

PFAS and the 2024 Elections: Why Neither Path Ends the Risks to Companies

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On Election Night 2024, two candidates often seen at polar opposite ends of the political spectrum await news from states as to their fate. For the past two years, I have been asked by clients, corporations, insurers, and finance world professionals for opinions on just how pivotal tonight's elections are to the path forward with respect to PFAS. Without question, the Biden Administration has aggressively regulated PFAS and taken what amount to leaps forward on research as compared with years past. As the build up to the election has generated steam, my impression from speaking with representatives across many industries is that the sentiment is that with a Harris win, the EPA's PFAS train will continue full steam ahead, whereas with a Trump victory, the PFAS issue will be laid to rest for four years, so companies can breathe a sigh of relief. While I agree with the former, I disagree wholeheartedly with the latter.

Kamala Harris and PFAS

Four years ago, there was little question as to where now President Joe Biden stood on the issue of PFAS. He campaigned on the issue (of course, among many other issues), stated on his campaign website the steps his administration would take to address PFAS, and soon after swearing in, the path forward began with the appointment of EPA Administrator Michael Regan, who had a prior history with tackling PFAS issues. It was rather remarkable to watch PFAS take at least part of the stage from a Presidential candidate. Certainly, the PFAS campaign promises were not cast aside after Biden's eventual victory.

Now, however, the picture is somewhat less clear, although in the balance it would be incredibly surprising if Kamala Harris wins the election and her EPA slows down (or stops) pursuing PFAS regulatory issues. I just cannot imagine that happening. The only direct sign from either Kamala Harris or Tim Walz during the campaign on the issue of PFAS came two weeks ago when Harris voiced her support for legislation to make it easier for disabled veterans to obtain benefits if they were exposed to PFAS while they served in the military. During her time as an attorney and in other political positions, Harris does have a history of showing intent to pursue environmental polluters and also supporting stronger environmental regulations. She also fought industry efforts to weaken existing environmental regulations. Walz has a record related specific to PFAS, as he supported and campaigned for Minnesota's PFAS ban that was signed into law (the legislation requires a phased approach to banning PFAS from all products sold in the state). All in all, these historical signs are

sufficient to support the notion that a Harris-Walz office would continue down the PFAS path that the last four years began to follow.

Donald Trump and PFAS

Donald Trump is a vocal opponent of a strong EPA, and in his prior administration, it is true that his office wiped off the books many environmental regulations and significantly weakened the EPA through funding cuts. Do his environmental policies that tend to favor corporations translate to PFAS risks to companies coming to a grinding halt if he prevails? I say no, for several reasons.

First, while it is undeniable that the Trump administration slashed environmental regulations, it is worth pointing out that his administration also advanced some environmental regulations, including some specific to PFAS. Most notable of those was the creation of TSCA section 8(a) reporting obligations, which many companies struggle with from a compliance perspective to this day (albeit also due to the fact that the PFAS regulations under TSCA section 8(a) were significantly strengthened during the Biden administration). In addition, his EPA did submit several PFAS “notices of intent to regulate” to the White House OMB, a few of which were approved to proceed. The political and citizen awareness level with respect to PFAS is even greater now than it was during the Trump administration. It would be politically harmful for Trump, or his supporters in the House and Senate, to completely ignore constituent concerns with respect to PFAS and simply stop legislating PFAS altogether, nor would they likely exert pressure on state agencies to cease regulating. Both will slow considerably, but they will not stop.

Second, I use the hypothetical of a Trump win, Congressional control shifting to Republicans, and the EPA’s CERCLA and Safe Drinking Water Act efforts being successfully legally challenged such that they are sent back to the EPA (where they would likely languish until another election cycle). Even then, companies have to consider and understand that there are already close to three dozen states regulating PFAS in drinking water, several regulating PFAS with “CERCLA-like” state regulations, several enacting PFAS reporting obligations for consumer goods, numerous bans being proposed and enacted, and various other PFAS proposals either enacted or on the table. I believe that these, too, will continue even under the scenario above. States who have been aggressive on PFAS even without a Biden EPA backing them will continue to be just that, causing companies headaches if they are brought into enforcement actions and in navigating the myriad of differing regulatory schemes at the state level.

Finally, I realize that it is always easier to see compliance / regulatory issues as presenting the most risk (especially with PFAS, given just how many compliance obligations exist) because they action steps exist for compliance, with missteps having relatively predictable consequences. Litigation risks are less likely to be addressed until litigation actually happens, as it is difficult to measure tangible returns on proactive litigation risk prevention strategies many times. The same is true with respect to how companies prioritize their PFAS risk strategies, but the trend is undeniable – PFAS litigation against companies that did not manufacture PFAS is strongly on the rise year over year, with no sign of a downturn in sight. PFAS litigation is, in my view, largely immune from politics. Civil litigation related to PFAS may allege a variety of damages (property damage, water contamination, injury, fear of an injury, etc.), but take a close look at the Complaints and it should become clear that virtually none of these lawsuits are relying on federal level PFAS regulations to bring forth the case. Rather, they sound in traditional tort law theories such as negligence, nuisance, strict liability, and medical monitoring. These are not the drumbeats that dominate the news – Superfund regulations, Safe Drinking Water Act, TSCA, TRI, RCRA, Clean Water Act, etc. True, the lawsuits may reference these federal level regulations as support for the alleged harms of certain PFAS, but that is a far cry from

the lawsuits relying on those regulations in order to prevail. This trend, I believe, will continue unabated even if there is a Trump victory, as plaintiffs' counsel continue to broaden their reach for industries and companies to target in PFAS litigation. Companies must continue to evaluate PFAS risks, compliance measures, and potential business disruption from PFAS if for no other reason than to prepare for the continuing wave of litigation targeting companies that utilized (whether intentionally or not) PFAS in some step in their manufacturing process.

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National Law Review, Volume XIV, Number 311

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