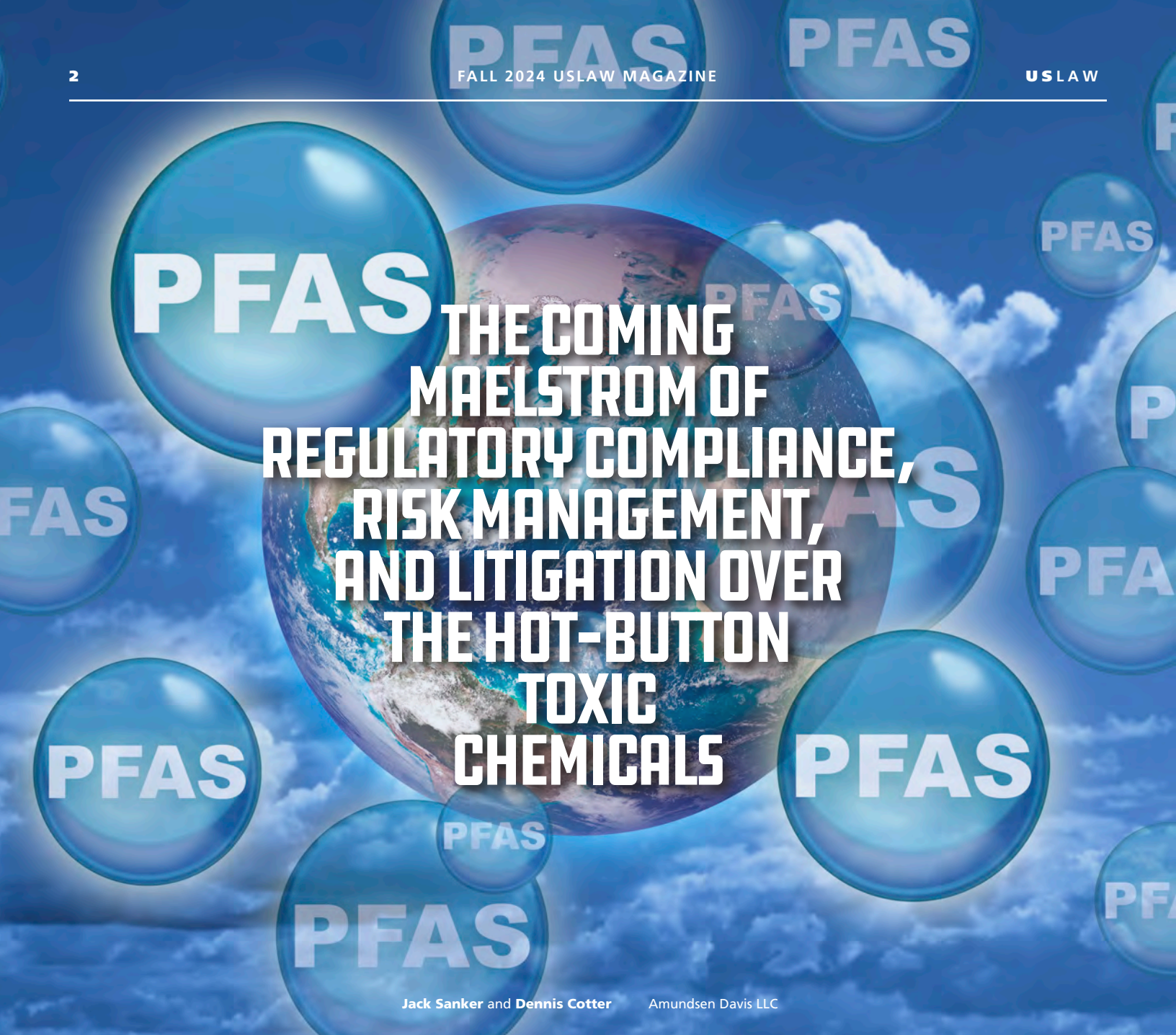


PFAS



# THE COMING MAELSTROM OF REGULATORY COMPLIANCE, RISK MANAGEMENT, AND LITIGATION OVER THE HOT-BUTTON TOXIC CHEMICALS

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You may not recognize the term now, but you will be hearing a lot more about something called PFAS (pronounced “PEA-fass”) and its longer name, polyfluoroalkyl and polyfluoroalkyl substances. PFAS is the general name for a large family of synthetic chemical substances of about 8,000-15,000 fluorinated chemicals and include other chemical compounds with similar abbreviations such as perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS).

## WHAT ARE PFAS AND WHY SHOULD I CARE ABOUT THEM

PFAS are often referred to as “forever chemicals” because of their inability to break down in the natural environment. For over the last 80 years, PFAS have been

used in food packaging, non-stick cookware, waterproofing chemicals, firefighting foam, insulation, leather goods, personal care products, and hundreds of other products. As a result, PFAS are omnipresent in many manufactured goods, clothing, packaging, industrial chemicals, and drinking water, and have leached into the overall environment.

In fact, PFAS are so common in the environment that they are also commonplace in the human bloodstream. Blood tests show that PFAS are present in human samples going back to the 1950s, and a report by the Centers for Disease Control and Prevention National Health and Nutrition Examination Survey states that an estimated 97% of Americans already have PFAS

in their bloodstream today.

