

Title: Taking action to deal with the risk from PFAS

[Taking action to deal with the risk from PFAS | Weightmans](#)

There is a great deal of activity around per- and polyfluoroalkyl substances (“PFAS”) at the moment.

The effects of these substances are not fully understood, but there is enough information available to suggest that they can lead to serious health effects.

This is a problem because they have been commonly used for years in a range of products and services and do not break down easily. People have been exposed at work during manufacturing processes, in the course of product use, and to used product residues in soil and water in the environment.

Two questions arise for companies:

- First, in relation to companies that currently manufacture PFAS or use PFAS-containing products in their manufacturing operations or services, is regulation going to mean that the future conduct of these activities is going to have to change?
- Second, what is the risk of liability arising out of the PFAS that is already “out there”.

The answer to the first question is a firm yes. Regulation is emerging across the globe that will require companies to rethink what they do with PFAS if they are to remain on the right side of the law.

France recently became one of the countries to introduce a wide ban on PFAS use, while the European Union is considering a comprehensive restriction proposal that will affect the viability of a very great many applications across multiple sectors. The UK, by contrast, has been more measured. However, the Environment Agency is mobilising and the Parliamentary Environmental Audit Committee is conducting a new inquiry into the UK’s regulatory approach.

The answer to the second question is that liability for personal injury is certainly on the cards for:

- employers, where there has been exposure to PFAS of employees in the course of employment;
- manufacturers and possible other actors in the supply chain, where there have been exposures of third parties to PFAS in the course of product use; and
- those said to have introduced PFAS into, or allowed it to remain in, the environment where it has led to environmental exposure of third parties.

Liability for polluters is also possible for certain types of “property damage” too. Further, regulatory cleanup liability for PFAS in soil and water is also a high risk for polluters and also for subsequent owners of the relevant land.

Obstacles do stand in the way of claimants and regulators, but liability is certainly not merely theoretical. There has been much litigation and clean up activity internationally, in particular in the US where large companies have already entered into large liability settlements. In the UK, two

manufacturing locations where PFAS has been used are currently being very closely examined by claimant law firms for possible claims.

What should companies be doing at this stage to understand whether PFAS could be a threat to their business?

- I. The first thing is to establish whether the company manufactures PFAS or uses PFAS or PFAS containing products as part of manufacturing or other operations. This will establish the extent to which the company is exposed to the emerging regulation around PFAS and whether business might therefore be curtailed in the future unless a workaround can be found.

Establishing this may not be a straightforward process, not least because there are thousands of individual substances under the PFAS umbrella and they can be hard to spot from the chemical names alone. PFAS manufacturers will be the best equipped to know in this regard, but the question will be harder to answer by those further down the product chain. Fortunately, there are third party organisations that can assist with this type of analysis.

If PFAS is identified, very careful consideration needs to be given to adapting the business to steer on the right side of the emerging regulation and restrictions. Alternatives to long standing PFAS/PFAS product related processes and applications may well be needed in the relatively short term if the relevant part of the business is to continue.

The identification of PFAS has another important implication. If no action is taken, and employees or third parties are, or continue to be exposed to PFAS, those employees and third parties could make much of the inaction in the face of the positive findings in any subsequent liability proceedings.

- II. The next thing is to ask what PFAS has been manufactured, or used in manufacturing processes, in the past. This will establish whether there is any risk at all of liability for historic activities.

This is not a straightforward process either, not least because companies change over the course of time, with businesses, assets and subsidiaries being acquired and divested often quite regularly. What may have been manufactured or used in the past could be obscured by merger and acquisition activity.

Where PFAS has been manufactured or used in manufacturing processes in the past, a host of sub questions arise that may need to be bottomed out in order that a full risk picture can emerge: to whom was it sold? In what quantity? Over what period? On what terms? Where is the PFAS likely to be now?

- III. Where PFAS is established to have been manufactured, or used in manufacturing processes, the next step is to establish whether potential liabilities have been transferred from those with whom they would normally rest to another by way of contract. Environmental liabilities are very commonly transferred or channelled, especially in corporate asset and share purchase agreements, and the transfer can be effected in whatever way the parties choose. This exercise can lead to nice surprises (where the

liability a company might otherwise have has been transferred away) or nasty surprises (where the company took on others' liability risk and now, with hindsight, regrets it).

- IV. The current company real estate portfolio is the next thing to consider. The question is: could the property be a source of environmental PFAS exposure, either as a result of the company's activities or a previous owner/occupier's activities? This question can usually be answered with a simple 'no' but, for certain current or former uses, PFAS contamination is a very real danger. In this category in particular are manufacturing sites where PFAS or PFAS products are, or have been, manufactured or used, landfills, and old fire-fighting facilities (e.g. at fire stations and airfields).
- V. If current property might be contaminated by PFAS, the next thing is to consider is the extent to which there might be material liability risk for the company. There are a couple of points to mull over here. The first is the terms on which the property was acquired, which may adjust how liability will fall between outgoing owner and incoming owner. The second is whether it might be prudent to do some intrusive investigation to establish the extent of any contamination more precisely. The information gained may help, but an investigation may be disruptive and expensive, and may lead to knowledge that the company, with hindsight, wishes that it had not acquired.
- VI. The final thing to ponder is the company's previous property interests. Could the company's former properties be a source of environmental PFAS liability exposure? This might be as a result of the company's historic activities or alternatively the activities of another previous owner/occupier that have been passed contractually to the company.
- VII. Insurance is an important consideration here as the company moves forward. The underwriting and claim departments at major insurers are quickly taking steps to understand the overall PFAS potential exposure, apply the science and modify their underwriting process accordingly. They are trying to tailor responses in individual cases depending on the cover sought, the industry sector, the activities, the available information and the perceived risks. Underwriting appetites and practices may evolve over the course of time with regards to PFAS exposures, aided also by the efforts of insurance brokers who are taking a proactive interest in better understanding the risk and mitigation strategies.

It is difficult to predict how historic general liability or excess casualty policies may be implicated. Complex scenarios could take place involving various types of claims alleging third party liabilities, cleanup/remediation obligations and legal defence costs associated with product liability or product pollution liability spanning multiple years and policy limits.

Completion of the above steps will hopefully reassure a company that it has little to fear from PFAS regulation and liability as it emerges. Alternatively, the potential PFAS regulation and liability issues that have been "smoked out" will be able to be considered at an early stage and factored into plans going forward.

Produced with grateful acknowledgement of the input from Neil Gunn (WTW Research Network) and Frederick Gentile (WTW GB Risk Management)

