HUNTON

RETAIL INDUSTRY

YEAR IN REVIEW | 2025

JANUARY 2026

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Dear Clients and Friends,

We anticipate that this new year will be another of meaningful progress for you and your organization.

As it is to you, the retail and consumer products industry is fundamental to Hunton. We don't just say that, we live it. We counsel hundreds of retail and consumer products clients on wide-ranging global transactional, litigation, and regulatory issues. Through decades of firsthand client service, we have organized our *Chambers*-recognized lawyers into teams that understand the industry from the perspective of their own practice areas and work together to provide the right resources to meet each challenge that retailers face today. This past year alone, we have supported close to 90 new retail clients and opened more than 600 retail and consumer products matters.

2025 was a year of change, both expected and unexpected. We saw it in the types of matters we worked on, as well as in the news, with topics like automation and the evolution of the use of robotics in the retail context, changes in the US administration and policies affecting the retail and consumer products industry, store closures and bankruptcies, and fluctuations in the cost of goods and consumer buying habits repeatedly making headlines. A notable area of significant technological progress is AI: AI-driven traffic to US retail websites increased 4,700 percent in 2025, and use of agentic AI in retail skyrocketed.

That same theme—change—ties together many of our pieces in the *2025 Retail Industry Year in Review*. You will read about developments in the laws, policies, and regulations that affected retailers and consumer goods companies over the past year, and that we predict will carry on throughout the next. This *Year in Review* is comprehensive, with articles on agentic AI, trends in privacy laws, tariff duty refunds, algorithmic pricing, food and beverage legal trends, retail M&A activity, increased Texas-based patent litigation, consumer data in bankruptcy, and more.

It is our privilege to partner with you through change. Thank you for choosing us as legal advisors to represent your retail and consumer products businesses as you seek to manage risks, contain costs, and boost profits. We extend our best wishes for continued growth and ongoing success in the coming year and hope to help you stay ahead of the curve in 2026.

Sam

Samuel A. Danon
Managing Partner

Use of Agentic AI in Retail Skyrocketed in 2025:

Creating New Challenges and Risks for Online Retailers

AI-driven traffic to US retail websites increased 4,700 percent in 2025.[1] Retailers who have developed an agentic AI digital commerce space, or are exploring that possibility, are facing new challenges and risks as consumer use explodes.

What is Agentic AI?

Retailers have to meet current customer expectations by providing an omnichannel shopping experience that is personalized, fast, secure, and as "frictionless" as possible. "Agentic AI" refers to AI systems that can make autonomous, independent decisions and actions to achieve specific human user goals (e.g., "find these Nike sneaker variants up to $250 in price, purchase them, and arrange for home delivery").

Personal electronic assistants are not necessarily new—some, such as Amazon's Alexa, have been offering narrow capabilities for specific tasks for more than a decade. However, many of the companies currently building iterative versions of AI technology have commented that AI agents that can carry out complex activities and tasks could be the "killer app" of AI. Tech and payments leaders are already betting on the shift to AI-driven digital commerce, and a growing wave of AI startups is also emerging, with a combination of the two developing the building blocks for fully autonomous shopping.[2]

Who's Really Clicking "Accept"?

Any retailer familiar with the current state of digital commerce knows the landscape of federal and state regulations and statutes, case law rulings, and payment network rules that set the framework under which a merchant must prove the purchaser's intent and authorization to make a transaction.[3] Where agentic AI adds a wrinkle to the current framework is as follows:

- **Current State:** Under current checkout and payment flows, the human/company making the purchase is involved in both the Point of Intent ("I want to buy this") and the Point of Checkout ("I authorize the purchase with my credit card").
- **Future State Under Agentic AI:** Under agentic AI checkout and payment flows, the Point of Intent and the Point of Checkout are separated for the first time.
  - **The Point of Intent** stays with the human who is delegating to the AI agent, and any related merchant terms and conditions likely need to stay with the human at the Point of Intent level to be enforceable. There should never be "autonomous code" acting solely as "buyer"; rather, the authorization point should be moved up the transaction chain to where the human authorizes the AI agent to take certain actions on the human's behalf within a set of delegated parameters.
  - **The Point of Checkout** is being delegated by the human to the AI agent under a set of parameters.

But the truly open question and unique issue for agentic AI transactions is who is liable when the *AI agent itself malfunctions*, such as hallucinating a transaction the human user did not authorize, or exceeding the boundaries of the authority delegated to it (e.g., buying 25 pairs of sneakers instead of 2 as instructed by the human user). The company developing the AI agent may try to disclaim all liability,

1 Deep Dive: The Role of Visa's Trusted Agent Protocol in Agentic Commerce, Sam Boboev, *Fintech Wrap Up*, October 19, 2025.

2 3 markets fueling the shift to agentic commerce, *CB Insights*, August 4, 2025.

3 While too long for this article, such existing digital commerce legal framework includes: (a) federal and state statutes including the Federal Electronic Signatures in Global and National Commerce (E-SIGN) Act and state versions of the Uniform Electronic Transactions Act (UETA) portion of the Uniform Commercial Code (UCC) (except for New York which has its own "Electronic Signatures and Records Act" (N.Y. State Tech. Law §301 et seq.)); (b) case law rulings holding the enforceability of "shrinkwrap"/"clickwrap" terms of use agreements; and (c) payment network rules include requirements from private payment networks such as Nacha (for ACH transactions), Visa, Mastercard, American Express and Discover) regarding required end user/cardholder transaction authorization and retention requirements.

along with direct and indirect damages in its terms of use. But if that is allowed, who gets stuck with the erroneous transaction loss "hot potato"—the user, the merchant, or the issuing bank for the payment method? Retailers need to understand this liability scenario with regard to any proposed agentic AI framework the retailer seeks to adopt.

Card Network/Payment Processing Issues

Developing end-to-end autonomous AI agents for use in digital commerce requires payment authorization processes. Retailers also must pay attention to the various standards emerging from payment networks (and any future standards). Each current approach below places different emphasis on identity, intent, payment control, and standard setting:

- **Visa Trusted Agent Protocol (TAP):** Visa is emphasizing identify verification by verifying the "who" behind the AI agent. Visa's TAP is tied to Visa's card network and seeks to cryptographically verify in real time that an AI agent making a purchase is indeed legitimate and truly acting on the purchaser's behalf.[4]
- **Mastercard Agent Pay:** Mastercard is emphasizing tokenization, restricting the "how" of the agentic AI transaction. Mastercard Agent Pay builds on Mastercard's existing tokenization capabilities, creating "Mastercard Agentic Tokens." Mastercard is also partnering with Microsoft Azure OpenAI Service and Copilot Studio to establish pathways for AI systems to complete purchases within conversational interfaces.[5]
- **Google Agent Payment Protocol (AP2):** Google is emphasizing intent mandates by being able to cryptographically prove the "what" and "why." AP2 is an open, payment agnostic standard for agents to transact via cards, bank transfers, or even stablecoins and cryptocurrency, using cryptographic user mandates to prove consent.[6]
- **Stripe & OpenAI Agentic Commerce Protocol (ACP):** Stripe and OpenAI are emphasizing standardized discovery and structuring the "where" to reduce friction and ambiguity by using standard setting and discoverability. ACP is an open-source solution focused on "conversational" checkout and seamless purchase, and utilizes shared payment tokens for AI-mediated transactions in chats/apps.[7]

Emerging Agentic AI Fraud

Finally, retailers need to be aware of (and discuss with their agentic AI partners) how to mitigate emerging fraud attack vectors in the agentic AI space. Some key questions that retailers should be asking include:

- How does agentic AI fraud differ from traditional programmatic fraud attacks?
- How does your service/platform distinguish a legitimate buying agent from a high-speed fraud bot?
- If an AI agent hallucinates and orders 5,000 units instead of 50, who is liable?
- When an autonomous AI agent makes a purchase, who owns the risk (human user, AI agent developer, or the merchant)?

As agentic AI commerce use continues its hockey-stick growth into 2026 by consumer and business users, retailers who have an existing agentic AI commerce space, or who are contemplating launching one, should think through the agentic AI purchase process flow, partnerships, and payment processing requirements. Issues of unique and emerging risks, payment network requirements, and allocation of transaction liability have to be understood at the front end and baked into the retailer's agentic AI process to ensure sustainability and scalability while guarding against fraudulent use of the agentic AI channel. Hunton will continue to be a resource and advise our retail clients regarding requirements, risk, and strategies in the agentic AI commerce space. •

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4 Deep Dive: The Role of Visa's Trusted Agent Protocol in Agentic Commerce, Sam Boboev, *Fintech Wrap Up*, October 19, 2025.
5 Mastercard Launches Agent Pay for AI Payment Transactions, Louis Thompsett, *Fintech Magazine*, May 2, 2025.
6 Google Launches New Protocol for Agent-Driven Purchases, Russell Brandon, TechCrunch, September 16, 2025.
7 How OpenAI and Stripe's Latest Move Could Blow Up Online Shopping As We Know It, Sharon Goldman, *Fortune*, September 20, 2025.

Navigating What's Next:

Food and Beverage Legal Trends to Watch in 2026

In 2025, food and beverage products remained at the forefront of consumer litigation and regulation, propelled by heightened media attention, increased federal oversight, and an uptick in novel state-level legislation. These trends are poised to accelerate in 2026, with direct and indirect impact for retailers.

Make America Healthy Again Commission

On February 13, 2025, President Trump established the Make America Healthy Again (MAHA) Commission to address the "childhood chronic disease crisis." Alongside the confirmation of Robert F. Kennedy Jr. to lead the Department of Health and Human Services (HHS), these developments signal the administration's focus on reshaping the nation's health regulatory landscape.

