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PERSPECTIVES

# PFAS RISK AND THE ROLE OF THE CORPORATE FIDUCIARY

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Corporate entities are feeling the heat per- and polyfluoroalkyl substances (PFAS) are generating. PFAS manufacturers are being sued in record numbers in the US based on novel legal theories involving personal injury tort claims, product liability, environmental damage and fraud, among other things.

Heightened legal activity in other jurisdictions, including the UK and the European Union (EU), is expected. Manufacturers of products containing PFAS, and their downstream users, are also becoming embroiled in lawsuits, including restaurants that use PFAS-containing food wrappers, packagers of products and large retailers of products containing PFAS.

All this litigation, risk management and finger pointing begs the question: what is the role of corporate fiduciaries in PFAS risk management? This article explores this important question.

## Background

PFAS are a large group of synthetic organic chemical substances. They contain at least one alkyl group on which all hydrogen atoms have been


replaced with fluorine. Well-known PFAS contain fully fluorinated carbon chains of various chain lengths attached to a functional group, such as carboxylic or sulfonic acids. Such groups are called perfluorinated acids and include perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS).

Shorter chain PFAS have been developed to replace the longer chain ones. The distinction between 'long chain' and 'short chain' PFAS is important, as their properties and hazards are quite different. PFAS also include polymers (e.g., fluoropolymers), perfluoropolyethers and polymers with fluorinated side chains. Larger polymers are considered less hazardous than smaller non-polymers because PFAS polymers are non-reactive and are too large to cause toxic effects or be absorbed and bioaccumulate in animal tissue.

Thousands of chemicals are classified as PFAS in the US. Given their diverse functionality, they are found in thousands of industrial, commercial and consumer applications, including pharmaceuticals,

medical devices, pesticides, non-stick coating in cookware, stain-resistant fabrics, food packaging, adhesives, electrical insulation wire, tank linings, firefighting foams, cosmetics, personal hygiene products, and many more.

## Expanding legal and regulatory liability

Globally, the number of PFAS restrictions, phaseouts and reporting requirements is increasing with astonishing speed, particularly in the US. While this article focuses on the US, globally PFAS regulation is increasing. The EU is currently considering a proposal to restrict more than 10,000 PFAS under the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) regulation. If adopted, this would be the most extensive regulatory restriction on PFAS, in one of the world's largest markets. The UK's Health and Safety Executive (HSE) recommended several risk management measures last year, including limiting PFAS in firefighting foams and consumer articles such as textiles, furniture and cleaning products. The HSE has added PFAS as a category of chemicals to the Community Rolling Action Plan as substances prioritised for evaluation under UK REACH.

The US regulatory landscape primarily focuses on PFAS in soil and drinking water, given this route of exposure's potential to increase human exposure. In 2021, the US Environmental Protection Agency (EPA) announced its 'PFAS Strategic Roadmap', laying out a holistic approach to addressing PFAS. The roadmap focuses on increasing investments in research, leveraging legal authorities to restrict PFAS chemicals from being released into the environment, and remediating PFAS contamination. Dozens of states are considering or have enacted comprehensive regulations that restrict PFAS, and more are on the way.

The EPA issued a rule requiring all manufacturers (including importers) of PFAS in any year since 2011 through 2022 to report information related to chemical identity, categories of use, volumes manufactured and processed, byproducts, environmental and health effects, worker exposure and disposal. This reporting standard requires submitters to conduct a reasonable inquiry within the full scope of their organisations, not just the information known to managerial or supervisory employees. The information will be made widely available, and responders need to be mindful of the implications of the data they are reporting and their utility in third-party lawsuits.

Toxics release inventory (TRI) data are also reported to the EPA annually by facilities in certain industry sectors that use tri-listed chemicals above certain quantities. A 2020 law identifies certain regulatory activities that automatically add PFAS or classes of PFAS (e.g., the EPA issuing a final toxicity value or being subject to a Toxic Substances Control Act Significant New Use Rule). In October 2023, the

EPA eliminated an exemption that allowed facilities to avoid reporting information on PFAS when those chemicals were used in small concentrations. The EPA most recently updated the list of PFAS subject to TRI reporting in May 2024.

An EPA rule issued in May 2024 designated PFOA and PFOS, two of the most hazardous PFAS, as 'hazardous substances' under the federal hazardous substance remediation law, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The rule makes these substances eligible for CERCLA cleanup requirements and requires entities to report immediately releases of PFOA PFOS that meet or exceed the reportable quantity of one pound or more in a 24-hour period. When the EPA announced its final rule, it also issued a separate PFAS enforcement discretion and settlement policy under CERCLA, stating that it will focus enforcement on parties that significantly contributed to the release of PFAS into the environment, including parties that have manufactured PFAS or used PFAS in the manufacturing process, federal facilities and other industrial places. In April 2023, the EPA sought public input on whether to seek similar CERCLA designation status as a 'hazardous substance' for other PFAS.

