

MERGERS & ACQUISITIONS

How to Deal with New PFAS Contamination Rules

Private equity firms are itching to use up their dry powder and M&A activity is surging. But a different acronym should be atop dealmakers' minds going into 2021.

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Regulations about PFAS contamination — per- and polyfluoroalkyl substances used in products like nonstick cookware and waterproof or stain-resistant fabrics — is primed to increase under the Biden administration. Meanwhile, dealmakers targeting sites possibly contaminated years or even decades ago face a heating (and possibly narrowing) M&A window.

For buyers, it's crucial to understand this moment and act accordingly.

Regulatory Focus Meets M&A Recovery

PFAS have been around since the 1950s, but regulatory pressure, mostly from states, increased in recent years. Efforts that began under **President Obama** and continued under **President Trump** mean that the **Biden** administration can move quickly at the federal level — and his campaign plans included designating PFAS as a hazardous substance and setting enforceable limits in the Safe Drinking Water Act. Congressional legislation to regulate PFAS is also set to be reintroduced in January.

Meanwhile, M&A volume has rebounded from pandemic-induced lows. Private equity and venture capital's share of the market continues to grow, and, in addition to wanting to use available cash, dealmakers might be rushing to close deals before tax changes under Biden.

New PFAS regulations could affect a range of target entities — e.g., manufacturers, public utilities, landfill operators and owners of property near possibly contaminated sites (the most highly publicized examples being land near airports and military bases). Problems could stem from something that happened under previous owners, complicating matters.

The current lack of regulatory clarity means it's hard to know how regulatory agencies will treat contaminated sites or the details of remediation. This makes PFAS a potential liability difficult to “price into” deals. Few PFAS-related lawsuits exist to offer precedent, especially as most relate to manufacturers who use PFAS, not landowners.

What Buyers Should Do

Smart buyers have readied for a PFAS sea change by requiring investigations, seller representations and warranties, and seller indemnities relating to PFAS in the same manner as substances already regulated as hazardous. Buyers also should consider adding “amended thereafter” language relating to regulatory definitions in deal contracts, to ensure that substances designated as hazardous down the road are covered. There are other important questions to ask:

- Was anything containing PFAS ever made or processed on the property?
- Were large volumes of consumer or industrial products containing PFAS ever disposed of there?
- Is the property near other potential PFAS sources?
- And has the owner ever completed a questionnaire disclosing PFAS influence or contamination?

The last question is tricky. Standard Phase I and Phase II site assessments have limitations because they do not always evaluate emerging contaminants — though that will probably change if PFAS is declared a



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hazardous substance. In the meantime, buyers should specifically ask their environmental consultants to consider PFAS in their Phase I reviews, as part of the buyers' acquisition due diligence.

Each acquisition, property and seller is different. Some sellers might try to provide a complete picture of PFAS contamination — perhaps hoping that their good-faith efforts will help in negotiations or avoid costly legal problems later. Others might be less forthcoming, especially if they see imminent regulatory pressure as a ticking clock.

Learning of PFAS contamination shouldn't necessarily kill a deal, but it can affect deal terms. For instance, buyers often work with sellers to split the cost of environmental insurance policies, provided coverage does not contain PFAS exclusions. Regardless, given the PFAS/M&A inflection point, buyers would be wise to understand the landscape and fully investigate target properties.

Otherwise, they could make a purchase they'll soon regret.

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