In May 2025, the MAHA Commission released its *Making Our Children Healthy Again Assessment* (Assessment). The Assessment identified four primary drivers of childhood chronic diseases: (1) ultra-processed foods (UPFs); (2) environmental chemical exposures; (3) reduced physical activity and mental health issues due to increased technology use; and (4) over-medicalization. The Assessment stressed the influence of corporations as an element in the current health crisis and appeared to set the stage for big changes—generating uncertainty across industries, including food and beverage.

In September 2025, the MAHA Commission published the *Make Our Children Healthy Again Strategy Report* (Strategy), its plan for addressing issues raised in the Assessment. While the Strategy sets forth 128 goals, it provides limited detail regarding their implementation and adopts a far softer approach than the Assessment, emphasizing the need for further research, rather than immediate regulation. The Strategy further states that it will avoid imposing new restrictions on UPFs or pesticides. Corporate influence—a central concern in the Assessment—is mentioned only once.

Thus, the Strategy is considerably more measured than the Assessment, suggesting that the MAHA Commission has stepped back from its attack on the food and beverage industry, at least temporarily. Moreover, budget cuts to federal agencies, research grants, and food assistance programs indicate that even the Strategy's more tangible initiatives may lack sufficient regulatory or financial support for full implementation.

UPF Litigation and Regulation

A primary focus of the MAHA Assessment, UPFs have faced growing public and media scrutiny over the last several years. Although UPFs lack a widely accepted definition, they are generally considered to be foods and beverages subject to heavy industrial processing and containing high levels of additives. UPFs are often convenient, affordable, and palatable—but have also been linked to various negative health outcomes.

Controversies surrounding UPFs are increasingly making their way into courtrooms nationwide. Before 2024, lawsuits involving UPFs generally focused on labeling and false advertising claims. New categories have since emerged. The most high-profile is *Martinez v. Kraft Heinz Co., et al.*, originally filed in Pennsylvania state court in December 2024 and later removed to federal court. Plaintiff alleges that 11 food and beverage manufacturers produced and aggressively marketed UPFs that caused him to develop two chronic illnesses by age 16. The complaint claims that defendants intentionally engineered UPFs to be satiating and addicting despite knowing their long-term negative health effects. Although the court initially granted defendants' motion to dismiss, ongoing briefing on plaintiff's motion for leave to amend his complaint is setting the stage for further developments.

State regulation of UPFs has become another driver of litigation. For example, on December 2, 2025, the City of San Francisco (represented by the same firm to bring *Martinez*) filed a consumer fraud and public nuisance lawsuit against the same defendants named in *Martinez*, alleging a "public health crisis" and seeking reimbursement for health care costs to the city, as well as abatement of the nuisance by ending the sale of UPFs. The suit follows California's first-in-the-nation law phasing out and ultimately banning UPFs in public schools. Additionally, in September 2025, a Texas law took effect requiring food producers doing business in the state to place warning labels on products containing any of 44 specified additives and creating a UPF advisory committee. On December 5, 2025, food and beverage manufacturers challenged the law, arguing that it is preempted by FDA labeling rules, is unconstitutionally vague, violates the dormant Commerce Clause, and compels speech in violation

> "They're absolutely top-notch, immediately gain the client's confidence, and they've been very easy to work with.
>
> *Chambers USA*, 2025

of the First Amendment. Several other states, including Wisconsin, Louisiana, and Florida, have also introduced measures to define, restrict, or ban UPFs.

Federal regulators are likewise focused on UPFs. In July 2025, the Food & Drug Administration issued a request for information to help develop a uniform definition of UPFs. Although the agency received nearly 20,000 public comments, it has not indicated whether it will issue a formal rule.

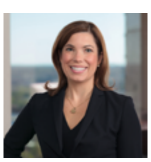
Taken together, these circumstances signal a pivotal moment for UPFs. What was once viewed primarily as a matter of personal choice is rapidly becoming a broad legal, regulatory, and political issue. Retailers should anticipate a tightening compliance landscape and related business disruptions.

2025–2030 Dietary Guidelines for Americans

Finally, the forthcoming 2025–2030 Dietary Guidelines for Americans (DGAs)—originally expected in late 2025 but now slated for 2026—could have an impact for retailers. Issued by the Department of Agriculture and HHS, the DGAs provide nationwide recommendations of what and how much Americans should consume to meet nutritional needs, promote health, and reduce disease risk. While not legally binding, they significantly shape public perception, nutrition policy, and industry standards.

The Scientific Report of the 2025 Dietary Guidelines Advisory Committee—released in 2024 under the prior administration—signaled that the upcoming DGAs would address UPFs, emphasize plant-based proteins, and provide updated guidance on alcohol. It remains to be seen whether the current administration will pursue those same focuses and whether—given the MAHA movement—the new DGAs will be any less disruptive for industry than those envisioned under the prior administration.

Either way, once released, the DGAs will generate substantial attention and may impact retailers as nutritional priorities and government's role in regulating foods and beverages continue to evolve. •



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The IEEPA Tariff Challenge:

A New Frontier for Duty Refunds in 2025 and Beyond

As 2026 begins, the retail industry finds itself at the intersection of constitutional law and supply chain strategy. While supply chain diversification and inventory management have dominated boardroom discussions for years, the most significant development in the coming months may take place not in a warehouse, but at the US Supreme Court.

On November 5, 2025, the Court heard oral arguments in *Learning Resources v. Trump*, a consolidated challenge that strikes at the heart of the Executive Branch's trade authority. The central question—whether the International Emergency Economic Powers Act (IEEPA) authorizes the president to impose tariffs—has immense implications for retailers. With the lower courts having already ruled that such tariffs are unlawful, the possibility of substantial refunds for tariff overpayments is emerging as a critical issue for companies to consider.

The Legal Landscape: *Learning Resources v. Trump*

To understand the opportunity, one must first understand the dispute. IEEPA has long been a tool for presidents to impose economic sanctions during national emergencies. Historically, IEEPA has been used to freeze assets and restrict trade with specific countries or entities. However, the current litigation challenges the administration's use of this statute to impose broad tariffs—specifically the "fentanyl" and "reciprocal" tariffs—rather than traditional sanctions.

The plaintiffs argue that while IEEPA grants the president the power to "regulate" importation, it does not explicitly grant the power to "tax" or impose duties. The distinction is critical. If the Supreme Court affirms the lower courts' rulings that the IEEPA does not authorize these tariffs, the duties collected under this authority would be deemed unlawful exactions.

During oral arguments, several justices appeared skeptical of the government's broad reading of "regulate," suggesting that the power to tax is a distinct legislative power that Congress must delegate clearly. If the Court rules in favor of the importers—a decision expected by early 2026—it would invalidate the legal basis for billions of dollars in duties already paid by US importers of record.

The Refund Opportunity: Not Certain, Not Automatic, and Not Guaranteed (Probably)

For retail executives and general counsels, the most critical takeaway is that a favorable Supreme Court ruling does not guarantee an automatic check in the mail, and unless the courts or the administration create an alternate mechanism for settling refunds or automatically refunding the IEEPA tariffs, importers will be left to pursue existing paths to recovery under current regulations. Customs law is rigid, and the path to recovery is paved with procedural landmines.

The Liquidation Trap

The primary obstacle to refunds is "liquidation"— the final administrative decision by US Customs and Border Protection regarding the rate and amount of duties owed on an entry. Once an entry liquidates (typically 314 days after importation), the importer has a narrow window to challenge the duties.

- **Protest Deadlines:** An importer has 180 days to file a protest challenging the tariff amounts after the date that an entry liquidates.
- **Finality:** If the 180-day window closes without the importer's filing a protest, the duties are final, potentially even if the underlying tariff is later declared unconstitutional by the Supreme Court.

This creates a "use it or lose it" scenario. Retailers who sit on the sidelines waiting for the Supreme Court ruling risk having their entries liquidate and become final, effectively forfeiting their right to a refund.

Strategic Imperatives for Retailers

Given the stakes, a passive approach is ill-advised. Retailers with significant exposure to IEEPA-based tariffs should consider immediate protective measures.

- **Auditing Import Data:** Counsel and compliance teams should be conducting a deep-dive audit of all entries subject to IEEPA tariffs during 2025. This involves identifying specific entry numbers, liquidation dates, and protest deadlines. This data is the foundation of any refund claim.
- **Filing Protective Protests and Lawsuits:** To preserve the right to a refund, importers must prevent the finality of liquidation. This is typically achieved by filing a protest. Companies could also consider seeking an injunction or suspension of liquidation through the Court of International Trade, particularly where they suspect liquidation is imminent. The goal is to keep the entry "open" until the litigation is resolved.
- **Post Summary Corrections:** Companies should be prepared to quickly file "Post Summary Corrections" or "PSC" on unliquidated tariffs should the Supreme Court vacate the IEEPA tariffs. The PSC will likely be the most straightforward process to claim a refund, provided it is submitted before liquidation occurs.
- **Assessing "Pass-Through" Implications:** From a business perspective, CFOs must consider how refunds interact with pricing strategies. If tariff costs were passed on to consumers, recovering those duties now provides a windfall that can be reinvested in the business or used to offset future compliance costs. For example, if a retailer passed the tariff cost to customers via price increases, a refund could create a one-time gain, but may also raise questions about customer restitution or future pricing adjustments. Legal teams should also review vendor contracts, as some DDP (Delivered Duty Paid) arrangements might complicate who is the actual "importer of record" entitled to the refund.

Looking Ahead: Preparing for 2026

As the industry awaits the Court's decision, it is clear that preparation matters even if the ultimate refund path remains uncertain. It's possible the administration or courts could create a streamlined refund process that avoids the rigid protest-and-liquidation framework. But unless and until such a process is created, the existing regulations govern—and they require importers to act now to preserve their rights.