In February 2024, the EPA announced two proposed rules that will add to its 'comprehensive approach' for addressing PFAS pollution and to the commercial bottom line for hundreds of businesses facing costs for cleanup. The first proposed rule would modify the definition of hazardous waste as it applies to cleanups at permitted hazardous waste facilities. The second proposed rule would amend the Resource Conservation and Recovery Act regulations to add multiple PFAS compounds as hazardous constituents. The PFAS would be added to the list of substances identified for consideration in facility assessments. Where necessary, further investigation and cleanup through the corrective action process would be required at hazardous waste treatment, storage and disposal facilities.

Implementation of these measures is expected to jump-start extraordinary remediation activities, resulting in significant cleanups, demands for cost recovery, reopening of 'cleaned up' sites and private litigation. The insurance industry is bracing for the impact. Due diligence in M&A will be complicated and costly.

In April 2024, the EPA issued the first-ever national drinking water standard for six PFAS. The EPA established legally enforceable levels for PFOA, PFOS, perfluorohexanoic acid (PFHXS), perfluorononanoic acid (PFNA) and hexafluoropropylene oxide dimer acid (HFPO-DA) as individual contaminants and PFAS mixtures containing at least two or more of PFHXS, PFNA, HFPO-DA and perfluorobutane sulfonate. The EPA estimates that between six and 10 percent of the 66,000 public drinking water systems subject to the

standard may have to take action to reduce these PFAS to meet the new requirements.

## Expanding commercial liability and brand damage

Thousands of lawsuits have been filed in the US alleging personal injury and property damage caused by PFAS. Plaintiffs' claims are based on negligence, wantonness, public nuisance and related tort-based allegations. The listing of PFOS and PFOA as CERCLA hazardous substances will inspire waves of new litigation. Companies must manage the fallout, assess the potential for legal action and prepare accordingly.

A growing number of consumer product liability cases are seeking class action certification alleging the presence of PFAS in purchased products. Plaintiffs assert fraud, various breaches of implied or express warranty, negligent misrepresentation, state consumer protection provisions and unfair competition claims, among other novel theories of liability. The commercial implications are devastating. Even if the cases are dismissed, transaction costs are high and brands are damaged significantly, impacting share value and undermining the commercial goodwill companies work hard to build with their customers.

## The fiduciary's role

With all this in play, what is the role of a company's board of directors? State laws vary and define the legal standard to which both for-profit and not-for profit directors are held, but at the end of the day, directors are fiduciaries and have a clear duty to ensure a company's success and corporate sustainability. The presence of PFAS in a company's supply chain is a risk factor, and directors, as fiduciaries, are required to assess this risk as they would any other that undermines the commercial success of the enterprise they serve and are tasked with protecting. Willful indifference to the presence of PFAS in a company's supply chain could well be regarded as a breach of a fiduciary's duty to protect the company and ensure its continuing success.

> **"In this legal, regulatory and commercial landscape, and the probability that this intense focus on PFAS is the new normal, fiduciaries are urged to develop a PFAS game plan."**

## What should fiduciaries do?

In this legal, regulatory and commercial landscape, and the probability that this intense focus on PFAS is the new normal, fiduciaries are urged to develop a PFAS game plan. The board should ensure the company is aware of PFAS in the supply chain, understand where PFAS might enter it and assess the criticality of the PFAS to a company's operations.

Are the PFAS incidental and easily replaced, or essential to the functionality of the process or product in which they are found? What kind of PFAS are at issue: short-chain or long-chain, known to be persistent, bioaccumulative and toxic or not, trivial in terms of concentration and exposure potential, or something else? These are the kinds of questions directors, managers and fiduciaries should be asking to assess whether or not the presence of PFAS in a company's supply chain poses an existential threat to the company's bottom line.

A PFAS game plan must include at least these elements, as outlined below.

First, diligently, and under the protection of the attorney-client privilege, ascertain where in the supply chain PFAS are found. Eliminate the source of the PFAS if possible or develop a reformulation strategy. If reformulation is not possible, determine what is needed to ensure continued market access. Clarify as much as possible what is known about each PFAS species – composition, performance, properties, uses, safety data, applicable bans, available alternatives and restrictions or reporting requirements – and develop a plan to protect market access.

Second, global monitoring is essential, and a company's operations must be fully informed about PFAS regulations, pending trends and proposed regulations. Bans in various countries and restrictions could affect companies even if they do not have an active presence in the markets in question. Many states are developing currently unavoidable use standards on which to base exemption requests from PFAS bans or phaseout restrictions. It is important to develop justifications for PFAS that are essential. Companies must be prepared to seek exemptions and derogations under domestic and international regulatory frameworks to ensure market access is available for as long as possible.

Third, fiduciaries need to assess business options, including insurance policies, contractual indemnifications, and related private-party risk mitigation measures to protect the company. Managers should be directed to conduct an insurance audit and shore up deficits, review supply and related commercial agreements to seek supplier indemnifications to provide as much contractual protection as possible, and revisit the company's product component certification programme to ensure protections are state of the art, as are its product certifications. It is also important for the

company to assess whether its procurement policies are PFAS sensitive and confirm that research and development activities and product development policies disallow non-essential PFAS at every step of the process.

## Conclusion

Fiduciaries must be aware of and minimises the presence of PFAS in a company's supply chain. The measures outlined above, if taken, will help discharge a fiduciary's duty of care to minimise PFAS liability. CD

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