreme and extended use products designed for outdoor sports experts for applications that provide protection against extended exposure to extreme rain conditions or against extended immersion in water or wet conditions, such as from snow, in order to protect the health and safety of the user and that are not marketed for general consumer use. Examples of extreme and extended use products include outerwear for offshore fishing, offshore sailing, whitewater kayaking, and mountaineering.” For specific guidance, please feel free to reach out to James Pollack (jpollack@martenlaw.com).

For California, if your organic fluorine reporting is under 100ppm in 2025 or 50 ppm in 2028, is labeling then not necessary?

Labeling is required for outdoor apparel for severe wet conditions that still contain PFAS above those levels after 2025. That category of goods can still be sold with added PFAS until January 1, 2028, at which point they will need to similarly meet the total organic fluorine thresholds. Labeling is not required for other textile articles after that date because one cannot sell products containing PFAS above those thresholds in the state.

Speaking specifically to California's AB1817, which primarily underlines apparel, accessories, and other textile articles, defined as textile goods typically used within households and businesses; is it safe to assume that temporary outdoor fabric structures/shelters fit into this definition?

AB1817 covers textile articles, which is defined to include “textile goods of a type customarily and ordinarily used in households and businesses, and include, but are not limited to, apparel, accessories, handbags, backpacks, draperies, shower curtains, furnishings, upholstery, beddings, towels, napkins, and tablecloths.” For specific guidance, please feel free to reach out to James Pollack (jpollack@martenlaw.com).

Does the CA PFAS disclosure need to be permanently fixed, or can it be on a hangtag or tear-away label?

The only guidance in the law is that the item must be “accompanied by a legible and easily discernable disclosure with the statement ‘Made with PFAS chemicals,’ including for online listings of products for sale.”

California is introducing a PFAS ban on children's product in July 2023. Do you have details on this (enforcement, allowance for existing products, etc.)?

AB652 goes into effect July 1, 2023. It prohibits the manufacture, sale, and distribution of juvenile products that include purposefully added PFAS. There are no sell-through provisions in the law. There are no agency enforcement or penalty provisions, and relevant California regulatory agencies have signaled this law will be enforced through private litigation. For specific guidance, please feel free to reach out to James Pollack (jpollack@martenlaw.com).

Is the AB2247 vetoed bill similar to what Maine currently has in place?

The vetoed bill was similar in scope—it would have required the reporting of PFAS in products. There are some critical differences, including its later proposed implementation deadline (2026 in California rather than 2023 in Maine).

There is a lot of mention of 3rd party testing of products to know what chemicals are in your products and also to audit for compliance for your RSL. I have run into the challenge of finding a 3rd party tester that tests for PFAS in fabrics or gear. Most tests pertain to water and air. Would anyone be willing to share what testing companies they use to test apparel and gear for PFAS?

On the webinar, the panelists mentioned working with SGS, Bureau Veritas (BV), and Intertek (ITS) -- and there are many more companies with capabilities for testing fabrics and gear for PFAS. Make sure you're talking with the relevant department within these companies, specific to consumer products and may further be split between hard goods and soft goods.

Are there any recommendations for testing methods or resources for PFAS content other than DWR, specifically for hardgoods products?

Testing labs may be a good resource for recommendations on test methods, including for hardgoods and non-textile products. Test methods are not defined in the state regulations, but California AB1817 defines limits for total organic fluorine content. Other global regulations on specific PFAS substances, such as PFOS, PFOA, and related substances, require different test methods than what would be used for total organic fluorine.

What are some of the best test methods you recommend for PFAS detection?

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There has been considerable conversation today about what test methods are or can be used to detect PFAS or organic fluorine. Does the current or coming legislation cite a specific quantitative method of test to generate data concerning the presence of PFAS in a textile product?

Specific test methods have not been provided by law, although guidance would be helpful in the future. For example, in Maine, the state agency has only provided that companies should use “commercially available analytical methods”.

Will there be any adaption/conformation to the testing thresholds used in Europe (0.025 mg/kg and 1 microgram/m²)?

Testing requirements for specific substances, such as PFOS, PFOA, and related substances will likely not be affected by the new regulations banning PFAS as a class. An additional test will be necessary to quantify total organic fluorine as referenced in California AB1817.

Can we go into more detail about the TSCA SNUR rule? Most importantly, when does this go into effect? And how often will a brand need to resubmit a notice - with every single shipment or just once?