In a landscape where constitutional law intersects with operational urgency, retailers that proactively review their data, protect their entries, and coordinate legal and financial strategies will be best positioned to benefit should the Court's ruling open the door to recovery. •


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2025 US Privacy Trends:

What Retailers Need to Know

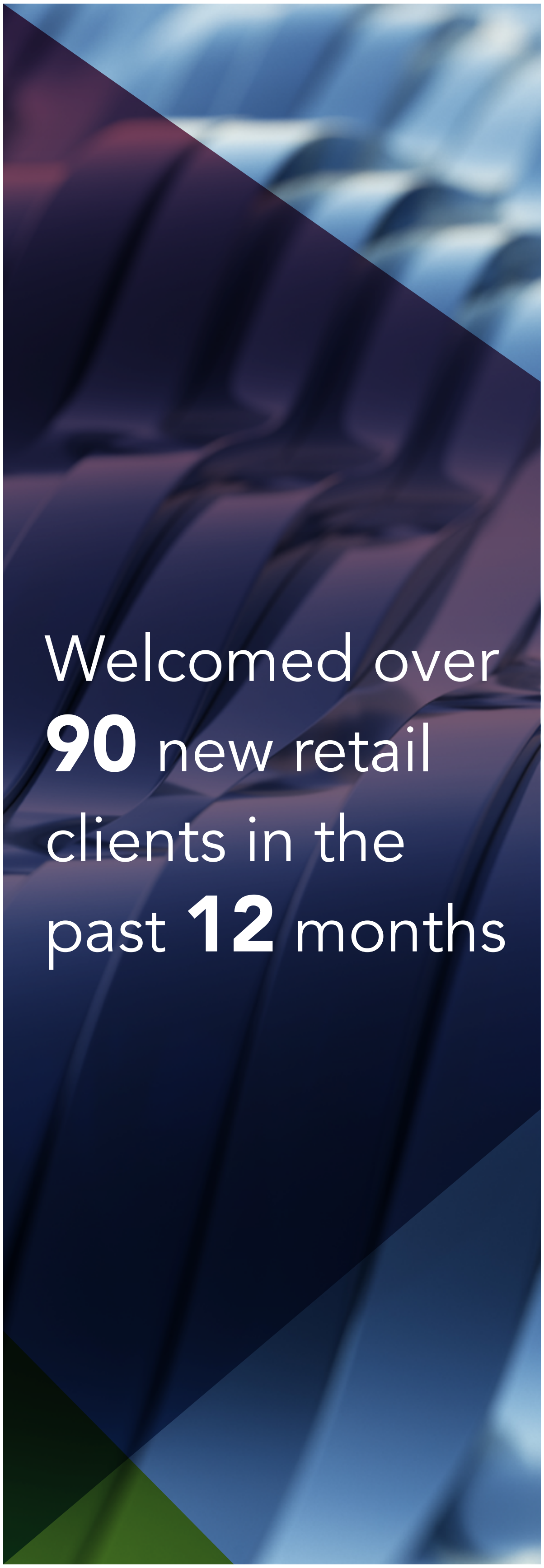
The US privacy landscape continued to shift in 2025, with states amending existing comprehensive privacy legislation and state regulatory enforcement efforts ramping up. The retail industry should prepare for heightened state regulatory enforcement in 2026 and beyond, with California leading the way. In this article, we identify recent legal developments and outline the steps retailers can take to manage risk in light of these developments.

Prepare for California's Opt Me Out Act

California enacted the Opt Me Out Act (AB 566), which will require web browsers to allow California consumers to transmit a single, universal opt-out preference signal (OOPS) to every business they interact with through a browser. The act, which amends the California Consumer Privacy Act of 2018 (CCPA) and takes effect on January 1, 2027, is designed to make it easier to opt out of sales of personal information and sharing of personal information for cross-context behavioral advertising.

As the first law of its kind in the United States, the Opt Me Out Act marks a significant shift in digital privacy regulation. Although it directly regulates web browser providers rather than retailers, the act will have significant downstream impacts on retailers that operate websites or rely on digital marketing, as consumers will now have the ability to easily opt out of certain tracking with a single click.

With the introduction of this browser-based opt-out method, retailers should expect a surge of consumer opt-out requests in early 2027 and beyond. Technical readiness is crucial. Effective January 1, 2027, retailers must ensure their websites detect and honor such OOPS requests. To avoid penalties under the CCPA, websites and e-commerce platforms must implement detection mechanisms for browser signals and disable targeted advertising or other data sharing subject to the CCPA's opt-out right when an OOPS request is detected.



Retailers also should revise their privacy notices to clearly state how the OOPS technology works, educate their teams on handling OOPS requests and compliance obligations, and stay abreast of the California Privacy Protection Agency's (CPPA's) rulemaking and enforcement efforts. We expect the CPPA to make the OOPS an enforcement priority when the act takes effect.

Lessons from CCPA Enforcement Actions

Retailers should be aware that California continues to aggressively enforce the CCPA, and even historical privacy practices may be subject to regulatory scrutiny. In 2025, the CPPA defended its right to investigate potential CCPA violations dating back to January 1, 2020, even before final implementing regulations were adopted.

In September 2025, the CPPA imposed a $1.35 million penalty on retailer Tractor Supply Company for violations of the CCPA. The CPPA's investigation, triggered by a consumer complaint, evaluated Tractor Supply's data practices dating back to 2020. Although Tractor Supply challenged the CPPA's ability to review its privacy practices before the CCPA regulations were finalized, the CPPA prevailed and subsequently determined that Tractor Supply failed to maintain a privacy policy that notified California consumers of their privacy rights, did not inform California job applicants of their privacy rights and how to exercise them, lacked effective mechanisms for California consumers to opt out of the sale and sharing of their personal information, and disclosed personal information to third parties without entering into contracts containing required privacy provisions.

The settlement required changes to Tractor Supply's privacy policy implementation, improvements to its mechanisms for honoring opt-out requests, annual compliance certification, and reviews of contracts with third parties. This case highlights the need to maintain historical records of privacy compliance practices and data handling.

In October 2025, the California attorney general announced a settlement with streaming companies Sling TV LLC and Dish Media Sales LLC, to resolve allegations that the companies violated the CCPA by not providing an easy way for consumers to opt out of the sale or sharing of their personal information, and not providing sufficient privacy protections for minors. This case serves as a warning for all digital platforms, including retail websites and apps, of the need to remediate hard-to-find or complicated opt-out options and inadequate protections for minors' personal information. It also highlights two priorities of California privacy regulators: the right to opt out and minors' privacy protections.

New York's Algorithmic Pricing Disclosure Law

Pursuant to a recent law in New York that went into effect on November 10, 2025, businesses now must disclose when they use algorithmic pricing that adjusts prices based on consumer-specific data like location or browsing history. The New York attorney general (NY AG) gave examples of customers' being charged different prices based on their ZIP Code or their location in a retailer's store. Retailers must clearly inform consumers if such pricing models are in use.

If the required disclosures are not made, the NY AG may issue a cease-and-desist letter with a specified cure period before an enforcement action. If a retailer does not cure the violation during the cure period, the NY AG can seek an injunction and civil penalties of up to $1,000 per violation, even if there has been no customer injury.

To comply with this law, retailers should take the following steps:

- Assess how pricing models operate and whether data can be linked, even indirectly, to a specific consumer.
- Keep records of pricing models and algorithms.
- Decide how and where disclosures will be made online and in stores.
- Monitor emerging state legislation (e.g., California) on algorithmic pricing.
- Monitor enforcement actions in jurisdictions that regulate algorithmic pricing.

Conclusion

Regulators are prioritizing consumer control and transparency as well as the protection of minors' personal information. We expect state regulators to ramp up enforcement efforts even as the privacy regulatory landscape continues to shift. Proactive compliance efforts can create a competitive advantage by helping to avoid costly regulatory investigations and fostering consumer trust and loyalty.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SEC Year in Review

The election of President Trump heralded a changing of the guard at the US Securities and Exchange Commission. SEC Chairman Paul Atkins took office in April 2025 and has initiated a range of reforms to the SEC's rulemaking agenda and enforcement objectives as well as continued a redesign of the agency's organizational structure. In many key ways, Chairman Atkins has departed from the approach of his predecessor, Gary Gensler. Retailers will be watching the agency closely in 2026.

Downsizing the Agency

By some estimates, nearly 20 percent of the SEC's workforce has left the agency during 2025 through a mixture of buyouts and attrition. Hiring freezes and reductions in the use of contract labor for IT and other back office functions are likely to reduce headcount further in the coming years. The SEC has also pursued a series of initiatives to redesign its organizational structure and streamline layers of management, particularly in the 10 regional offices outside Washington, DC. A small regional office in Salt Lake City closed entirely in late 2024, and rumors about further office closures continue to persist. While playing a less prominent role than at other agencies, in 2025 representatives from the Department of Government Efficiency, or DOGE, spent time at the SEC and proposed a series of cost-cutting measures. Going forward, fewer SEC staffers will have a greater share of work to complete as Chairman Atkins advances his priorities.

Rulemaking

Chairman Atkins has published an ambitious rulemaking agenda for the next several years. Nearly all the rule-writing projects initiated under Chairman Gensler have been canceled or withdrawn. In their place, Atkins is focused on a series of measures involving updates to the process for conducting public offerings, making it simpler to raise capital privately, reforming public company disclosure and reporting standards with a view toward reducing the costs and burdens of being publicly traded, reimagining the SEC's approach to the regulation of digital assets, and revisiting the SEC's market structure rules.

In a series of speeches and statements, Atkins has made clear that he hopes to reignite the IPO market and increase the total number of public companies. He has stated that his guiding principles will be rooting disclosure requirements in the concept of financial maturity and scaling disclosure requirements with a company's size and maturity. Atkins has also cited the objective of "future proofing" any regulatory action to ensure future regulatory clarity and guard against repeal by a future chairman.

