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EPA Proposed Designation of New CERCLA Hazardous Substances Would Significantly Impact Business Facilities, Manufacturers and Property Owners

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On August 25 and 26, 2022, the U.S. Environmental Protection Agency (EPA) issued a press release and a pre-publication version of a proposed rule to designate two per- and polyfluoroalkyl substances (PFAS) as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Specifically, EPA is proposing to designate perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), including their salts and structural isomers, as CERCLA hazardous substances.

PFOA and PFOS have historically been used in a wide range of consumer products including carpets, clothing, fabrics for furniture, cleaning products, nonstick products and cookware, and packaging for food. PFOA and PFOS have also been used in a variety of industrial applications and products including chrome plating operations, electronics manufacturing, textile manufacturing, firefighting foams, insecticides, adhesives, paints, varnishes, inks, and photographic coatings. EPA's proposed rule indicates that these substances are persistent and mobile in the environment and may present a danger to human health and the environment.

The proposed designation, if finalized, will have widespread impacts on manufacturers, commercial and industrial facilities, and property owners. Facilities that release PFOA and PFOS into the environment will be obligated to report the release to the governmental authorities. Additionally, the proposed rule would: (1) permit the EPA to require potentially responsible parties to cleanup these substances; (2) permit cost recovery and contribution actions associated with the cleanup of these substances; (3) require federal entities that transfer their property to

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provide notices and covenants regarding PFOA or PFOS on the property; and (4) subject potentially responsible parties to CERCLA's provisions of joint and several liability. Importantly, once designated as a hazardous substance, the potential for a release of PFOA and PFOS into the environment would need to be evaluated as part of the pre-acquisition environmental due diligence and Phase I Environmental Site Assessment in order for a prospective purchaser to potentially qualify for a defense to liability.

The EPA indicated that they will be publishing the Notice of Proposed Rulemaking in the next several weeks and the final rule is expected in summer 2023. Once published in the Federal Register, EPA indicates that the proposed rule will have a public comment period for 60 days. Later this year, EPA also anticipates seeking public comment on designating other PFAS chemicals as hazardous substances under CERCLA.

Please contact the author of this Alert with questions related to the proposed designations or to discuss impacts to your specific operations.

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