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Practice Update

Impact of PFAS on Private Equity: Preparing for the Coming Wave of Regulation and Litigation

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Regulation of Per and Poly-Fluoroalkyl Substances (PFAS) is increasing at the state and federal level as costly PFAS-related litigation is on the rise throughout the United States. Found in everyday products such as food packaging, stain, water and grease-resistant materials, and nonstick cookware, as well as being present on virtually all military bases and airports, the prevalence of PFAS combined with the heightened awareness of the public and the plaintiffs' bar, make private equity funds and their portfolio companies prime targets for litigation and regulation.

Some estimate that companies, governments, and other entities responsible for PFAS contamination could face liabilities in the billions, if not hundreds of billions, of dollars. Prudent private equity funds and their portfolio companies need to prepare for new regulations, assess their potential exposure, and focus on reducing their risk.

Primary Industries Impacted: Aerospace, airports and military bases, apparel, automotive, building/construction, chemicals, consumer products, electronics, energy, healthcare, metal/surface finishers, oil and gas, paper/pulp, pharmaceuticals and hospitals, plastics, semiconductors, textiles and leather

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Targets for Claims: Manufacturers, waste haulers and waste site operators, suppliers, distributors, and downstream manufacturers whose products incorporate PFAS into their products

What are PFAS?

Perfluoroalkyl and polyfluoroalkyl substances (PFAS) refer to a family of thousands of man-made chemicals — the most common being PFOA, PFOS, and GenX — that are heat-, water-, grease-, and oil-resistant. Because of these qualities, manufacturers have used PFAS since the 1940s in a wide-range of industrial and commercial products, including everyday household items such as non-stick cookware and stain-resistant carpeting.

Many dub PFAS "forever chemicals" since they don't easily break down, but instead accumulate over time. Because they possess a durable chemical makeup, the chemicals persist in the environment and in the human body for years.

Why are PFAS Now a Focus of Litigation and Regulation?

Recently, more attention has been focused on PFAS as the result of new scientific studies showing that PFAS exposures can lead to adverse human health effects, including: kidney cancer, testicular cancer, ulcerative colitis, thyroid disease, pregnancy-induced hypertension, and high cholesterol. This has resulted in increased regulatory scrutiny of PFAS, including:

1. Potential bans on certain uses of PFAS;
2. Creating lower regulatory limits on the levels of PFAS allowable in soil and groundwater, including in public and private drinking water supplies; and
3. Requiring companies to implement costly remediation projects to address PFAS contamination in soil and groundwater.

Moreover, the EPA as well as various states have begun to take action towards classifying PFAS as a hazardous substance under CERCLA or companion state statutes. Emerging litigation surrounding PFAS's adverse impacts has been so rapid (with a multi-district litigation pending in South Carolina and numerous other lawsuits pending across the country) — and the exposures so significant — that some have labeled PFAS as the "new asbestos."

Where are PFAS?

Because of the wide array of household and industrial uses of PFAS, the chemicals are ubiquitous in their use. According to the EPA, PFAS can be found in such everyday things as:

- Drinking water (typically localized and associated with a specific facility such as a manufacturer or wastewater treatment plant);
- Foods packaged in PFAS-containing materials (e.g., hamburger wrappers and pizza boxes), processed with equipment that used PFAS, or grown in PFAS-contaminated soil or water;
- Household and consumer products, including stain- and water-repellent fabrics, clothing items (e.g., Scotchguard and Gore-Tex), carpet (e.g., Stainmaster), nonstick cookware products (e.g., Teflon), polishes, waxes, paints, and cleaning products;
- Aqueous Fire-Fighting Foams (AFFF) — a major source of groundwater contamination at airports and military bases where firefighting training occurs;
- Workplaces, including production facilities or certain industries that use PFAS (e.g., chrome plating, electronics manufacturing, or oil recovery).

Emerging PFAS Litigation

The same long-lasting, “forever” qualities that make PFAS prized ingredients in so many industries are the same qualities that are now causing public concern and driving significant litigation and regulatory actions.

In *Leach v. E.I. Du Pont de Nemours & Co.*, Case No. 2:14-cv-23755, roughly 80,000 class members contended that PFAS from a manufacturing facility near the mid-Ohio River Valley contaminated the water supply for at least six public water systems in West Virginia and Ohio. DuPont and Chemours settled this one class action lawsuit relating to one site for approximately $1 billion.

Recent studies have found that PFAS-containing water supplies have affected as many as 110 million people in the United States. Consequently, numerous governmental entities and private property owners have commenced lawsuits against the polluting manufacturers to seek cleanup and remediation costs. In *Minnesota v. 3M Company*, for example, the state of Minnesota sued 3M Company for $5 billion, alleging damage to the state’s natural resources, including to its drinking water supply and wildlife. 3M settled the lawsuit for $850 million. Other states, cities, and municipalities across the country have commenced litigation against 3M and other manufacturers based on similar claims.

State and federal agencies, as well as private plaintiffs, are continuing to file lawsuits around the country seeking redress for PFAS contamination. For example, more than 100 lawsuits involving AFFF—the majority of which are class action lawsuits—were recently consolidated into a multi-district litigation proceeding in South Carolina.

Emerging PFAS Regulation

Estimates put some levels of PFAS contamination in nearly all 50 states. Due to their heavy usage and known adverse health effects, many states that have grown impatient with federal inaction are now

regulating PFAS. These regulations, from states such as California, New Jersey, New York, Minnesota, Maine, New Hampshire, and Michigan, include setting the maximum contaminant levels for certain perflourinated chemicals in drinking water, limiting which PFAS chemicals can be used in food packaging, and requiring fire departments to report the use of firefighting foam containing PFAS.

On June 27, 2019, the U.S. Senate passed legislation (expected to pass the House in July) to regulate PFAS by requiring, *inter alia*:

1. Manufacturers to report air and water discharges of PFAS;
2. The Department of Defense to phase out the use of PFAS in its fire-fighting foam by 2023;
3. The EPA to establish safe water drinking limits for PFAS (and as a result public utilities would need to begin testing their potable water supplies for PFAS); and
4. The EPA to issue guidance on the destruction and disposal of PFAS within one year.

What does PFAS Mean to You and How Akerman can help?

Akerman's experience in analyzing and evaluating PFAS liabilities and exposures positions us to assist private equity firms and their portfolio companies in the myriad ways PFAS may present an issue. We can help prevent or mitigate potential liabilities by:

- Advising about PFAS liabilities for transactional and real estate due diligence.
- Evaluating buyer's/seller's products to assess potential PFAS liabilities.
- Evaluating insurance programs to ensure protection from or mitigation of PFAS liabilities, as insurers are beginning to write exclusions for PFAS-related liabilities.

- Assessing historic operations, chemical storage, and waste handling practices that could lead to PFAS liabilities.
- Counseling on preparing for, complying with and the impact of new federal and state legislation regulating PFAS.
- Analyzing portfolio companies for possible PFAS-related exposures.
- Defending companies against claims in litigation or by regulatory agencies.
- Developing Best Practices to ensure protection and safety of employees, surrounding communities, and the environment.