To that end, Atkins frequently speaks of ensuring the SEC rulebook is "fit for purpose." To encourage faster resolution of shareholder claims, the SEC in September 2025 issued a policy statement supporting the use of mandatory shareholder arbitration of securities claims. Finding a path to repeal the SEC's controversial climate reporting rules also seems to be a priority for Atkins. Privately held retailers seeking to raise capital and publicly traded retailers looking to simplify SEC reporting may benefit from these initiatives.

Enforcement

Chairman Atkins' selection of Judge Margaret Ryan from the US Court of Appeals for the Armed Forces to lead the SEC's Division of Enforcement also suggested a shift in tone for the agency. Statements by various senior SEC officials suggest less of an institutional willingness to pursue novel or wide-ranging legal theories against parties accused of violating the federal securities laws. Instead, the SEC's focus on enforcement cases has generally shifted back to traditional areas such as offering and investment frauds, insider trading, market manipulation, and other violations of the federal securities laws where there is clear harm to investors. Conversely, the agency seems less interested in bringing cases that allege only technical violations of the law, particularly when there is minimal evidence of investor harm. Under Chairman Atkins, the SEC also announced modest reforms to the Wells process to give potential defendants an enhanced opportunity to present exculpatory information as well as returning to the previous agency practice of considering settlement offers and requests for disqualification waivers simultaneously.

Digital Assets

An area where the shift in enforcement priorities has been most acute involves the agency's approach to cryptocurrency and digital assets. President Trump campaigned heavily on the promise that he would reform the federal government's restrictive view of the crypto sector, and he has issued a series of orders and advanced other initiatives in satisfaction of that goal. Shortly after the change in presidential administrations, the SEC began dismissing numerous enforcement cases it had initiated targeting crypto companies.

Further, the SEC withdrew a series of guidance documents that adversely impacted the industry. The SEC also formed a Crypto Task Force with a broad agenda focused on rulemaking and other projects to provide both clarity and flexibility in the regulation of digital assets. And in December the SEC staff approved a pilot program to permit limited trading of tokenized securities. We expect the SEC to be busy in 2026 advancing crypto-related rules and interpretive guidance. Retailers seeking to expand the use of blockchain technology for loyalty programs or payment systems may capitalize on future SEC rulemaking.

Shareholder Proposals

SEC Rule 14a-8, which permits certain qualifying shareholders to include a shareholder resolution in a public company's proxy statement, has become a subject of debate and controversy in recent years. Supporters view the rule as a simple, efficient way to influence corporate policy, and critics see the rule as distracting to management and increasingly embroiling companies in political and social controversies. Over several recent presidential administrations, the Rule 14a-8 pendulum has swung back and forth from pro-shareholder to pro-management, depending on who has held office. Chairman Atkins seems focused on reforming the process more fundamentally.

300+ lawyers across
20 practices serving our retail
and consumer products clients

On February 12, 2025, under Acting Chairman Uyeda, the SEC staff released Staff Legal Bulletin No. 14M (SLB 14M), which addresses various aspects of the Rule 14a-8 proposal process. SLB 14M rescinds prior staff guidance and gives public companies more flexibility to exclude certain shareholder proposals, particularly those related to environmental and social issues. In sum, SLB 14M reasserts a more company-friendly approach and eliminates guidance that, in practice, led to an increase in shareholder proposals and fewer requests for no-action relief.

In November 2025, the SEC staff released a statement indicating a shift in the staff's handling of shareholder proposal no-action requests. Historically, companies have generally sought the staff's concurrence that it would not recommend enforcement action if a company excludes a particular shareholder proposal from its proxy statement under one of the enumerated grounds in Rule 14a-8. Under the new policy, the staff will not provide no-action relief except under narrow circumstances, and instead requires a company seeking to exclude a proposal only to notify the SEC of its intent. This practice more closely aligns with the minimum requirements of Rule 14a-8. We expect future SEC rulemaking on the shareholder proposal process to follow in 2026, with the process likely to look much different in the years to come. Publicly traded retailers often receive many shareholder proposals on topics unrelated to their core businesses, and they may see relief in future SEC rulemaking on this topic.

Conclusion

The impact of the government shutdown in the fall of 2025 slowed but did not derail several key priorities for Chairman Atkins. We anticipate an active year in 2026 for SEC rulemaking and a continued emphasis on making the public company model more attractive. Future SEC developments could, in turn, create opportunities for retailers. •

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AI in Retail:

Unpacking the Hidden Risks and Insurance Solutions

Like nearly every industry, retail is being reshaped by artificial intelligence. From chatbot assistants to targeted, hyper-personalized marketing and automated supply chains to AI-powered products on the sales floor, AI is redefining how retailers operate and connect with customers. But innovation is not without risk. As AI adoption accelerates, retailers face new and expanded risks—some obvious, others hidden—that strain traditional risk management playbooks. The insurance market is evolving to address AI risk, but it is reactionary and in many ways far behind the curve. This article explores the emerging AI-driven risks confronting retailers, highlights recent litigation that brings those dangers into focus, and examines key insurance considerations for navigating this rapidly changing landscape.

Risks of AI in Retail

AI now touches nearly every aspect of retail, from pricing and inventory to hiring and consumer-facing products. While the upside is significant, AI also introduces new risks and amplifies existing ones:

- **Operational and Product Liability:** AI failures can scale quickly, leading to pricing errors, inventory disruptions, contractual disputes, and product or robotics-related injury and property damage, often with unclear fault allocation.
- **Regulatory, Litigation, and Employment Risk:** Growing scrutiny over AI deployment has driven enforcement actions and private litigation tied to alleged deceptive practices (including exaggerating AI capabilities, also known as "AI washing"), antitrust concerns tied to algorithmic pricing, and bias, discrimination, and other employment-related claims.
- **Data Privacy, Cyber, and Reputational Exposure:** AI's reliance on large volumes of consumer and employee data heightens privacy and cybersecurity exposure, while publicized AI missteps, particularly involving consumer products, can trigger recalls, third-party claims, and rapid, long-lasting brand damage.

How Insurance Can Address AI Risk in Retail

Although AI introduces new operational and legal complexities, many of the risks it creates are not new to retailers. From the outset, risks like bodily injury, property damage, employment claims, privacy violations, product liability, and alleged misrepresentations have gone part and parcel with retailing. And for just as long, retailers have relied on traditional lines of commercial insurance for protection. So why is AI any different? In many ways it is not.

Legacy Insurance Programs and "Silent AI" Coverage

AI may be the new tech on the block, but the liabilities that it can cause are nothing new. For example, a chatbot or AI-powered toy may instruct a child to engage in injurious behavior. The direction coming from the bot or toy may be new, but the resulting injury is not. Similarly, an AI-powered thermostat may cause a food distributor's refrigeration system to shut down. The cause of the shutdown may be novel, but the resulting spoilage is not. Before AI, retailers looked to their traditional lines of liability insurance to guard against these and other risks of injury and damage. Simply because the injury or damage may have involved AI technology should not alter the analysis. And, when we look closely at the policy wording, it does not.

Retailers can be expected to look to existing (legacy) lines of insurance when faced with AI-related incidents. These coverage lines include:

- **Commercial General Liability (CGL) Insurance:** These policies cover bodily injury and property damage caused by a fortuitous event (an accident). As long as the cause of that event is not specifically excluded, the policy should respond the same for an AI-related claim as it would for any other.
- **Employment Practices Liability Insurance (EPLI):** These policies cover employment-related claims, including those involving discrimination, privacy, and hiring-related conduct. AI is being used to enhance employee monitoring as well as to screen prospective employees. This has already led to claims based on racial, age, and sexual discrimination and privacy infringements based on the use of AI technology to gauge the truthfulness of job applicants.
- **Cyber and Privacy Insurance:** These policies cover data breaches and other cyber-related liabilities. AI pushes the potential risk in these areas into overdrive by enhancing the scope, magnitude, and probability for AI-related data misuse, security incidents, and regulatory investigations.
- **Directors & Officers (D&O) Insurance:** These policies insure company management against liabilities arising from their decisions and corporate disclosures, among other things. Claims have emerged in significant numbers based on overstatements about the use of AI including the use of AI in drafting corporate disclosure statements. To the extent claims involve AI, they are no different than similar claims that involve other issues or technologies.
- **Errors and Omissions (E&O) Technology Liability Insurance:** These policies guard against errors and omissions in the use of a company's technology. As with D&O insurance, claims alleging AI-related errors, omissions, or failures in the performance of a retailer's technology-enabled services or systems should fall squarely in the insuring agreement's definition of an insured wrongful act.

The concept that these traditional lines of coverage should respond to AI-related claims is known as "silent AI," since the policies do not specifically mention AI. But when insurance policies contain broad grants of coverage, the reasonable interpretation is that they respond to all claims within that grant of coverage unless they are specifically excluded elsewhere in the policies. Where there is no mention of AI in the policy, the reasonable conclusion is that it is covered. As discussed below, for this reason insurers are rolling out various forms of "AI exclusions" as endorsements to traditional lines of insurance.

AI Claims Are Testing Traditional Lines of Coverage

Recent litigation shows how AI claims map onto traditional insurance lines. For example, in *Baker v. CVS Health Corp.*, CVS faced a putative class action lawsuit alleging that its use of an AI-powered screening tool used during the interview of prospective hires resulted in violations of a Massachusetts statute making it unlawful to require or administer a lie detector test as a condition of employment or continued employment. While the technology was novel, the alleged violations of the statute were squarely within the types of risks typically addressed by EPLI, cyber, and D&O insurance.

The case was ultimately settled but illustrates a broader trend: AI-related claims often arise in familiar legal categories, but they introduce added complexity around vendor reliance, algorithmic opacity, and regulatory scrutiny—factors that can complicate coverage analysis and claims handling.

Coverage Challenges and the Rise of AI Exclusions

As AI-related risks become more common, insurers are reassessing their exposure. Even absent AI-specific exclusions, retailers may face threshold coverage disputes about AI-related claims, including:

- Whether an AI-driven loss constitutes "bodily injury" or "property damage";
- Whether algorithmic outcomes trigger intentional acts or expected injury exclusions;
- Whether an AI-driven loss requires a showing of physical loss or damage to property; and
- How liability is allocated between retailers and third-party AI vendors.