Broadly speaking, there are many health concerns that are strongly correlated to PFAS exposure. The current epidemiological evidence suggests associations between PFAS exposure and health effects such as increases in cholesterol, lower antibody responses to vaccines, kidney and testicular cancer, decreases in birth weight and other infant complications, liver and kidney complications, among others. While PFAS has not yet specifically been proven to be the cause of these health concerns yet, they are closely linked.

## REGULATORY CHANGES

The prevalence of PFAS and their negative effects have garnered media attention

and increased regulatory involvement. In 2021, the Environmental Protection Agency (“EPA”) rolled out a [“Strategic Roadmap”](#) that set future timelines for additional regulations on PFAS in drinking water and reporting requirements on PFAS. On a state level, legislatures are passing laws regarding PFAS use, resulting in state attorneys general bringing lawsuits against PFAS manufacturers to protect the public from PFAS exposure.

Recently, the EPA finalized a rule (40 C.F.R. Part 705) requiring companies that manufactured, produced or imported PFAS chemicals to report several key data points, including:

- Whether the PFAS were used as a chemical substance or in a mixture or separate item;
- The specific type(s) of PFAS chemical(s);
- Molecular structure of PFAS;
- The volume/amount of PFAS;
- Intended uses (commercial, industrial and consumer);
- Description of the byproducts resulting from the manufacture, processing, use or disposal of PFAS chemicals, including information on releases into the environment;
- “All existing information concerning the environmental and health effects” of the relevant PFAS chemical in the company’s possession or control;
- Information regarding worker exposure, including the number of individuals exposed, activities performed by the workers, and exposure scenarios and duration;
- Disposal information; and
- Information on environmental and health effects.

Most importantly, the regulations apply retroactively, requiring reporting on these items going all the way back to 2011. State-level regulations vary by state and are often more advanced than federal regulations. States are using different approaches to manage PFAS, including banning the sales of certain items containing PFAS and establishing guidance on PFAS in potable water.

Eleven states (ME, MA, MI, NH, NJ, NY, PA, RI, VT, WA, and WI) have hard caps on the amount of certain PFAS allowed in drinking water. Maine, Delaware, and Virginia have also begun the process of establishing standards for certain PFAS. Twelve additional states (AK, CA, CT, CO, HI, IL, MD, MN, NC, NM, OH and OR) have adopted guidance, health advisory, or notification levels for certain PFAS chemicals.

A total of 30 state attorneys general have already filed lawsuits against PFAS manufacturers for contaminating the water supply and many states are adopting piecemeal regulations for food packing, apparel, personal care products, retailers, and fire-fighting materials.

### PFAS ARE THE NEW ASBESTOS

The increased risk of litigation and enforcement actions, along with the prevalence of PFAS up and down supply chains, could take the form of litigation and exposure similar to another well-known toxic chemical: asbestos.

Early PFAS litigation was focused on contamination of the environment surrounding major PFAS manufacturing locations. Major manufacturers faced thousands of lawsuits over the past several decades related to their products contaminating the water supply and allegedly harming residents in the surrounding areas.

One extreme example is the recent \$12.5B settlement between chemical giant 3M and a class of municipalities that sued over PFAS water contamination. Partially as a result of this settlement, 3M has ceased manufacturing PFAS altogether.

Similarly, Kimberly-Clark has been the target of a proposed class action PFAS lawsuit. That suit, filed in Connecticut federal court, accuses Kimberly-Clark of negligence for failing to warn residents near its Kleenex facility that the facility’s smokestacks were emitting PFAS. Kimberly-Clark has denied that it uses PFAS in its U.S. consumer products.

Downstream of that, retailers of goods are being targeted over claims that their products falsely advertise being “all natural” or “organic” when they contain trace amounts of PFAS. Advertising-related claims are likely to grow over the next few years.

Merging businesses, companies contracting with suppliers, and retailers need to be aware of the risks associated with conducting business with other companies who themselves may not be in compliance with the new regulations. These businesses need to be prepared to include protections in their service agreements, purchase orders, and other contract documents to protect and indemnify themselves from potential non-compliant (and therefore risky) business partners.

### TAKING DEFENSIVE MEASURES

Businesses, suppliers, retailers, manufacturers, and anyone adjacent to those industries should take defensive action to limit their exposure to claims and enforce-

ment actions now. Specifically, businesses should be seeking to include indemnification provisions and other limitations on liability in their contracts with downstream suppliers and contractors, specifically carving out liability for PFAS-related civil claims and regulatory enforcement actions. Since the federal regulations are retroactive back to 2011, businesses will need to identify their prior potentially risky business relationships.

By and large, most major insurance carriers have already begun to write coverage for PFAS out of their commercial and general liability policies (another similarity to asbestos), so losses associated with PFAS tort actions will mostly be uncovered. Concerned businesses should reach out to their brokers to discuss what coverages may be available, if any.

In anticipation of new regulations and potential litigation, prudent businesses will want to consult counsel regarding new laws and regulations unique to their business and state to ensure their compliance, and they may consider hiring outside consultants (in addition and separate from legal representation) to audit their business to determine whether PFAS are used in their manufacturing process and/or the materials received from suppliers.

Ready or not, the presence of and regulation of PFAS will become a serious concern for businesses over the coming years, and as the EPA reporting deadline approaches, businesses and their counsel will be busy.



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