In recent years, significant media attention has been given to PFAS (per- and polyfluoroalkyl substances) and the impact that the chemicals can have on human health and our drinking water supplies. The chemicals have traditionally been manufactured and utilized by two chemical industry leaders, and these companies have borne the brunt of litigation costs for environmental cleanup and personal injury lawsuits to date. Estimates for the costs to the chemical companies for PFAS litigation is upwards of over two billion dollars and climbing, with direct impacts on portfolios that include those companies.

However, private equity, portfolio managers, risk assessors, and the financial world need to quickly realize that the market impact of PFAS is soon going to be felt well beyond just a few chemical manufacturers. Manufacturing, industry, waste management, construction, utilities, and insurance sectors will all be significantly impacted within the next year due to a number of federal and state-level actions underway with respect to PFAS regulations. Since the laws all fall under “drinking water” or “Safe Drinking Water Act” discussions, many companies assume that any regulations related to drinking water will not impact them, as virtually no industries, aside from water utilities, have any direct impact on drinking water. However, this belief provides a false sense of security that must immediately be dispelled.
Biden Administration’s Drinking Water Regulation Impacts On PFAS Risks

The Biden-Harris administration campaigned on the promise to make “the environment” one of their top priorities, with climate change issues receiving nearly all of the press on this topic. However, a deeper dive into the campaign promises of the current President show that PFAS were just behind climate in terms of importance for the administration. In just over four months since being in power, federal-level actions have taken place that solidify the notion that PFAS is of utmost importance to the administration.

First, Biden’s EPA nominee, Michael Regan, was confirmed by a bipartisan Senate. Mr. Regan has a demonstrated history of tough action on PFAS issues when he led North Carolina’s Department of Environment and Natural Resources. It is therefore not surprising in the least that on March 10, 2021, the same day that Mr. Regan was confirmed to lead the EPA, the Federal Register published the Final Regulatory Determinations for two of the most widely known PFAS chemicals – PFOA and PFOS. The timing of this move is in fact quite important, as it is the final necessary step before the EPA can begin the process of implementing a national drinking water regulation for these two types of PFAS. While the EPA certainly must follow certain administrative steps to ensure that any final PFAS drinking water rules pass muster, it is not unrealistic to predict that these steps can be accomplished by early 2022.

PFAS Action Bill – “Hazardous Substance” Designation

The PFAS Action Bill is a federal bill that calls for a requirement that the EPA designate PFAS as a “hazardous substance” under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) – also known as the “Superfund law.” Once a substance is classified as a “hazardous substance” under CERCLA, the EPA can force parties that it deems to be polluters to either clean up the polluted site or reimburse the EPA for the full remediation of the contaminated site. The costs of remediating polluted Superfund sites is often hundreds of millions of dollars. Without such a designation, the EPA can merely attribute blame to parties that it feels contributed to the pollution, but it has no authority to force the parties to remediate or pay costs. The designation also triggers considerable reporting requirements for companies. Currently, those reporting requirements with respect to PFAS do not exist, but they would apply to industries well beyond just PFAS manufacturers. A “hazardous substance” designation under CERCLA also allows the EPA to reopen previously closed Superfund sites or Superfund sites that are currently in cleanup phases pursuant to an approved plan by the EPA. If the EPA suspects that any of these sites may have PFAS contamination that was not previously addressed, the EPA would be permitted to reopen the site for testing and further cleanup by the responsible parties.

During its campaign, the Biden-Harris administration pledged to have the EPA designate PFAS (or some of the thousands of types of PFAS) as “hazardous substances” under CERCLA. The downstream effects of this designation would be massive.

Portfolio Risks From PFAS Legislation
So how does all of this matter to the wide range of business sectors mentioned above? Once limits for certain PFAS are implemented, state arms of the EPA must hold its constituents accountable under those same standards. Some states are likely to enact or already have in place drinking water limits for PFAS types that are more stringent than the federal levels. States will test local waterways, wells, and other drinking water sources for regulated PFAS types. PFAS levels found above the set regulation limits will trigger the state enforcement agencies to seek cleanup costs, penalties, and fines from businesses, landowners, and other entities that agencies find responsible for PFAS pollution into waterways. Depending on the severity of the pollution and the culpability that the regulatory agencies determine for specific entities, these costs can range from tens of thousands of dollars to millions of dollars. With the extent of costs, entities look to other parties to try to recoup some or all of these costs, which means lawsuits and the associated costs of proceeding with or defending those lawsuits.

In states that have progressively set PFAS drinking water standards, the hits to profits are already playing out on a near-daily basis. Companies that had no idea that they utilized PFAS in their manufacturing processes, that they were sending PFAS-containing waste to landfills, that they were selling or buying property that had pre-existing PFAS soil contamination (which may leach into waterways over time), or that they were utilizing PFAS-containing products in construction projects are receiving violation notices in increasing numbers due to local environmental regulatory agencies feeling pressure from citizens to clean up PFAS contamination. Some companies are finding themselves being named in lawsuits by private citizens who allege that their drinking water is contaminated, their health effects are due to the PFAS-containing drinking water, and property values have diminished due to PFAS contamination. Water utilities especially are scrambling to find ways to estimate and pay for cleanup costs in their districts, with many turning to litigation to try to hold polluting parties responsible for the costs. The insurance industry, too, has spent years attempting to determine the risk of loss to the insurance industry due to PFAS, with publicly available estimates ranging widely from hundreds of millions of dollars to billions of dollars.

**Conclusion**

“When will the EPA take action?” is the most popular question asked with respect to PFAS. Given the almost absolute certainty that a federal PFAS drinking water regulation will happen in the near future, for the financial world the most critical question should not be “when”, but “are the sectors or business types that are in our portfolios going to be impacted by all of this, and by how much?” The PFAS time bomb is already ticking for the financial world, and the fuse is running short. The “when” should be within the next year, and the financial world needs to spend the remaining time doing full-scale due diligence into every sector or business type to avoid market and portfolio disruption, and to be better prepared for fluctuations in stock values as more companies feel the effects of PFAS regulations.

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