More specifically, some insurers are introducing explicit AI exclusions across traditional product lines. These exclusions range from narrow provisions targeting generative AI content to broad so-called "absolute" AI exclusions that purport to exclude coverage for any claim "arising out of" the use, deployment, or development of AI. Such exclusions are now appearing in CGL, EPLI, cyber, D&O, E&O, and fiduciary policies.

The proliferation of these exclusions signals a material shift in insurers' risk appetite. Coverage that might once have been assumed under traditional, legacy policies may no longer be available upon renewal. It is imperative, therefore, that retailers carefully review their policies and, where an insurer attempts to limit or exclude AI, negotiate or restructure the insurance program.

Affirmative AI Insurance: An Emerging Option

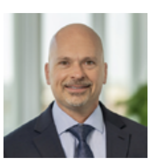
In response to these developments, a nascent market for affirmative AI insurance products is beginning to emerge. These policies are designed to address risks that may be excluded under traditional legacy policies, or for which coverage may be uncertain, such as: erroneous or harmful AI outputs; algorithmic or model failures; performance guarantees tied to AI tools; or certain AI-specific third-party liability exposures.

While still evolving, these products reflect a growing consensus that AI presents a distinct risk profile requiring targeted underwriting and risk transfer solutions.

Key Takeaways for Retailers

AI is reshaping retail operations and the insurance landscape. For retailers, the takeaway is not that existing insurance is obsolete but that it can no longer be assumed. As AI becomes embedded across the business, retailers must take a deliberate approach to identifying, mitigating, and transferring the ethical, operational, and legal risks that accompany its use.

Cases like *Baker v. CVS Health Corp.* illustrate how quickly AI adoption can translate into litigation and regulatory exposure. As AI moves from experimentation to core infrastructure, proactive coordination between legal and risk management becomes essential. Experienced insurance coverage counsel can help retailers evaluate evolving coverage limitations, address emerging gaps, and position their insurance programs to respond effectively as AI-related risks continue to develop. •

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What California Retailers Need to Know About S.B. 642:

The Pay Equity Enforcement Act

California's S.B. 642, the Pay Equity Enforcement Act, is poised to reshape the landscape for all employers—but retailers, in particular, need to pay close attention. With the law recently taking effect on January 1, 2026, and significant new obligations for pay transparency and anti-discrimination, retail businesses should be proactive. The retail sector's reliance on large, diverse workforces, variable pay structures, and frequent hiring makes these changes especially impactful.

Why Retailers Should Be Aware

Retailers often operate with multiple locations, high headcounts, and various job categories, from hourly sales associates to store managers. These environments make pay equity compliance both critical and complex. S.B. 642's expanded requirements mean that inconsistencies or oversights in wage structures, job postings, and recordkeeping can quickly lead to liability and costly litigation.

Key Legal Changes Affecting Retailers

Pay Transparency in Job Postings

Previously, employers with 15 or more employees had to include a pay scale for open positions in job postings, but the law allowed a broad pay range for the position at large. The new law now mandates a "good faith estimate" of the actual wage or salary range for what a new hire will be offered upon hire, not just the generic pay range for the position.

This means pay ranges must closely reflect what candidates will actually earn. Posting overly broad ranges for entry-level sales roles or management roles is no longer compliant. Since retailers hire frequently and for similar positions at different locations, consistency and accuracy are crucial.

Expanded Anti-Discrimination Protections

The act amends California's pay discrimination law to prohibit disparities between employees of "another sex," rather than just the "opposite sex." This extends protections to non-binary workers and others who do not identify as male or female.

Retailers must ensure that compensation decisions are free from gender bias across all gender identities, not just men and women. With diverse workforces in retail, this change increases the need for careful pay audits performed under privilege and training.

Broader Definition of Wages

S.B. 642 expands the definition of "wages" to include bonuses, commissions, stock options, travel reimbursements, and other benefits—not just base hourly wages or salary.

Compensation packages often include commissions, performance bonuses, or expense allowances. Retail employers must now compare all forms of pay when evaluating equity, not just base pay. This broader definition requires a holistic approach to pay equity analysis.

Longer Statute of Limitations and Damages Period

The time for employees to file pay discrimination claims rises from two to three years, and employees can recover up to six years of lost pay under a continuing violation theory (up from three years previously).

With high employee turnover and frequent rehires, retailers must ensure accurate, long-term payroll records. Poor recordkeeping could make defending against claims much harder.

What Retailers Should Do to Prepare

Audit and Update Job Postings

- Ensure job postings across all platforms reflect realistic, location-specific pay ranges for new hires.
- Standardize pay ranges for similar roles across locations unless justified by business reasons (e.g., cost-of-living differences).

Conduct Comprehensive Pay Equity Reviews

- Review pay practices for all positions, considering all forms of compensation.
- Work with counsel or consultants to identify and remediate pay disparities, especially those that could affect employees of different sexes, races, or ethnicities.

Enhance and Extend Recordkeeping

- Retain payroll and compensation records for at least six years.
- Implement or upgrade digital recordkeeping to enable secure, accessible storage and retrieval.

Train HR, Store Managers, and Recruiters

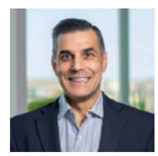
- Educate hiring teams about the new requirements for pay disclosures and the expanded definition of wages.
- Provide anti-bias and pay equity training for those involved in compensation decisions.

Update Policies and Employee Communications

- Revise employee handbooks and policies to reflect the new law.
- Communicate clearly with employees about your company's commitment to pay equity and the procedures for raising pay concerns.

Conclusion

S.B. 642 requires California retailers to take a closer look at how they advertise pay, determine compensation, and maintain records. Given the volume and variability of hiring in retail, these changes present both a compliance challenge and an opportunity to lead on pay equity.



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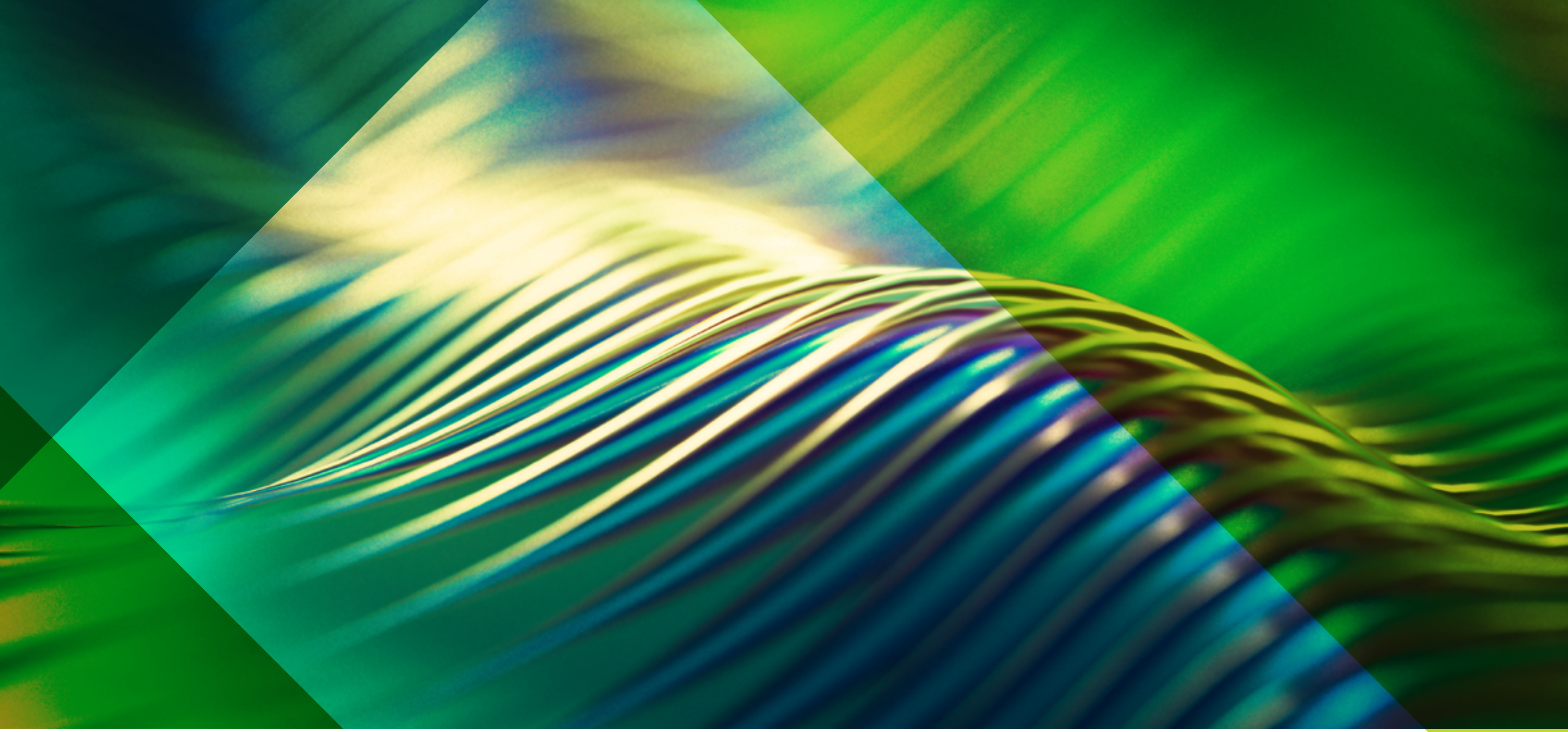


Retailers Brace for Upcoming Bans on Consumer Products Containing PFAS Chemicals in 2026 and Beyond

Retailers across the country are gearing up for new state-level restrictions on products sold in stores and online that contain per- and polyfluoroalkyl substances (PFAS). PFAS are a class of man-made chemicals found in numerous types of consumer, industrial, and commercial products and are known for their grease- and water-resistant properties. Due to the persistence and pervasiveness of these substances, the federal government and, especially, state environmental agencies have prioritized studying, monitoring, and regulating PFAS exposures in response to public health and environmental concerns.

