

PFAS Regulatory Developments and Risk Considerations for Manufacturers

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I. Overview of Federal Regulatory Developments Related to PFAS

Federal government activities with respect to regulation of PFAS in 2021, which will likely carry forward through 2024 include the following:

1. **Environmental Protection Agency**. EPA announced proposed new regulations, as well as plans for further review and evaluation - likely leading to additional restrictions in the near future.
 - **RCRA**. Pursuant to the Resource Conservation and Recovery Act (“RCRA”), EPA initiated rulemakings to list certain PFAS substances (PFOA, PFOS, PFBS and GenX) as “hazardous constituents” and update and clarify RCRA Corrective Action Program regulations. Once adopted, the rules will require those PFAS to be handled, stored, and disposed of under RCRA regulations, and EPA will have authority to require clean-up of those substances. In addition, RCRA “hazardous constituent” designation is a step towards listing certain PFAS as “hazardous substances” under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”), which would further broaden EPA’s authority (and private companies’ potential liabilities) for cleanup/remediation.
 - **EPA’s PFAS Strategic Road Map**. EPA issued a “PFAS Strategic Roadmap,”^[1] which outlines the goals and actions EPA plans to take during the next three years (through 2024) to research, restrict, and remediate PFAS. These include the following:
 - **National PFAS Testing Strategy**. EPA developed a national PFAS testing strategy to group and prioritize PFAS, and eventually require toxicity testing of PFAS using the Toxic Substances Control Act (“TSCA”). EPA is also revisiting old TSCA reviews of toxicity data.
 - **Water Discharge Effluent Limitations Guidelines**. EPA plans to restrict PFAS discharges in wastewater from multiple industrial categories, *including textile manufacturers*, by the end of 2024. EPA also intends to conduct a study of textile manufacturers regarding their use, treatment, and discharge of PFAS.^[1]
 - **TRI**. The Toxics Release Inventory (“TRI”) tracks and reports data on releases of toxic substances. The 2020 TRI included data on PFAS for the first time, and three PFAS

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were added to the TRI in 2021, which will *require reporting in 2022*.

- **TSCA.** EPA proposed a new PFAS reporting requirement under TSCA. If finalized, manufacturers, including importers, would be required to report all products containing PFAS compounds. See 86 FR 121 (June 28, 2021).
 - **CERCLA.** The EPA plans to propose designation of certain PFAS compounds as CERCLA “hazardous substances,” with proposed rules expected in Spring 2022 and final rules expected in Summer 2023. The “hazardous substance” designations would allow government authorities to obtain information regarding the location and extent of releases, and seek recovery and contribution for costs incurred for cleanup from potentially responsible parties. Textile manufacturers who have used PFAS in their operations and/or own property where PFAS have been released may well be “potentially responsible parties” under CERCLA’s strict liability scheme.
 - **PFAS Council.** The EPA Administrator created a new EPA Council for PFAS charged with studying and ultimately reducing the potential risks caused by these substances.
2. **Federal Legislation.** The Infrastructure Investment and Jobs Act, enacted in November 2021, allocates \$10 billion for actions related to emerging contaminants, including addressing PFAS contamination in drinking water. The PFAS Action Act of 2021 was passed by the House in July 2021, and is currently pending before the Senate. Draft provisions include legislative requirements for EPA to undertake many of the initiatives identified in EPA’s “PFAS Strategic Roadmap.”
 3. **Executive Order on Sustainability.** President Biden’s Executive Order on Sustainability states that it will prioritize the purchase of “sustainable products” in all federal procurement contracts, including products that do not contain PFAS.[1]

II. Suggestions For Assessment and Management Of PFAS-Related Risks

In light of the legal and regulatory developments related to PFAS, we suggest that textile manufacturers and other users of PFAS materials consider the following actions to assess and manage PFAS risks.

- **Assess PFAS use.** Determine what PFAS materials are currently being used and have been used in the past by the company, and/or on properties owned by the company, and how those materials have been acquired, handled, and disposed of.
- **Locate and review past and current insurance policies.** Historic occurrence-based policies may provide coverage for pollution-related liabilities, while modern policies are more likely to exclude such coverage. Careful examination of past and current policies is necessary to determine potential coverage and communicate and negotiate effectively with insurers

regarding any claims.

- **Engage with legislators and regulators.** Work collectively with industry groups to monitor and engage in federal and state legislative and administrative rulemaking processes.
- **Be ready to engage with local POTWs.** Municipal sewer utilities are unlikely to have existing ability to treat wastewater for PFAS, and are not only subject to the same discharge limitations as other industries, but also have to manage disposal of biosolids that contain residual PFAS. Textile manufacturers that discharge process wastewater to those utilities should expect inquiries regarding PFAS constituents.
- **Understand the trend line.** In 2016, EPA set a health advisory level for PFOA of 70 parts per trillion in drinking water. EPA is now working on a health advisory level for GenX—supposedly a less toxic substitute—that is projected to be even lower. EPA is also reassessing its 2016 determination for PFOA, and its draft risk calculations extrapolate to a new health advisory level in parts per quadrillion. Stringent and impactful PFAS restrictions are coming.

[1] https://www.epa.gov/system/files/documents/2021-10/pfas-roadmap_final-508.pdf

[2] <https://www.epa.gov/system/files/documents/2021-09/prepublication-preliminary-elg-plan-15.pdf> at 6.4.4.

[3] <https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/08/fact-sheet-president-biden-signs-executive-order-catalyzing-americas-clean-energy-economy-through-federal-sustainability/?source=email>

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