# The Ever-changing Regulatory Landscape and Potential Impacts of PFAS on Businesses

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The ubiquity of PFAS (per and polyfluoalkyl substances), so-called "forever chemicals," has made them a focus of regulatory agencies like the Environmental Protection Agency ("EPA"). In response to evolving scientific knowledge and public awareness about PFAS, these agencies are limiting their use. There are thousands of PFAS chemicals and they are used in a wide variety of applications, including consumer, commercial, and industrial products. While exposure to some types of PFAS chemicals has been associated with higher instances of certain health issues, many have not been thoroughly assessed and are still in the process of being studied and regulated. This rapidly evolving regulatory landscape creates uncertainty and can lead to potential enforcement actions against impacted businesses. A recent decision by the Fifth Circuit Court of Appeals highlights the potential legal landmines and economic upheaval that can result from the swiftly changing landscape of PFAS regulation.

In *Inhance Technologies v. U.S. Environmental Protection Agency*, the EPA sought to prohibit Inhance Technologies, LLC ("Inhance") from using a fluorination process it had used since 1983 to create a barrier that prevents chemicals from leaching out of their plastic containers and that also prevents substances like pesticides from permeating the containers. The EPA had recently discovered that Inhance's fluorination process created PFAS and issued orders pursuant to the Toxic Substances Control Act ("TSCA"), 15 U.S.C. 2601-2697 to prevent Inhance from manufacturing PFAS though its fluorination process. The TSCA regulates chemical substances through two mechanisms. First, Section 5 of the TSCA allows the EPA to regulate "new chemical substances" and "significant new uses" of chemical substances. Second, Section 6 of the TSCA permits the EPA to regulate existing chemical substances but requires that it engage in a cost-benefit analysis, weighing the negative effects of the chemical substance against the benefits of the substance as well as the economic consequences of prohibiting or limiting the substance. The EPA relied on Section 5 of the TSCA and ordered Inhance to stop using its fluorination process that created PFAS. Inhance immediately petitioned the court for expedited review noting that enforcement of the ban on its fluorination process would shut down the company and force it into bankruptcy.

The Fifth Circuit Court of Appeals held that the EPA exceeded its statutory authority by regulating Inhance's process under Section 5. The Court rejected the EPA's argument that the process was "new" because the EPA had just learned that it created PFAS. Instead, the Court held that Section 5 was only intended to cover chemicals or significant new uses that had only recently come into existence. The EPA could not avoid the cost-benefit analysis required by the TSCA Section 6 by characterizing existing chemicals or uses as "new." Inhance's fluorination process which had been in use for 40 years could not be considered "new" under any reasonable definition of that term.

The Court vacated the EPA's order that used Section 5 to prohibit Inhance from using its fluorination process. The

Court noted, however, that the EPA could regulate Inhance's decades-old process through Section 6, subject to the cost-benefit analysis required by that section. The case shows how PFAS regulations and enforcement actions can impact businesses and even present an existential threat. From fluorochemical manufacturers to companies using PFAS-treated products, businesses need to be prepared to address legal issues that may arise from their manufacture or use of PFAS. If you have questions about the fast-changing landscape of PFAS regulations or how your business could be impacted, please contact Matt Hennesy, partner and chair of Barley Snyder's Litigation Practice Group.

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