A total of 18 states have PFAS product restrictions ranging from bans to reporting to labeling requirements. The laws initially targeted food packaging, cosmetics, and textiles, but have expanded to include all types of consumer products. Each year for the past four years, approximately 200 PFAS-related bills have been introduced in state legislature, and we expect this trend to continue, potentially adding to the growing patchwork of PFAS restrictions. Notably, in 2025, the state of California, which represents the largest state economy in the US and the fifth-largest economy in the world, came close to passing a ban for all products containing intentionally added PFAS. The bill was ultimately scaled back due to significant business opposition and then vetoed by Governor Gavin Newsom; however, the significant support in the California state legislature that nearly led to passage is reflective of increasing pressure on lawmakers to address PFAS in a broad range of applications.

In 2026, six states will have new restrictions going into effect for numerous types of consumer products containing PFAS, including cookware, cleaning products, apparel, furniture, cosmetics, dental floss, and menstrual products. The table below provides a high-level summary of new restrictions on the sale of PFAS-containing products:

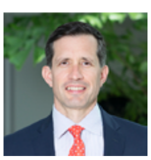
State	Product(s)	PFAS Restriction	Compliance Date
Colorado	Artificial turf, cookware, cleaning products, ski wax, menstrual products, dental floss	Ban	1/1/2026
Connecticut	Outdoor apparel for severe wet conditions	Label	1/1/2026
	Turnout gear (i.e., firefighter PPE)	Notification to purchaser	1/1/2026
	Cosmetics, apparel, juvenile products, cleaning products, cookware, carpets and rugs, dental floss, ski wax, fabric treatments, upholstered furniture, textile furnishings, menstrual products	Reporting and labeling	7/1/2026
Maine	Dental floss, cleaning products, cookware, cosmetics, upholstered furniture, juvenile products, textile articles, ski wax, menstruation products	Ban	1/1/2026
Minnesota	Pesticides	Annual reporting requirement	Effective 1/1/2026 (reports due by end of year)
	All products	Reporting	7/1/2026
Vermont	Food packaging, cosmetics, menstrual products, incontinency protection products, juvenile products, aftermarket stain and water-resistant treatments, textiles, artificial turf, firefighter PPE, carpets and rugs, ski wax	Ban	1/1/2026
Washington	Leather and textile furnishings for indoor use	Ban	1/1/2026

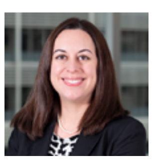
In 2027, eight states will have new restrictions go into effect for dozens of products. Many states have more PFAS bans on the horizon for 2028, 2029, etc., and in 2032, three states will ban *all products* sold or distributed in their states containing intentionally added PFAS, unless the product meets an exemption.

The breadth of PFAS laws will ultimately subject millions of products to various labeling, disclosure, and reporting requirements or bans. Due to the complexity of product supply chains and prevalence of imported products or components from foreign countries, retailers can be vulnerable to regulatory enforcement or litigation over chemicals of concern in consumer products. Retailers are often not privy to the chemical composition, let alone PFAS content, of the products they sell unless their material suppliers are willing and able to provide them with the information. Limited knowledge, stringent state restrictions, the extremely broad definition of PFAS that all states have adopted, and customer demand for greater chemical ingredient transparency create a challenging regulatory environment.

Thus, it is critical for retailers to develop internal due diligence programs and arrangements with suppliers to mitigate such liability. Retailers that are subject to these restrictions should consider the following steps to address PFAS in their supply chains:

- **Evaluate state restrictions to see if the retailer meets an exemption.** Some, but not all, states have included in their laws protections for retailers, such that if the retailer was not put on notice in writing by the manufacturer about the product's PFAS content, then the retailer cannot be held liable. However, some states also define the manufacturer of a product to include the product importer, which in some cases could be the retailer. Many state laws are silent regarding the role of retailers and simply prohibit the sale or distribution of a PFAS-containing product, making any person who sells the product potentially liable. Therefore, it is important to review each state's restrictions to see how retailer liability is addressed.
- **Implement an internal due diligence program to evaluate products and fill information gaps.** To fill information gaps, it may be necessary to survey upstream suppliers or test products for PFAS content. It is critical to develop processes that leverage points of consistency between state requirements (e.g., the definition of PFAS, PFAS being intentionally added) while accounting for nuances in the laws.
- **Address liability in supplier agreements.** When possible, include provisions in contracts that shift liability onto the supplier for failure to notify the retailer of PFAS presence or comply with PFAS restrictions.
- **Be vigilant in reviewing product claims and corporate sustainability commitments.** Plaintiffs have begun to scrutinize claims that products are "safe," "natural," or free of specified chemicals, alleging that such claims are "misleading" under state consumer protection laws where PFAS is allegedly present. When making product-related sustainability claims (or broader corporate commitments), it is important to ensure the company has done sufficient due diligence on PFAS presence.
- **Tracking of new laws**. As state requirements for products containing PFAS continue to emerge, companies will need to regularly track these developments and prepare to assess the presence of PFAS in their supply chains. The Hunton PFAS in Products State Law Tracker is a publicly accessible tool to help companies track state statutes and regulations that ban or impose reporting or disclosure requirements for products containing PFAS.





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Retail and Consumer Products M&A:

What to Watch for in 2026

Overview of 2025

2025 proved to be a remarkable comeback year for global M&A, with both deal volume and value surging after the challenging 2023 to 2024 period, when elevated interest rates and economic uncertainty dampened dealmaking activity.

While the retail and consumer products sector saw decreased overall deal volume, the increase in megadeals (transactions valued at $1 billion or greater) led to increased deal value year over year. Notable megadeals included Dick's Sporting Goods' completed acquisition of Foot Locker, Sycamore Partners' completed acquisition of Walgreens Boots Alliance, and Keurig Dr Pepper's announced acquisition of JDE Peet's, which is expected to close in the first half of 2026.

Retail and consumer products companies felt economic headwinds more acutely than other sectors during 2025. Tariff uncertainty directly affected cost structures for companies reliant on imported goods; inflation compressed margins across labor-intensive retail operations; and shifting consumer preferences toward value challenged traditional retail models. The ongoing transformation from brick-and-mortar to omnichannel models continued to require significant capital investment, making near-term cash flows less predictable for potential buyers. The question now is whether the M&A market, both broadly and in the retail and consumer products sector, can navigate these headwinds and sustain continued growth into 2026.

Looking Forward to 2026

Despite continued headwinds from economic uncertainty and inflationary pressures, we expect the global M&A market will continue its upward trajectory in 2026, with retail deal value increasing as strategic consolidation continues.

Megadeals: The megadeal trend will likely continue as companies pursue transformational scale to compete with dominant players like Amazon and Walmart, and as private equity firms deploy record levels of dry powder on large platform acquisitions.

Private Equity: With approximately $2.2 trillion in dry powder and continued growth of the private credit market, sponsor activity should increase in 2026. Private equity will target undervalued assets with strong real estate portfolios, subscription-based revenue models, and opportunities for digital transformation. Private credit has made it easier for PE firms to finance large transactions without relying on traditional syndicated loan markets, reducing execution risk.

Interest Rates: The Federal Reserve began cutting interest rates in September 2024, with additional cuts in November and December 2024, then resuming cuts in September, October, and December 2025, reducing the federal funds rate from 5.25–5.50 percent to 3.50–3.75 percent. Fed guidance indicates only one additional 25 basis point cut in 2026, though market expectations may differ. The cumulative 175 basis point reduction has improved deal economics, and M&A activity could remain robust even without significant additional rate cuts, particularly as private credit offers competitive financing alternatives.

Antitrust: Companies may be more willing to pursue M&A given perceived reduced antitrust scrutiny from the Trump administration, which has signaled a more permissive approach to enforcement compared to the Biden administration. However, significant retail transactions like Dick's/Foot Locker attracted scrutiny from Senator Elizabeth Warren, who urged the FTC and DOJ to closely review the transaction, arguing it could reduce competition and raise prices. Large deals will continue to face careful review regardless of the administration's general posture.

Tariff Uncertainty: Tariff uncertainty may make some companies hesitant to pursue M&A, particularly those reliant on imported goods. This concern is acute in retail, where the vast majority of apparel and footwear sold in the United States is imported. The Trump administration's seeming use of tariffs as a negotiating tool has created valuation challenges, as buyers struggle to model future cost structures while tariff policy remains to some degree unpredictable. This uncertainty may push retail M&A toward domestic-focused businesses or companies with diversified supply chains.

Other Retail-Specific Trends

Sector-specific dynamics driving retail M&A in 2026 include:

- **Omnichannel Integration:** Retailers with scaled e-commerce operations and strong last-mile delivery capabilities will command premium valuations as acquirers seek to compete with Amazon's logistics network.
- **Direct-to-Consumer Consolidation:** Continued roll-up activity among DTC brands as smaller players struggle with customer acquisition costs and larger platforms seek to add differentiated products to their portfolios.
- **Beauty and Wellness Integration:** The convergence of beauty, personal care, and wellness presents significant M&A opportunities. Digitally native, founder-led brands with strong social media presence and efficacy-driven formulations will attract both strategic and private equity buyers.
- **Technology-Enabled Retail:** Companies leveraging AI for inventory management, personalized marketing, and dynamic pricing will be attractive targets as traditional retailers seek to modernize their operations.
- **Grocery and Convenience:** Consolidation may accelerate as operators seek scale to negotiate better terms with suppliers and invest in automation.
- **Continuation Funds & Secondary Transactions:** As private equity firms manage aging portfolio companies, continuation vehicles and secondary transactions are expected to account for approximately 20 percent of exits in 2026, according to Cambridge Associates. This provides liquidity solutions for limited partners while allowing general partners to extend hold periods for high-conviction retail assets, particularly as traditional exit channels remain challenged.

