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PFAS Update: EPA Designates PFOA and PFOS as Hazardous Substances Under CERCLA

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Introduction

The U.S. Environmental Protection Agency ("EPA") has designated perfluorooctanoic acid ("PFOA") and perfluorooctanesulfonic acid ("PFOS"), including their salts and structural isomers, as hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), commonly referred to as "Superfund." PFOA and PFOS have been two of the most widely used, produced and studied members of the man-made chemical group commonly known as per- and polyfluoroalkyl substances ("PFAS"). PFAS have been manufactured and used in a wide variety of industries and consumer products since the 1940s. EPA expects its designation of PFOS and PFOA as hazardous substances under CERCLA (the "Final Rule") to enable EPA, other authorized federal agencies and states with state laws that incorporate CERCLA designations by reference, to help effectively remediate PFOS and PFOA contaminated sites under CERCLA.

On April 19, 2024, EPA released a pre-publication version of the Final Rule, which requires immediate reporting of any release of one pound or more of PFOS or PFOA within a 24-hour period to the National Response Center and other state, tribal and local emergency response authorities. The Final Rule marks EPA's first-ever exercise of authority under CERCLA Section 102(a) to designate hazardous substances under CERCLA. This designation is expected to have significant cost implications across different industries given its potential to trigger cleanups of many PFAS-contaminated sites and reopen closed Superfund sites across the country. The Final Rule will take effect 60 days after publication in the Federal Register.

This *Alert* highlights notable features of the Final Rule and provides an overview of some of the direct and indirect consequences for industries and companies. In other recent *Alerts*, we discussed EPA's proposed rule designating PFOS and PFOA as hazardous substances under CERCLA and EPA's recently announced national drinking water standards for certain PFAS.

Background

PFAS encompass a broad spectrum of man-made chemicals used extensively across various industries and consumer goods in the United States and other countries. PFAS provide a barrier against water, oil, grease and staining and are used in stain- and water-repellant products, such as fabrics, nonstick products, paints, waxes, cleaning products and firefighting foams and suppressants. Since their emergence in the 1940s, PFAS have been detected in surface and subsurface soils, surface water samples, groundwater monitoring wells and public drinking systems. Among the many PFAS compounds, PFOA and PFOS stand out as the most produced and extensively studied compounds. Although the production of PFOA and PFOS in the United States has largely been phased out since the early 2000s, some amounts may still be imported, generated as byproducts during the manufacture of other PFAS chemicals, introduced to products as impurities or formed by the breakdown or transformation of PFOA or PFOS precursors.

PFAS, commonly referred to as "forever chemicals," exhibit persistence in the environment and the human body, resisting breakdown and accumulating over time. According to EPA, exposure to these substances may pose risks of adverse health effects, including cancer and reproductive, developmental, cardiovascular, liver and immunological effects. Based on supporting science and the substances' prevalence in the environment, EPA contends that PFOA and PFOS meet the criteria outlined in CERCLA Section 102(a) for designation as "hazardous substances," which include any elements, compounds or substances that may present substantial danger to the public health or welfare, or the environment when released. Under the Final Rule, PFOA and PFOS will be added to the list of more than 800 substances currently designated as hazardous substances under CERCLA.

Historically, PFOA and PFOS were considered "pollutants and contaminants" under CERCLA, which meant that EPA, and other authorized agencies, were only authorized to respond to releases of these substances if they were able to show that the releases posed an imminent and substantial danger to public health or the environment. After the Final Rule takes effect, such a showing will not be required prior to the agency's

response. This change is expected to enable both EPA and other authorized agencies to rapidly respond to a greater number of releases of PFOA and PFOS. The designation of PFOA and PFOS as hazardous substances would also authorize EPA and other authorized agencies to order actions by and recover response costs from potentially responsible parties ("PRPs"). Furthermore, private parties may seek to recover cleanup costs for PFOA and PFOS from others through cost recovery or contribution claims.

CERCLA is designed to address existing environmental contamination on a site-specific level, involving assessment of a release or a potential release's nature, scope and impact on human health and the environment. CERCLA includes a strict, presumptively joint-and-several liability framework aimed at addressing hazardous substances within the environment. Under this regime, any individual deemed responsible for a CERCLA site may be held accountable for all associated cleanup expenses, regardless of their contribution to the contamination. In addition to EPA's authority to oversee or directly undertake cleanups and establish guidelines for allocating liability for site remediation costs, CERCLA also imposes specific spill reporting obligations for hazardous releases.

Summary of the Final Rule's Requirements

The Final Rule requires entities that release a pound or more of PFOA or PFOS, including their salts or structural isomers, in any 24-hour period to promptly report the release to the appropriate authority — which includes the National Response Center, state or Tribal emergency response commission and the local or Tribal emergency planning committee (local emergency responders). The reportable quantity for PFOA and PFOS under the Final Rule is considerably lower than the reportable quantity specified for many other hazardous substances, which are often set at over 100 pounds.

