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PFAS: What's All the PFUSS?

Any issue that poses the potential for health risks and/or liabilities associated with uncertain regulatory requirements demands corporate attention. Per- and polyfluoroalkyl substances (“PFAS”), a group of human-made chemicals, have flooded the news cycle, heightened regulatory attention and are ubiquitous. Whether or not a company knowingly made or used such materials, PFAS risk is an issue that requires C-Suite consideration.

Per- and polyfluoroalkyl substances (PFAS) are a group of human-made chemicals that encompass ~4,000 different compounds, many around since the 1940s. PFAS are found in commonly encountered products, including non-stick coatings, waterproof fabrics, firefighting foams, car wash soaps/waxes, floor waxes, architectural resins, cosmetics and other consumer products. PFAS have earned the nickname “forever chemicals” because they are ubiquitous in the environment, are mobile, bioaccumulate and do not easily break down in the environment or human body. Often referred to as “emerging contaminants” – given recent developments (including the proliferation of articles in the popular press reporting on PFAS found in food packaging and bottled water), it would be unwise to assume they are anything but “emerged” contaminants.

The rapidly growing body of scientific research raises concerns over potential links between PFAS and a range of health concerns, including low infant birth weight, immune system impacts, elevated cholesterol, cancer and thyroid hormone disruption. PFAS are pervasive in the environment (soil, groundwater, surface water and drinking water), leading to concerns about human exposure and ecological risks. However, there is risk and there is risk that matters – the distinction relative to PFAS is not yet clear because much is still unknown about PFAS, including: how to accurately/uniformly sample for them in the various media (e.g., soil, storm water, groundwater) and develop reliable and agreed-upon laboratory analytical methodologies to measure them; what the background levels are and for which compound(s); and how or if they should be (or even can be) cleaned up.

If you didn't manufacture PFAS, is this an issue you should consider?

The answer is “yes.” As noted above, PFAS have been commonly used for a variety of applications and are found in many common materials. PFAS are present in many industrial fire-fighting foams (e.g., used at petroleum refineries, airports, parking complexes, military bases, defense manufacturing contractors, fire stations). Also, PFAS were used as additives (e.g., mist suppressants) in many manufacturing operations (e.g., semiconductors/electronics, plating, chemicals, textiles and paper). Due to the fact that evolving actionable concentrations of PFAS are in the parts-per-trillion (ppt) range, even minor applications/uses of PFAS should be considered. A review of a company's operations is the best strategy to determine whether PFAS issues are relevant to its business.



Given the above, companies should consider developing risk management plans (RMPs) to: track developments in the rapidly evolving PFAS legal and technical landscape; evaluate their risks/liabilities associated with past and current operations; evaluate non-PFAS alternative products; and deploy coordinated legal and technical strategies to manage potential liabilities and impacts to future business transactions.

Legal Developments

Although not a focus of this alert, it is important to note that the PFAS litigation landscape is taking shape nationally. Manufacturers like 3M and DuPont are defending product liability and environmental claims, often concluding in nine-figure resolutions. Further, drinking water utilities are finding themselves as defendants and plaintiffs, facing claims from customers regarding the quality of the water and pursuing their own claims based on the source of contamination. In parallel, as the scientific/medical knowledge of PFAS matures, federal and state regulators are scrambling to better understand and properly manage human health and eco-risks (actual and perceived) associated with PFAS.

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Federal

Currently, no enforceable federal standards for PFAS have been established, but under the Safe Drinking Water Act (SDWA), the U.S. EPA set a drinking water health advisory level for certain PFAS (i.e., PFOA and PFOS) of 70 ppt. EPA also released a PFAS Action Plan earlier this year that, among other things, advises: (i) establishing SDWA levels for two of the most well-known PFAS chemicals, PFOA and PFOS; and (ii) designating PFOA and PFOS as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Congress is currently evaluating multiple bills that would include additional federal limits and restrictions on PFAS which, if passed, could have significant ramifications.

States

Some states are not waiting for federal action, however, and have started to set their own PFAS limits. States have proposed limits of anywhere from 5 ppt to 400 ppt, depending on the exposure scenario (e.g., drinking water, soil remediation target) and the specific PFAS chemical. The state regulatory frameworks address cleanup requirements, drinking water safety, and/or use prohibitions/restrictions. While many states have initiated a regulatory framework addressing one or more of these issues, few, if any, have implemented a comprehensive framework addressing the entire spectrum of PFAS risks. The rapidly evolving state regulatory landscape leads to inconsistencies among jurisdictions, which presents significant risk management hurdles for companies with operations (and/or waste disposition) in multiple venues.

