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Biden Administration Announces Plans to Regulate “Forever Chemicals”

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On October 18, 2021, the Biden Administration announced an all-of-government plan to address per- and polyfluoroalkyl substances, or PFAS, providing a timeline for federal regulation that has been the subject of years of discussion. While the effort involves eight federal agencies, the cornerstone of the plan is the U.S. Environmental Protection Agency (“EPA”) PFAS Strategic Roadmap for 2021-2024, which outlines a set of intended actions to expand regulation of PFAS at the federal level. The guidance accelerates years of movement toward comprehensive federal PFAS regulation and is part of a broader federal PFAS strategy that includes the Department of Agriculture, Department of Defense, Department of Health and Human Services, Department of Homeland Security, Federal Aviation Administration, Food and Drug Administration, and the White House Council on Environmental Quality.

PFAS Concerns

PFAS have been the subject of growing attention in recent years. PFAS are a family of human-made chemicals that are resistant to grease, oil, water and heat. As a result of these characteristics, PFAS are used in a wide range of consumer and industrial products, including in stain- and water-resistant fabrics and carpeting, cleaning products, paints, and fire-fighting foams. Certain PFAS are also authorized for limited use in cookware, food packaging and food processing equipment. The widespread use of PFAS in numerous consumer and industrial applications, and their ability to remain intact in the environment, means that over time PFAS levels from past and current uses have resulted in increasing levels of environmental contamination. The presence of increasing PFAS levels in the environment have been allegedly linked, primarily via ingestion in drinking water, to adverse human health effects, including birth defects, liver damage and increased cancer risks.

Prior PFAS Regulation Efforts

Prior to the announcement earlier this week, PFAS regulation in the U.S. has been piecemeal and inconsistent. While various federal efforts have been made, including the EPA PFAS Action Plan announced in 2019 and updated in 2020, there has been no unified federal approach to PFAS regulation. In the absence of a comprehensive strategy, a patchwork system of state-level PFAS regulations and standards has emerged in recent years, with a majority of states now having some form of PFAS regulation in place. The scope and stringency of such regulations vary widely from state to state, in terms of the PFAS chemicals and environmental media that are regulated, as well as applicable standards. Since the Biden Administration came into office, there has been an increased federal focus on PFAS. This year, EPA proposed drinking water monitoring rules for PFAS, expedited its review process for new PFAS chemicals under the Toxic Substances Control Act, published new information on PFAS toxicity and created an EPA Council on PFAS, among other actions, setting the stage for the announcement that came earlier this week.

EPA PFAS Strategic Roadmap and Other Agency Actions — Key Elements

EPA Strategic Roadmap

The whole-of-agency effort outlined in the Strategic Roadmap focuses on the central directives of research, restriction and remediation. The Roadmap's approach spans EPA's functions, including actions addressing chemicals, water, cleanup of contamination, air emissions and scientific research. Certain key actions outlined in the Strategic Roadmap are described below.

Cleanup and Disposal of PFAS

As long expected, EPA will propose to designate PFAS as a "hazardous substance" under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). The proposed rule implementing this designation is expected in early 2022, with the final rule anticipated in mid-2023.

The Agency is only designating two PFAS compounds – perfluorooctanoic acid (“PFOA”) and perfluorooctane sulfonic acid (“PFOS”) – as hazardous instead of the full suite of PFAS chemicals, which includes several thousand discrete compounds. However, EPA intends to seek public comment on whether to designate additional PFAS compounds as hazardous under CERCLA.

EPA also announced that its updated guidance on methods to destroy and dispose of PFAS is expected to be published in late 2023.

Drinking Water, Wastewater and Biosolids

Part of EPA’s efforts will include enacting regulations concerning an enforceable national primary drinking water standard for PFAS in drinking water. EPA plans to release final drinking water standards for PFOA and PFOS by fall 2023. Monitoring and review of additional PFAS compounds in water will continue.

Standards for PFAS concentrations in wastewater through effluent limitations and changes to wastewater permitting are to be proposed in 2022. EPA also announced it would undertake a risk assessment of PFOA and PFOS in biosolids (sewage sludge sometimes used as fertilizer) to determine if regulations are appropriate.

Chemicals and Air

The EPA’s Office of Chemical Safety and Pollution Prevention will continue its efforts to utilize the Toxic Substances Control Act to restrict new PFAS from entering the market, review PFAS chemicals already in commerce and bring PFAS into the scope of toxic chemical reporting.