We remain cautiously optimistic about the overall outlook for 2026 retail and consumer products M&A. While macroeconomic uncertainty and tariff concerns may dampen activity in the first half of the year, we expect dealmaking to accelerate in the second half as companies gain clarity on trade policy and interest rates stabilize. As ever, M&A will remain an indispensable tool for retail companies seeking to transform business models, expand into new markets, and reposition themselves for long-term growth in an increasingly competitive landscape. •


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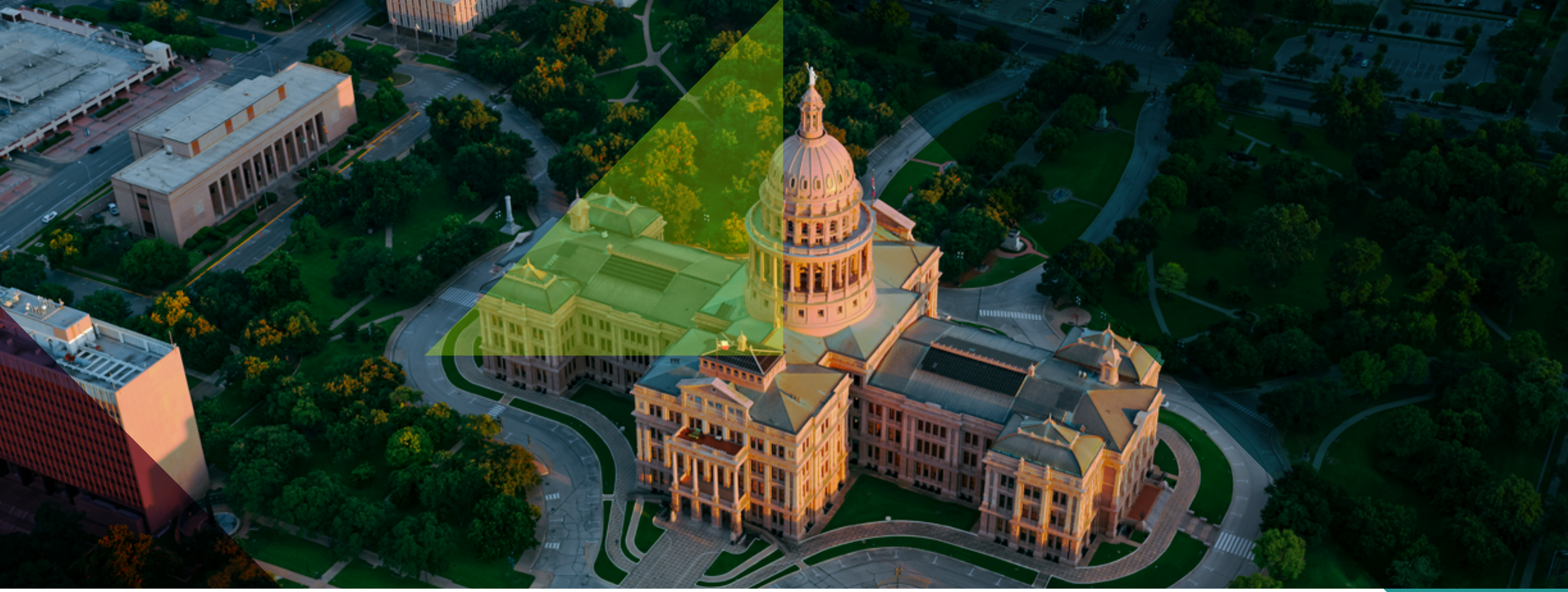

Looking Ahead to 2026:

More Patent Suits in Texas?

Retail and consumer products companies in the United States face a constant threat of patent infringement lawsuits, and that threat could soon increase, given new discretionary denial procedure for *inter partes* reviews (IPR) instituted by the US Patent and Trademark Office (USPTO). A jurisdiction where we expect to see an uptick in patent litigation is the Eastern District of Texas.

When a retail or consumer products company is sued for patent infringement in district court by a patent owner, there are many actions the company may take to fight back. One option is to bring a challenge before the USPTO to the validity of the patent being asserted.

Until recently, the preferred challenge of many patent litigation defendants was to request an IPR. Historically, the director of the USPTO delegated the authority to institute an IPR proceeding to the Patent Trial and Appeal Board—which would then assess the merits of an IPR petition and, more than 60 percent of the time, institute an IPR. But by mid-2025, for reasons we discussed in A Recent Change In Patent Office Procedures Makes Challenging Patents More Difficult, the IPR institution rate had dropped to approximately 35 percent. And now that the director makes all IPR institution determinations, the IPR institution rate is around 10 percent (as of December 15, 2025, with 13 out of 113 petitions being instituted).

We have suggested that retailers and consumer products companies accused of patent infringement may turn to *ex parte* reexamination (EPR), which also allows for a post-grant review of validity before the USPTO, as an alternative to IPRs. Like with an IPR, institution of an EPR proceeding can lead to a stay of related district court litigation. However, *the district court stay rate is lower for EPRs*, in part because the EPR process is slower (taking approximately 18 to 24 months start to finish, compared to approximately 18 months for an IPR, which has a statutorily set timeline).

What Does This Mean for Patent Litigation in District Court?

With a decreased risk of IPRs' being instituted, patent owners may be emboldened to file more patent infringement lawsuits in the coming year. And even if EPRs are filed and instituted, related district court litigation is more likely to proceed to trial.

Statistics we evaluated using Lex Machina show a more than 50 percent chance of obtaining a district court stay based on a corresponding IPR or EPR. However, some popular patent venues are below that average: For example, the stay rate for the Eastern District of Texas (EDTX) is around 40 percent. That means, in EDTX, more than half of the stay requests are denied, and the district court litigation proceeds in parallel.

EDTX has historically been a preferred venue for patent infringement filings; it has a reputation for fast trials, well-established patent case procedures, and plaintiff-friendly verdicts. All this, coupled with the lower rate of stay and the USPTO procedural changes making it harder to challenge patents with IPRs, indicates that EDTX may become an even more attractive venue for patent holders to file suit. Even if an asserted patent is challenged in an EPR, the infringement litigation in court will most likely continue.

Thus, we believe that when a retail or consumer products company is sued for patent infringement in federal district court by a patent owner, whether a competitor or non-practicing entity, there is a fairly high chance that the suit will be brought in EDTX—assuming the company has a presence there, which includes the northern counties of the Dallas-Fort Worth metroplex. Our patent team's experience in EDTX is extensive—we are deeply familiar with the venue, judges, and local practitioners—having defended claims of patent infringement in the venue for more than 20 years and in over 100 cases. Should you find yourself being sued for patent infringement in EDTX, please do not hesitate to reach out to discuss your options. •




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Retail GC Hot Topics Newsletter

The firm is pleased to provide an informative communication focused on the issues facing retail general counsel. This quarterly publication features items in every area in which retail-related developments arise, including advertising, antitrust, consumer health and safety, corporate governance and securities disclosure, immigration, insurance, intellectual property, labor and employment, privacy and cybersecurity, and retail finance.

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Privacy on the Auction Block:

Consumer Data in Bankruptcy

Consumer data is among the most valuable digital assets modern retailers hold. They routinely collect and store voluminous amounts of personally identifiable information (PII) from customers—names, addresses, email addresses, phone numbers, and purchase history, among other data. Retailers use it to develop and optimize their business strategies. The use of artificial intelligence to further leverage this information makes PII even more valuable. But PII is valuable not only to the retailer that collected it. The same information can be used by a wide range of entities and industries across different use cases. When retail businesses face bankruptcy, the fate of this valuable data becomes a focal point where privacy concerns and value maximization collide. The recent bankruptcy of a cryptocurrency platform, Celsius Network, examined important privacy and security issues with respect to the sale of PII through Chapter 11 bankruptcy, while illustrating the balance the Bankruptcy Code aims to strike between privacy interests of consumers and commercial interests of distressed businesses and their creditors. Below, we examine the key issues, legal frameworks, and evolving challenges of attempting to monetize consumer data in recent retail bankruptcies.

The Bankruptcy Code and PII

The sale and transfer of consumer data in bankruptcy is primarily governed by two provisions of the Bankruptcy Code: section 363 governing asset sales, and section 332 governing appointment of a consumer privacy ombudsman (CPO), as more fully described below.

- **Asset Sales: 11 U.S.C. § 363.** Section 363 of the Bankruptcy Code governs when a debtor may use, sell, or lease its assets. When a debtor seeks to sell its assets outside the ordinary course of business, a bankruptcy court must approve such sale following notice to interested parties and a hearing. However, additional consumer protections are triggered for debtors with, or required by law to maintain, a policy prohibiting the transfer of collected PII. In those instances, any sale must either (i) be consistent with the relevant policy or (ii) come following the appointment of a CPO under section 332 of the Bankruptcy Code and otherwise comply with applicable non-bankruptcy privacy law.
- **Consumer Privacy Ombudsman: 11 U.S.C. § 332.** A CPO is a disinterested person, appointed when required under section 363, tasked with assisting the court to analyze the facts, circumstances, and conditions of a proposed PII sale. CPOs may investigate the debtor's privacy practices, assess the risk to consumer privacy involved in the proposed sale, and recommend risk mitigation strategies (such as restricting the types of purchasers eligible to participate in the transaction, providing public notice of the sale, or including an opt-out for consumers). While CPO recommendations are non-binding, courts often adopt their suggestions as procedural safeguards to help ensure the integrity of the bankruptcy process.