Furthermore, the Final Rule includes provisions requiring any federal entity engaged in a property transfer or sale to disclose any storage, release or disposal of PFOA or PFOS on the premises. These disclosures must be accompanied by a covenant, or commitment within the deed, ensuring that any resulting contamination has been remediated or will be addressed in the future as necessary, in accordance with CERCLA requirements. Additionally, Section 306(a) of CERCLA requires the Department of Transportation to list and regulate these substances as hazardous materials for intrastate, interstate and foreign transportation purposes under the Hazardous Materials Transportation Act. The Final Rule will take effect 60 days after publication in the Federal Register.

In both the proposed rule and the Final Rule, EPA stated that cost is not one of the considerations evaluated when designating a substance as hazardous under CERCLA Section 102(a) because Congress did not include consideration of costs as a statutory requirement for such a designation. However, EPA did analyze the direct costs associated with the Final Rule, which are expected to be limited to costs to report releases (i.e., notification costs). These direct costs were estimated at $2,658 per release, or $1,630,000 annually for all impacted entities nationwide. EPA believes that any incremental costs that EPA would incur to address PFOA and/or PFOS releases at National Priorities List ("NPL") sites would still be incurred absent the designation (because PFOA and PFOS generally are not found in isolation and are often comingled with other contaminants of concern). EPA anticipates that these costs can be transferred to PRPs as a result of the designation.

EPA also stated that indirect costs stemming from potential enforcement actions that may result in additional response activities for PFOA and PFOS at non-NPL sites are estimated to range from $327,000 to $18,100,000 per year, depending on the type of response actions taken at a given site. EPA contends that costs to address PFOA and PFOS will fall within typical response cost ranges for actions to address other hazardous substances and recognizes that response costs "will be significant in some cases." By contrast, the U.S. Chamber of Commerce estimated that cleanup costs for private parties under the Final Rule could exceed $17 billion and fall between $700 and $900 million annually. In responses to public comments provided in the pre-publication version of the Final Rule, EPA contended that such estimates were too high and based on several "unfounded or inaccurate assumptions that lead to the overestimation of costs," including, for example, the assumption that the proposed designation would require all existing non-Federal NPL sites to search for PFOS and PFOA contamination. Additional information on EPA's cost estimates is provided in the Regulatory Impact Analysis prepared in response to public comments received by EPA.

Looking Ahead

The designation of PFOA and PFOS as hazardous substances under CERCLA will have a widespread impact on many industries, including those that have manufactured, imported or processed PFOA or PFOS, downstream product manufacturers and users of PFOA and/or PFOS products and waste management and wastewater treatment facilities. After the Final Rule takes effect, EPA and other authorized agencies will be able to compel these parties to either cleanup sites contaminated with PFOA and/or PFOS or reimburse the government for the full cost of remediation. The Final Rule would allow EPA to address PFOA and PFOS contamination, including at sites with

ongoing cleanup activities, as well as new sites that are not subject to ongoing cleanup activities and sites previously considered closed or remediated by regulatory authorities that are subject to EPA "reopener" rights. Expenses associated with addressing site contamination are likely to encompass a wide range of activities, such as investigation, remediation and monitoring efforts. Additionally, expenses may include costs for providing alternative drinking water sources and restoring natural resources damaged by PFOS and PFOA contamination.

EPA Enforcement Guidance

In response to enforcement concerns, EPA released a memorandum on April 19, 2024, providing EPA's enforcement discretion and settlement policy for PFAS under CERCLA ("the Policy"). The Policy states that EPA intends to focus on holding responsible "parties that have played a significant role in releasing or exacerbating the spread of PFAS into the environment." Such parties include parties that manufactured PFAS or used PFAS in the manufacturing process, and other industrial parties (i.e., "major PRPs"). EPA also intends to pursue federal agencies or facilities responsible for PFAS contamination.

The Policy also states that EPA does not intend to pursue entities "where equitable factors do not support seeking response actions or costs under CERCLA." The enumerated entities include community water systems and publicly owned treatment works; municipal separate storm sewer systems; publicly owned/operated municipal solid waste landfills; publicly owned airports and local fire departments; and farms where biosolids are applied to the land. EPA may extend enforcement discretion under this Policy to additional entities, based on the totality of equitable factors set forth in the Policy. The factors include:

1. Whether the entity is a state, local or Tribal government, or works on behalf of or conducts a service that otherwise would be performed by a state, local or Tribal government;
2. Whether the entity performs a public service role comparable to those provided by the enumerated entities listed above;
3. Whether the entity manufactured PFAS or used PFAS as part of an industrial process; and
4. Whether, and to what degree, the entity is actively involved in the use, storage, treatment, transport or disposal of PFAS.

The Policy states that contribution protection from third-party claims may be extended to these entities through settlement agreements with EPA. Notably, EPA may prevent major PRPs from suing certain non-settling parties over matters addressed under a settlement with EPA.

