Implications of PFAS Regulation on the Commercial Real Estate Industry

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If you have read the news lately, you have likely heard about "forever chemicals" and the dangers they may pose. While you might be familiar with the potential impacts to human health and the environment, the implications of these chemicals on the commercial real estate industry may be less obvious.

The term "forever chemicals" refers generally to per- and polyfluoroalkyl substances, also known as "PFAS." PFAS are man-made and have been manufactured in the United States for over 70 years. They are used in a wide array of consumer and commercial products and processes across industry sectors and have achieved popularity and success in large part because of their unique resilience to degradation. While the chemical makeup of PFAS has made them critical to certain industries, it has also allowed them to persist widely in the environment (and potentially in humans and animals).

Over the last several years, states and the federal government have undertaken efforts to regulate PFAS. Most of the regulations so far have been aimed directly at protecting human health, such as the regulation of certain PFAS in drinking water systems and limitations on the future manufacture and/or use or particular PFAS compounds.

Recently, however, the U.S. Environmental Protection Agency ("EPA") has also taken steps to regulate certain PFAS - Perfluorooctanoic Acid ("PFOA") and Perfluorooctanesulfonic Acid ("PFOS") - under the federal Comprehensive Environmental Response, Compensation & Liability Act ("CERCLA"). EPA designated PFOA and PFOS as "hazardous substances," meaning they now trigger both the "reportable quantity" release reporting requirements and the statute's strict liability scheme familiar to many in the commercial real estate industry. Because of the ubiquitous nature of these compounds, this designation will have wide-ranging impacts for current property owners and for those engaged in buying, selling, financing, or redeveloping many types of commercial properties.

One of the most significant implications of the CERCLA listing is potential liability exposure. Under that statute, current and former owners and operators of property with contamination can face liability for cleanup costs associated with the release of PFOA and PFOS, regardless of fault (unless one of the defenses or exemptions from CERCLA liability applies). This liability is triggered by *any amount* of PFOA or PFOS.

The designation is also likely to impact transactional due diligence. While PFOA and PFOS have not traditionally been within the scope of Phase I Environmental Site Assessments in real estate transactions, prospective buyers and lenders will now need to consider potential PFOA and PFOS sources or contamination, especially when there is reason to believe a property may have been impacted from historic uses of PFAS on site or at nearby properties. Of course, the more a buyer or lender knows about the existence of PFOA or PFOS prior to finalizing a transaction, the more they can protect themselves or mitigate related risks before closing. Notably, however, prospective buyers and lenders may face reluctance from sellers with respect to pre-acquisition sampling for two reasons. First, the strict liability scheme under CERCLA means that sellers could themselves face liability for PFOA or PFOS identified should the transaction fall through. And second, because some states require that *all* sampling results be reported to

the local or state environmental agency, sellers may be unwilling to generate data that triggers potentially problematic reporting requirements.

Even if prospective purchasers or lenders include PFAS within the scope of their transactional due diligence, there will likely be many unanswered questions. For example, it may be difficult to discern which PFAS contaminants to include in the scope of sampling. To date, some sampling protocols have been approved by EPA, but few laboratories and samplers are fully capable of implementing those sampling methods. Furthermore, if sampling identifies PFAS in on- or off-site media, there are currently only a few viable options available for addressing or remediating those contaminants.

While all of this may seem daunting for the commercial real estate world, stakeholders can take some reassurance in the unknown, as well. Concurrent with the CERCLA listing, EPA also issued its *PFAS Enforcement Discretion & Settlement Policy Under CERCLA* which provides some exceptions to the otherwise strict liability scheme and is intended to give comfort to certain stakeholder groups (including some private owners or operators of contaminated properties). And, based on recent actions of Congress and certain states, there will likely be carve outs and challenges to the scope and implementation of the Final Rule.

Regardless of the potential uncertainties, stakeholders should be prepared to comply with the rule, which became effective on July 8, 2024. Those engaged in all aspects of real estate could face novel challenges as it is implemented over the course of the next several months and years. NAIOP is paying close attention to Congress, the courts, and the actions of the states, all of which are likely to shape the ultimate reach of the Final Rule.