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PFAS UPDATE: A RETROSPECTIVE ON FEDERAL PFAS REGULATION IN 2021

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As anticipated, 2021 was an eventful year for the regulation of per- and polyfluoroalkyl substances (“PFAS”) at the federal level. BCLP has highlighted the key developments in this document, but this is not intended to be a comprehensive list of all of the federal actions with respect to PFAS over the past year.

In addition, on October 18, 2021, the Biden-Harris Administration issued a [fact sheet](#) discussing its overall plan to address PFAS substances, which is a helpful reference document, as are the summaries and plans issued by federal agencies, some of which are discussed below.

ENVIRONMENTAL PROTECTION AGENCY (“EPA”) PFAS ACTIONS

Predictably, EPA was the most active agency in this space, and announced a wide range of new regulations, as well as plans for further review and evaluation which are expected to lead to additional restrictions over the next several years.

RCRA

EPA has taken two actions pursuant to the Resource Conservation and Recovery Act (“RCRA”): (1) four PFAS substances were listed as “hazardous constituents,” and (2) the RCRA Correction Action Program regulations were updated and clarified. BCLP provides more detailed information in this [Client Alert](#).

EPA’S PFAS STRATEGIC ROAD MAP

As discussed in [BCLP’s Client Alert](#), the [PFAS Strategic Roadmap](#) outlines the approach, goals, and actions that the EPA anticipates taking during the next three years. Although the Roadmap was only published in the latter part of 2021, EPA has already implemented or begun to implement certain components of the Roadmap, partially summarized below:

- **Adopt a National PFAS Testing Strategy.** Currently, most PFAS substances have incomplete toxicity data or no toxicity data whatsoever, and as a result, EPA developed a [national PFAS](#)

testing strategy to group and prioritize PFAS substances, and eventually to require testing of PFAS substances using the Toxic Substances Control Act (“TSCA”).

- **Compel PFAS Manufacturers to Conduct and Fund Studies.** In accordance with the testing strategy, EPA recently granted a petition to compel a manufacturing company to conduct and fund the toxicity testing of certain PFAS substances. Additional phases of testing are expected in the future.
- **The Fifth Unregulated Contaminant Monitoring Rule (“UCMR 5”).** The UCMR sets out a list of unregulated contaminants that is updated every five years, and requires public water systems to sample for those contaminants. The newly issued UCMR 5 requires sample collection for 29 PFAS compounds (and only one non-PFAS compound) between 2023 and 2025. Prior to the UCMR 5 development, EPA collected data for only six PFAS substances in this program, so the increase in the number of PFAS compounds identified, and the fact that almost no other compounds are identified underscores EPA’s focus on PFAS regulation. Additional information addressing this issue can be found at EPA’s website.
- **Ongoing Toxicity Assessments.** EPA published the toxicity assessments for PFBS and GenX (also known as HFPO-DA). EPA expects to develop non-enforceable and non-regulatory drinking water health advisories for PFBS and GenX chemicals in the spring of 2022. Moreover, the Office of Research and Development is currently developing toxicity assessments for five additional PFAS substances (PFBA, PFHxA, PFHxS, PFNA, and PFDA).
- **Effluent Limitations Guidelines.** EPA has conducted a multi-industry study to inform the extent and nature of PFAS discharges in the industrial wastewater of different industries. Based on this study, EPA plans to restrict PFAS discharges from multiple industrial categories by the end of 2024. To date, EPA has proposed revising the Effluent Limitation Guidelines to address PFAS discharges for two industries: (1) the organic chemicals, plastics and synthetic fibers industry, specifically targeting companies that manufacture PFAS compounds themselves; and (2) the metal finishing industry, specifically chrome plating facilities. EPA is also proposing further investigation and information gathering from the pulp, paper, and paperboard industry as well as from textile and carpet manufacturers. For additional information, please refer to BCLP’s Client Alert regarding this topic.
- **TRI.** The Toxics Release Inventory (“TRI”) released data that contains information regarding PFAS substances, and three PFAS substances were added to the TRI. For more information, please refer to BCLP’s Client Alert on this topic.
- **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 during any time period beginning on January 1, 2011. For details regarding this requirement, please refer to BCLP’s Client Alert.

- **PFAS Council.** EPA Administrator Michael Regan created a new EPA Council for PFAS. According to EPA's [press release](#), the Council “is charged with building on the agency's ongoing work to better understand and ultimately reduce the potential risks caused by these chemicals.”