Opposition to the Rule through Proposed Legislation and Potential Legal Challenges

Some commentators and legislators assert that the Final Rule will burden innocent non-polluters with liability. They argue that passive receivers of PFAS — such as water utilities and landfills — could be saddled with cleanup costs under CERCLA's strict, presumptively joint-and-several liability framework, even though they did not cause the PFAS contamination.

As noted above, EPA has exercised its authority to designate hazardous substances under CERCLA Section 102(a) for the first time ever. Legal challenges to the Final Rule are widely anticipated, though it is not known whether such challenges will ultimately delay implementation of the Final Rule. Potential challenges to the rule may include:

- The Final Rule serves as EPA's first designation of hazardous substances under Section 102(a) of CERCLA, based on EPA's determination that PFOA and PFOS pose substantial risks to public health, welfare or the environment. Other contaminants identified as hazardous substances under CERCLA were identified as such because they were previously classified as hazardous under one or more other federal environmental laws (which is not the case with PFOA or PFOS). Opponents of the Final Rule may argue that EPA has not interpreted its statutory authority reasonably. Much-anticipated rulings from the Supreme Court in two cases challenging a rule issued by the National Marine Fisheries Service are expected to limit court deference to an agency's reasonable interpretations of ambiguous statutes under the long-standing judicial "*Chevron* Deference" doctrine. Rulings limiting the doctrine may facilitate challenges to EPA's interpretations of Section 102(a) under the Final Rule. Experts suggest that a majority of the justices on the current Supreme Court seem poised to limit the *Chevron* Deference doctrine.
- Industry groups may argue that the reportable quantities of PFOA and PFOS set by EPA are impractical. The one-pound quantity is significantly lower than the reportable quantity for many other hazardous substances regulated under CERCLA, which are often set at over 100 pounds.
- Legislation has been introduced in both houses of Congress titled "Forever Chemical Regulation and Accountability Act," in part in response to this Final Rule. The Senate bill, S. 4187, has been referred to the Environment & Public Works Committee. The legislation seeks to phase out non-essential PFAS use over the next 10 years and

seeks to prevent responsible parties from avoiding CERCLA cleanup liability for releases through bankruptcy procedures or statutes of limitation or repose. The legislation proposes amendments to CERCLA that would toll state statutes of limitations and statues of repose for newly designated hazardous substances, like PFOA and PFOS, until the later of the date on which it was designated under CERCLA or when the plaintiff knew or reasonably should have known their injury was caused by the hazardous substance.

- Opponents to the Final Rule may seek to narrow the universe of PRPs subject to cleanup liability under CERCLA. In particular, there may be efforts to provide formalized protections to "passive receivers" of PFOS and/or PFOA. As discussed above, EPA has stated in the Policy that it does not intend to pursue such entities "where equitable factors do not support seeking response actions or costs under CERCLA."
- Lastly, commentors to the proposed rule argued that EPA did not complete a full economic analysis when it designated PFOA and PFOS as hazardous substances even though an analysis was warranted. EPA prepared a Regulatory Impact Analysis following the public comment period. The sufficiency of that analysis may be subject to further scrutiny.

Due Diligence Considerations

The Final Rule brings new due diligence considerations to the forefront of transactions, including in M&A and real estate transactions. PFOA and PFOS must now be considered as part of a Phase I Environmental Site Assessment under the new ASTM Standard E1527-21 for purposes of meeting the "all appropriate inquiries" standard. Compliance with this standard is important for prospective real estate and asset purchasers, in particular, who may seek defenses to liability and cleanup obligations under CERCLA. The inclusion of PFOA and PFOS in Phase I Environmental Site Assessments may prompt sampling or "Phase II" investigations that lead to the identification of historical PFOA and PFOS contamination that may trigger cleanup obligations under CERCLA. Many technical environmental professionals were early adopters of the new ASTM standard and incorporated PFAS risks into their environmental diligence reporting as "non-scope considerations," "business environmental risks" or "other considerations."

In addition, the designation of PFOA and PFOS as hazardous substances under CERCLA may mean that certain sites may be at risk of new or expanded scopes of investigation or remediation, and sites that previously received regulatory closure for other contaminants may be at risk of a regulatory "reopeners" to evaluate previously uninvestigated PFOA and PFOS impacts. Such risks could shift the due diligence

calculus for evaluating sites with known or suspected contamination or previously remediated contamination, particularly when operated by industries in which PFAS use, handling or disposal are known to be common.

EPA's recent Final Rule highlights the importance of evaluating PFAS contamination risk and related risk of cleanup orders and litigation during due diligence. The Kirkland environmental team continues to monitor regulatory, legislative, policy and litigation developments related to PFAS to provide updates and business guidance as needed.

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Suggested Reading

- 24 April 2024 Press Release Kirkland Advises Apax Digital Funds on Strategic Investment in IANS Research
- 23 April 2024 Award M&A Deals of the Year 2023
- 16 April 2024 Kirkland Alert PFAS Update: EPA Announces its First Enforceable and Final National Drinking Water Standards for Certain PFAS

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