The tension between 363 and 332 is inherent: no CPO is necessary if the proposed transaction is consistent with the debtor's privacy policy. Yet, a CPO's primary purpose is to aid the court in interpreting and understanding the very same policy that the court is analyzing to determine whether a CPO is necessary. This statutory structure gives courts significant discretion in determining when, and to what extent, they would benefit from the assistance of a CPO. In recent cases, courts have exercised their discretion and appointed a CPO.

CPO Use Case

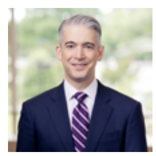
When Celsius Network, LLC (Celsius) filed bankruptcy in 2022, it possessed the financial and personal data of approximately 600,000 customers—including wallet addresses, transaction histories, and crypto holdings.[1] During its case, Celsius proposed to sell consumer PII under section 363 of the Bankruptcy Code, prompting the Office of the United States Trustee to file a motion for the appointment of a CPO.

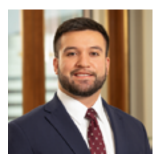
Celsius objected to the appointment of a CPO, arguing that it was unnecessary because the proposed sale complied with its existing privacy policy. The court found that "even if a sale will comply with the Debtors' privacy policy," it has discretion to appoint a CPO if a neutral third party would be helpful. In this instance, the volume and sensitivity of the data involved contributed to the court's decision to appoint a CPO. The court's decision likely turned on a massive data leak that occurred earlier in the case when counsel inadvertently filed a 14,500-page PDF containing an internal user database with recent transaction data of 500,000 customers. Overall, the court's decision underscores that the appointment of a CPO can be warranted when the circumstances demand additional safeguards, even if the sale technically complies with existing privacy policies.

As Data Collection Increases, So Will Consumer Protection

As discussed above, sale of PII through section 363, where the sale does not comply with the debtor's privacy policy, requires compliance with applicable non-bankruptcy law. Since 2018, states such as California, Colorado, Illinois, Virginia, and others have enacted comprehensive consumer privacy laws. Both federal and state governments have long scrutinized PII sales through bankruptcy. For example, in *RadioShack*, a proposed sale of PII drew objection from the Federal Trade Commission (FTC) and 37 state attorneys general.[2] The court ultimately approved the sale following appointment of a CPO and subject to conditions suggested by the FTC. With the continuing development of privacy law at the state level, dedicated privacy agencies and attorneys general are likely to increasingly scrutinize bankruptcy-related data sales. Further, retailers may face substantial difficulty obtaining approval of PII sales where they operate in multiple states, subject to numerous state privacy laws, making compliance challenging. Even determining which state laws apply can be a legally challenging question as the retail industry increasingly moves to online platforms. These considerations tend to favor the appointment of a CPO, which serves as yet another roadblock.

Looking ahead, the use of AI to predict consumer behavior and otherwise leverage retail business strategies should only increase the value of collected PII. PII may represent one of the most valuable assets in future retail industry bankruptcies, particularly for retailers that operate in the digital space. The ability to monetize those assets will become paramount. The role of the CPO will become more prominent and complex as courts considering PII sales grapple with harmonizing federal bankruptcy procedures and expanding privacy laws at the state level. We expect that the competing interests of stakeholders looking to maximize value from sales of PII in distressed retail cases and regulators seeking to protect consumer privacy will continue to play out over the coming years. •

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1 *See Celsius Network, LLC*, Case No. 22-10964 (Bankr. SDNY 2022).

2 *See RadioShack*, Case No. 15-10197 (Bankr. D. Del. 2015).

Immigration Compliance in an Era of Increased Enforcement

As the second year of the new administration approaches, its enhanced immigration-related enforcement efforts will continue to affect all types of US employers, including those in the retail space. Over the last year the Immigration and Customs Enforcement Agency of the Department of Homeland Security (DHS) implemented an aggressive multifaceted strategy and greater coordination with local law enforcement that saw:

- Increased frequency of unannounced worksite inspections;
- Enhanced scrutiny of I-9 identification/employment verification documentation;
- Expanded administrative audits; and
- Targeted investigations of industries known to employ larger populations of unauthorized workers.

The consequences for non-compliance have never been more serious. Not only are employers subject to civil fines and penalties, but those found complicit in the hiring of undocumented workers can be charged under criminal laws as well. This can lead to the sudden loss of the workforce that will disrupt supply chains, production, and services provided by US employers. Those that prepare in advance are better situated to avoid or greatly reduce penalties for non-compliance and the loss of portions of their workforce.

What Types of Penalties Could Be Levied by DHS?

DHS can impose both civil (monetary) and criminal penalties for non-compliance. For example, in the I-9 context, paperwork violations can range from $288 to $2,861 per violation even if the workers are legally authorized to work. Violations for knowingly hiring/employing unauthorized workers can range from $716 to $5,724 per worker and increase substantially if there have been prior offenses by the company. In addition, an I-9 inspection can result in the loss of employees DHS deems unauthorized to work, which can disrupt a business on short notice.

What Should Employers Do if DHS Shows Up at Our Headquarters or Retail Locations?

Employers should create detailed plans of action to follow if DHS shows up so that those at the work locations know what they should and should not do. The person on the front line—the receptionist, the local manager, the security guard, etc.—should:

- Know what to say/not to say to the officer;
- Not sign any documents;
- Immediately contact the designated company official to either talk to the officer by phone or meet with the officer in person as soon as possible;
- Not allow the officer anywhere on the premises other than the reception area or a room that the company has designated for DHS officers to wait in; and
- Follow other predetermined protocols developed for these situations.

Hunton advises more than **600 retail clients** across a broad spectrum of complex transactional, litigation and regulatory matters in the US and worldwide.

What Steps Should Employers Take to Minimize Risk in Advance of a DHS Enforcement Visit or I-9 Audit?

Employers need to develop and implement comprehensive compliance programs that include document management, training/education, and I-9 verification procedures:

Document management

- Conduct regular I-9 audits with immigration counsel.
- Develop recordkeeping procedures.
- Maintain I-9 forms and supporting documents.
- Establish protocols for retention/destruction of I-9s and related documents.

Training/Education

- Provide frequent training for human resources and other personnel involved with interviewing, hiring, and onboarding new hires about the I-9 process and dos/don'ts for those requiring work-authorized visas.
- Train managers about how to handle immigration-related matters for employees requiring work-authorized visas or documents.
- Develop easy to follow protocols for responding to government inquiries and visits by government officials.

I-9 Verification Process

- Consider enrolling in E-Verify if not already enrolled.
- Review internal I-9 verification procedures to streamline the process to avoid common paperwork errors.
- Implement standard hiring and verification procedures.
- Establish clear procedures for handling identity and/or work authorization documents that appear to be suspect.
- Maintain records of the company's I-9 verification efforts.

Employers that are proactive in developing programs described above, and those who regularly conduct internal audits of their I-9s and existing programs to ensure ongoing compliance, are better situated to deal with DHS investigations and audits. •

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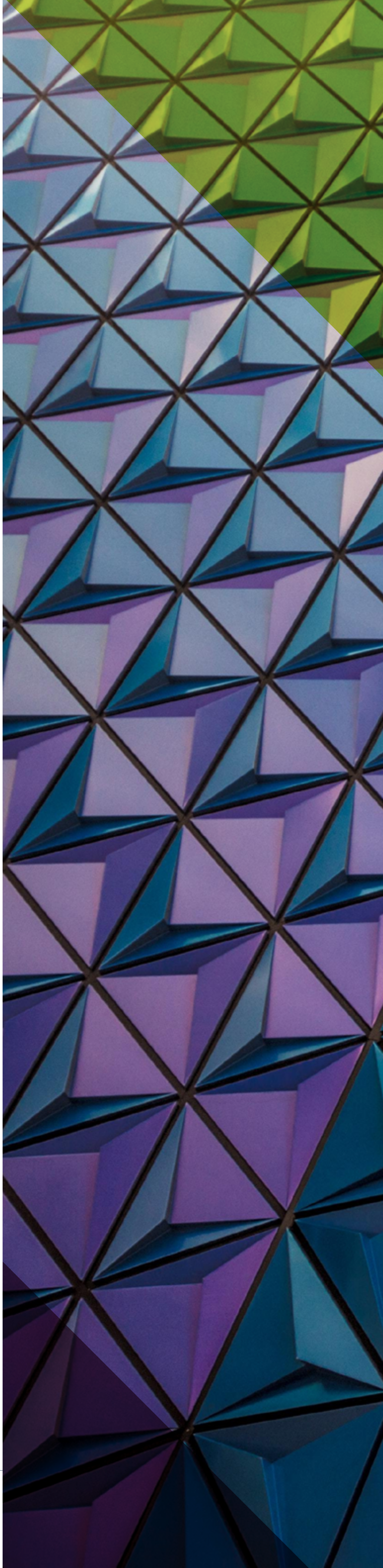

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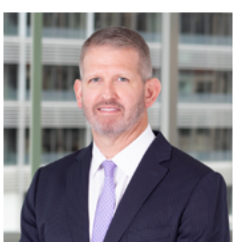

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About Us

Hunton is a global law firm handling transactional, litigation and regulatory matters for clients in myriad industries including retail and consumer products, energy, financial services, real estate, and technology. Areas of practice focus include labor and employment, capital markets, mergers and acquisitions, intellectual property, P3, public finance and infrastructure, and privacy and cybersecurity. With offices across the United States and in Europe, the Middle East and Asia, we're aligned with our clients' businesses and committed to delivering exceptional service.

Our retail industry lawyers represent businesses at every step, from factory floor, to retail outlet, to online store. Our extensive list of international, national and regional clients includes many well-known restaurant chains, malls, home improvement centers, supermarkets, and media and entertainment companies, as well as manufacturers and retailers of apparel, baby products, cosmetics, electronics, fine jewelry, luxury goods, toys and other merchandise. Our retail team is composed of more than 300 lawyers who represent retailers in the Fortune 500® and virtually every retail sector.

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