INFRASTRUCTURE BILL

On November 15, 2021, President Biden signed into law the [Infrastructure Investment and Jobs Act](#) (“IIJA”) that specifically allocates \$10 billion for emerging contaminants, including PFAS contamination in drinking water.

As summarized in an [EPA publication](#), the \$10 billion is divided in the IIJA as follows:

- \$5 Billion: Funding for small and disadvantaged communities to address PFAS in drinking water through the use of point-of-entry or point-of-use filters and filtration systems;
- \$4 Billion: Funding available to public water systems to remove PFAS from drinking water supplies; and
- \$1 Billion: Funding available for community water quality infrastructure projects through the Clean Water State Revolving Fund to address emerging contaminants.

PFAS ACTION ACT OF 2021

In conjunction with PFAS-related actions taken by the Biden-Harris Administration, the House of Representatives passed the [PFAS Action Act of 2021](#) on July 21, 2021, which is currently before the Senate. The following are some of the principal provisions of the PFAS Action Act of 2021, as passed by the House:

- **Hazardous Substances.** Designate PFOA and PFOS as a “hazardous substances” under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”) within one year. EPA will also determine if all PFAS substances should be classified as “hazardous substances” within five years;
- **Testing.** Require testing of all PFAS substances for toxicity to human health under TSCA within two years;
- **National Drinking Water Standards.** EPA will establish drinking water standards for perfluorooctanoic acid (“PFOA”) and perfluorooctane acid (“PFOS”) within two years;
- **Air Emissions.** EPA must designate PFOA and PFOS as “hazardous air pollutants” under the Clean Air Act within 180 days;

- **Labeling.** Within one year EPA must identify the requirements for a covered product to meet in order to be labeled with a Safer Choice label. Notably, covered products include, among other things, pots, pans, cooking utensils, carpets, rugs, clothing, luggage, food packaging materials, and cleaning products; and
- **Discharge Regulations.** Create wastewater effluent limitations guidelines and standards for listed priority industry categories (e.g., textiles, electroplating, paint formulating, electrical and electronic components) of measurable discharges of PFAS substances within four years.

Importantly, EPA has addressed some of these issues in the [PFAS Strategic Roadmap](#), published only three months after the PFAS Action Act of 2021 passed the House of Representatives, so the bill may be revised or abandoned depending on the perceived need for further legislative action on these issues. BCLP will continue to monitor developments as this legislation is considered by the Senate.

MISCELLANEOUS PFAS ACTIONS

There were also a number of other PFAS actions implemented by other federal agencies including:

- **Consumer Products.** The Biden-Harris Administration declared that it will prioritize the purchase of “[sustainable products](#)” in all federal procurement contracts, and has defined these products as ones that do not contain PFAS materials.
- **Food and Drug Administration.** The Food and Drug Administration (“FDA”) conducted several tests involving PFAS in [various foods](#), notably in [seafood](#). Additionally, the FDA also published related [technical and analytical studies](#).
- **Department of Defense.** The Department of Defense (“DoD”) has implemented [new PFAS testing methods](#), has held [discussions with stakeholders](#), and has managed a series of public outreach presentations, all related to legacy PFAS releases from military facilities.
- **NDAA.** The National Defense Authorization Act for Fiscal Year 2022 (“NDAA”) was signed into law on December 27, 2021. The PFAS provisions include, among other things, creating a PFAS Task Force, testing most military facilities for known releases of PFAS materials, prohibiting the incineration of PFAS substances, and increasing funding for PFAS remediation at sites owned by the DoD.

CONCLUSION

As should be apparent from all of the actions described above, both the current administration and the legislature have been focused on regulating PFAS compounds in a variety of sources and under different regulatory programs. Businesses that historically or currently interact with these compounds should consider identifying and evaluating their potential risk. BCLP will continue to

monitor and report on PFAS-related government actions at both the federal and state levels throughout the coming year, which is expected to be just as active as the past year.

For more information on PFAS chemicals, and the regulatory and litigation risks that they pose, please visit our [PFAS webpage](#). If you have a question about how to manage federal PFAS risk, or in any specific state jurisdiction, please contact Tom Lee, John Kindschuh, Elyse Voyer, or any other member of our PFAS team at Bryan Cave Leighton Paisner LLP.

RELATED CAPABILITIES

- PFAS

MEET THE TEAM



John R. Kindschuh

St. Louis

john.kindschuh@bclplaw.com

[+1 314 259 2313](tel:+13142592313)



Thomas S. Lee

San Francisco

tom.lee@bclplaw.com

[+1 415 675 3447](tel:+14156753447)

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