In Connecticut, for example, Governor Lamont recently established the Connecticut Interagency PFAS Task Force. The Task Force, led by the Department of Public Health and Department of Energy and Environmental Protection but embracing involvement from the regulated community, is charged with developing a PFAS Action Plan by October 1st to: (1) minimize health risks; (2) minimize future releases of PFAS; and, (3) identify, assess and clean up historic releases of PFAS to the environment.



What can companies be doing now?

Looking Back: With many states and the federal government evaluating or actively implementing PFAS regulations, legacy liabilities may increase for current and former owners/operators of contaminated and/or remediated sites. Federal and state agencies have the ability to revisit closed sites (e.g., under common reopener provisions found in “settled” consent orders/decrees or other regulatory closure/ “no further action” letters) when regulations are promulgated that require testing for, and potential remediation of, “new” contaminants. For example, previously remediated sites may not have effectively addressed PFAS, leaving regulators to request sampling and, if present, impose additional remediation obligations. Thus, companies should evaluate their potential exposure at currently and formerly owned/operated sites (as well as sites where they historically sent their waste streams and/or locations to which they discharged process wastewater). A company’s evaluation should include a review of: (1) prior consent orders/decrees and other regulatory closure letters; (2) prior transactional documents where it may have retained (or discharged) obligations/liabilities for PFAS; and (3) historical insurance policies (and any settlements related thereto) to determine what, if any, coverage may be available for prior activities or releases associated with PFAS. Such statutory and contractual liabilities could result in unanticipated and significant remediation costs and other exposures (such as third-party “toxic tort” claims).

Looking Forward: The pace of PFAS regulation will increase for the foreseeable future, and undoubtedly PFAS investigation and cleanup obligations and the associated costs will increase. As discussed, individual states are approaching PFAS regulations in their own ways, adding a burden to stakeholders to monitor for changes in multiple jurisdictions. In New York, for instance, the Department of Environmental Conservation has classified PFOA/PFOS as hazardous substances and now requires that 21 PFAS compounds be sampled for at all sites in state cleanup programs and in any imported soil.

Given the current haphazard landscape of PFAS regulation and nascent analytical methods, it may not be prudent to voluntarily test for PFAS. Companies should instead work with experienced environmental consultants and legal counsel to evaluate potential exposures and develop a strategic RMP.

To that end, best practices for such RMPs include:

- monitoring federal and state legal and technical PFAS developments;
- evaluating risks/liabilities with respect to past and current operations;
- evaluating non-PFAS alternative products; and
- planning for impacts to future business transactions (and, particularly for publicly-traded companies, impacts to financial disclosures).

Of note, the likely designation of one or more PFAS chemicals as a CERCLA hazardous substance (as advised by EPA’s PFAS Action Plan) would expand the scope of Phase I environmental site assessments (in accordance with ASTM E1527, for example) and thereby impact the evaluation, and ultimate allocation, of environmental risks in business transactions. Until it becomes a requirement, sellers, buyers and lenders/investors will need to weigh the pros and cons (and significantly increased costs as compared with “traditional” contaminants) of sampling/analyzing for PFAS in the scope of their overall due diligence and risk management approaches (especially given that site information on historic PFAS use may be scant). Importantly, sellers should carefully plan how to respond if a buyer requests sampling for PFAS as part of its due diligence in a real estate or



corporate transaction. Ultimately, any plan to test needs thorough vetting given that: (1) regulatory efforts are focused on measuring PFAS not at parts per million (ppm) or even parts per billion (ppb) levels like we measure traditional contaminants but at a ppt level (essentially a few drops in an Olympic-sized swimming pool); and (2) there are analytical approaches for only a handful of PFAS chemicals (and such analytical approaches are not fully developed and/or agreed upon by the federal and state regulators or regulated community—as one Connecticut regulator recently acknowledged, the current methods are, disconcertingly, only “somewhat reliable”).

One important mitigation tool for all parties (whether owner/seller, buyer/developer, lender/investor) to consider while developing their RMP is customized environmental insurance to “box in” the risk of environmental costs/liabilities attributable to the fluid PFAS legal and technical landscape.

Conclusion

The rapidly and disparately evolving PFAS legal landscape creates uncertainty for many businesses and other entities around the country. Proactive and coordinated legal and technical counseling can help clients develop an appropriate risk management plan to identify, mitigate and manage PFAS risks associated with past and current operations and future business transactions. To take poetic license with an old axiom, the bottom line for PFAS: “those who PFail to plan, plan to PFail.”

Questions or Assistance:

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