To date, air emissions have not been a key focus of PFAS regulation. The EPA Office of Air and Radiation plans to conduct research to provide a technical knowledge base for identifying sources of PFAS air emissions, developing techniques to monitor emissions and ambient air, developing information on cost-effective mitigation strategies, and increasing understanding of the fate and transport of PFAS air emissions.

Other Research and Development

EPA published a National Testing Strategy for PFAS intended to build the knowledge base for PFAS impacts, including potential risks to the environment and human health. The purpose of the strategy is to expedite research to better inform regulatory standards.

Beyond the testing strategy, EPA will also focus on developing methods for detection of PFAS in the environment, assessing human health and environmental hazards, and developing technologies to remove PFAS from the environment.

Cross-Program Enforcement and Public Engagement

EPA will enhance its enforcement efforts to identify releases of PFAS utilizing its authority under RCRA, TSCA, CWA, SDWA and CERCLA. Currently, this includes inspections, information requests and data collection, but EPA notes that it will use its statutorily authorized powers to take appropriate other actions. A voluntary PFAS stewardship program will also be established to task companies with reducing PFAS releases into the environment beyond the regulatory requirements.

Public involvement is also a key feature of the Roadmap, including engagement with communities affected by PFAS contamination and public education on PFAS risks.

Other Agency Efforts

- The Department of Defense (“DOD”): In 2019, the Secretary of Defense created the DOD PFAS Task Force to develop policies related to PFAS use and fulfill DOD’s cleanup responsibilities related to PFAS contamination. Building on these initiatives, DOD will continue to evaluate and conduct clean up assessments of DOD and National Guard facilities where PFAS was used or may have been released, namely military bases where firefighting foam containing PFAS were deployed. DOD expects to complete preliminary cleanup assessments at the approximately 700 military sites where PFAS was used or may have been released by the end of 2023.
- The Department of Homeland Security (“DHS”): DHS will form an Emerging Contaminants Working Group and coordinate with the Biden administration with respect to PFAS remediation work at DHS facilities. Additionally, DHS recently established a protocol for addressing known or suspected PFAS at DHS facilities to better coordinate remediation efforts at these sites.
- The Food and Drug Administration (“FDA”): In 2019, FDA developed a PFAS analysis method for evaluating the impacts of PFAS contamination on certain foods, and, over the next three years, FDA will continue to test food supply to estimate dietary exposure to PFAS, including targeted testing of commonly eaten types of seafood. Pursuant to a series of 2020 agreements with certain manufacturers, FDA also will continue to work to reduce the presence of PFAS in food contact packaging and in cosmetics.

- The Department of Agriculture (“USDA”): The USDA Agricultural Research Service will continue to research PFAS in the food system and support outside research of PFAS in the environment. The USDA Food Safety and Inspection Service has also developed and is currently deploying analytical methods for testing PFAS in meat and poultry products.
- The Department of Health and Human Services (“DHHS”): DHHS will continue its review of the human health effects of PFAS exposure and is partnering with EPA to guide clinicians on PFAS testing and impacts on patient care, including a particular focus on occupation exposure to PFAS by firefighters and immunological effects of PFAS exposure.
- The Federal Aviation Administration (“FAA”): FAA is researching ways to reduce PFAS discharges from firefighting activities and the testing of firefighting equipment, and, in collaboration with the DOD, is developing PFAS-free alternatives to Class B firefighting foam.
- The White House Council on Environmental Quality (“CEQ”): CEQ will facilitate the coordination of the inter-agency PFAS response across the federal government through the new Interagency Policy Committee on PFAS, which kicked off its first meeting on Monday, October 18.

Next Steps: Challenges and Opportunities

As described in the Strategic Roadmap, the deadlines for the various EPA actions to address PFAS come as soon as fall 2021. However, due to the nature of the administrative rulemaking process, it likely will be several years before any of the announced regulations come into effect.

Once promulgated, we anticipate the various rules will be subject to challenges from industry groups, environmental groups and other interested parties. In the interim, there will be opportunities for stakeholders to participate in the rulemaking process, including through submission of comments to draft regulations once promulgated. Industries that may be particularly affected by the regulations, and so particularly interested in participation in the rulemaking process, include manufacturers of chemicals, plastics, synthetic fiber, electrical equipment, and textile and carpets, as well as pulp and paper mills, landfills and aviation.

The potential effects of the series of federal PFAS actions are far reaching. While these actions may require changes in how certain industries function, the announcement of a unified federal strategy also brings some level of predictability to this area of

regulation that will allow for companies to make more informed decisions about their operations and futures.

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