EPA has implemented many rules covering PFAS under TSCA. EPA's long-chain PFAS SNUR has been in place since July 2020, although the agency had other previous PFAS regulations already in place that regulate the use of certain PFAS in products. The long-chain PFAS SNUR requires a pre-manufacture notice before the import or manufacture of chemicals listed in the SNUR. There is also an ongoing obligation under TSCA to report the import of chemicals not already regulated under TSCA. The agency's data call that would require the reporting of all imported articles that contain PFAS since 2011 is still in draft form, but the agency expects to finalize the rule by January 2023. You can find information about EPA's PFAS-related TSCA activities here: <https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/risk-management-and-polyfluoroalkyl-substances-pfas> For specific guidance, please feel free to reach out to James Pollack (jpollack@martenlaw.com).

Question for Patagonia: How does Patagonia come to the conclusion a product is PFAS free? Is it from testing for Total Organic Fluorine? Or some other method?

We have been working closely with our supply chain partners for years to design and test PFAS-free materials and products. Creating a PFAS-free product starts with first ensuring that we are aware of all components that could have PFAS in them (materials, membranes, trims, etc.) and making sure that we run trials with and ultimately specify only PFAS-Free components on the bill of materials (BOM). Second, as part of our RSL compliance program, we work with certified 3rd party labs to test the final material or garment for Total Organic Fluorine (TOF) to ensure that organic fluorine content is below the required limits.

Question for Patagonia: Can you confirm that the products you developed at Patagonia are as good as with PFAS for your alpine level products? Has performance has been impacted?

Because of the high performance requirements of our pinnacle tier shells (alpine, etc.) we have spent many years researching, designing, testing, and iterating on the best PFAS-Free DWRs and membranes to create rain and snow shells that could meet our very high performance standards while also being PFAS-Free. Based on our lab and field testing data, these shells perform as well as or better than the short chain (C6) PFAS shells that have become industry standard after the long chain (C8) chemistry phase out. Achieving PFAS-Free product parity with the original high performing C8 chemistry is a challenge we have yet to solve, though we are certainly working on it.

Question for KEEN: In your research in finding 105 different types of PFAS in components, did you do this through testing of your entire production to collect data?

No, we tested 2 pairs from each of our finished goods assembly lines. We also tested the individual components that go into our shoes prior to assembly. Both types of testing yielded the unasked for PFAS in the results. Today, suppliers need to go through an RSL screen before we will purchase components. Intertek, SGS and Bureau Veritas all have our RSL testing standards for suppliers to send components to.

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Question for KEEN: Can a chemicals management system alone be effective vs complementing this with p.o. by p.o. materials testing based on an assessment of supplier capacity to execute?

No, an RSL chemical policy alone cannot be the only tool to detox our supply chain. Many tools are needed, such as: Compliance testing to meet the regulatory requirements of various markets, including:

- USA (CPSI act, PROP 65)
- Turkey (Phthalates)
- Japan (Formaldehyde)
- China (GB/T 15107)

Additionally, see pages 13 – 27 of KEEN's Chemical Management Policy & RSL. Our non-compliance and corrective action policy (to manage failures) is in this section.

Question for Patagonia and KEEN: How do you control PFAS usage from a fabric manufacturer where there may be many used for different materials which could contaminate?

At KEEN, we have worked back with staff and factory management to make processing changes to textiles and material components being created for KEEN assembled footwear to avoid PFAS contamination. Our suppliers have been on the journey with us and are very aware of our RSL standards. For example, COSMOS (our footwear lining supplier) in China completely changed their processing of lining material for KEEN to avoid cross-contamination with orders for other brands. We trust but verify, random testing is key to this process working and maintaining our standards. KEEN can elaborate and are available to speak with individuals more about this.

At Patagonia, similarly to what KEEN noted above, we have built strong relationships with our suppliers and have worked together with them on this transition to dig deep and really understand their processes and challenges. We don't directly specify that suppliers must use dedicated lines for our products, preferring to trust them to manage their processes in a way that meets our PFAS-Free specifications. As noted above, we have a robust RSL testing program and can detect organic fluorine present above our limits.

Do you have specific questions about PFAS legislation/regulations or phase-out?

Email OIA at ga@outdoorindustry.org -- OIA will compile your questions and provide more information to members in the coming months

This Q&A does not constitute legal advice. To seek legal advice on PFAS regulatory compliance, email James Pollack at Marten Law at jpollack@martenlaw.com