

# Regulatory and Legal Update: Pending PFAS Roadmap Challenges

The PFAS Emergence: Is It  
Summer Yet?



National Association of Environmental Professionals (NAEP) Webinar

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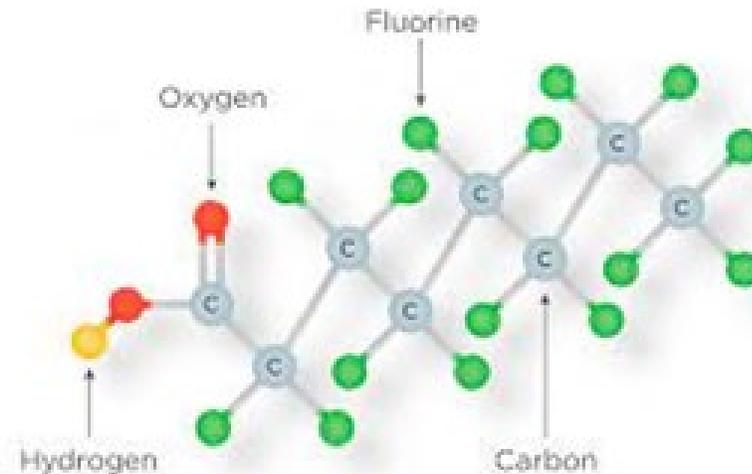
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# Agenda

- ▶ Introduction
- ▶ PFAS Lightning Round
- ▶ PFAS Risks
- ▶ Class B Firefighting Systems: Background
- ▶ Current Regulation of Class B Firefighting Systems
  - ▷ Federal PFAS Roadmap
  - ▷ States
- ▶ Best Practices

# PFAS Lightning Round

- ▶ PFAS = Per- and Polyfluoroalkyl Substances
- ▶ Accidentally discovered by 3M chemist in 1938
- ▶ Carbon-fluorine bond
- ▶ Repels water, oil, fats
- ▶ Heat, fire resistant
- ▶ Friction resistant
- ▶ Durable – “Forever Chemical”
- ▶ Broad range of applications



# PFAS All Around Us

- ▶ Scotch-Gard
- ▶ Stainmaster
- ▶ Gore-Tex
- ▶ Teflon
- ▶ POTW biosolids
- ▶ Food Packaging
- ▶ Cosmetics/Pesticides
- ▶ Surfactants
- ▶ Aqueous Film Forming Foam (AFFF)
  - ▷ Airports
  - ▷ Class B Firefighting Systems



# PFAS Risk

- ▶ PFAS Descriptors:

- ▷ “Forever Chemical”

- ▷ “Ubiquitous”

- ▶ Perhaps, instead:

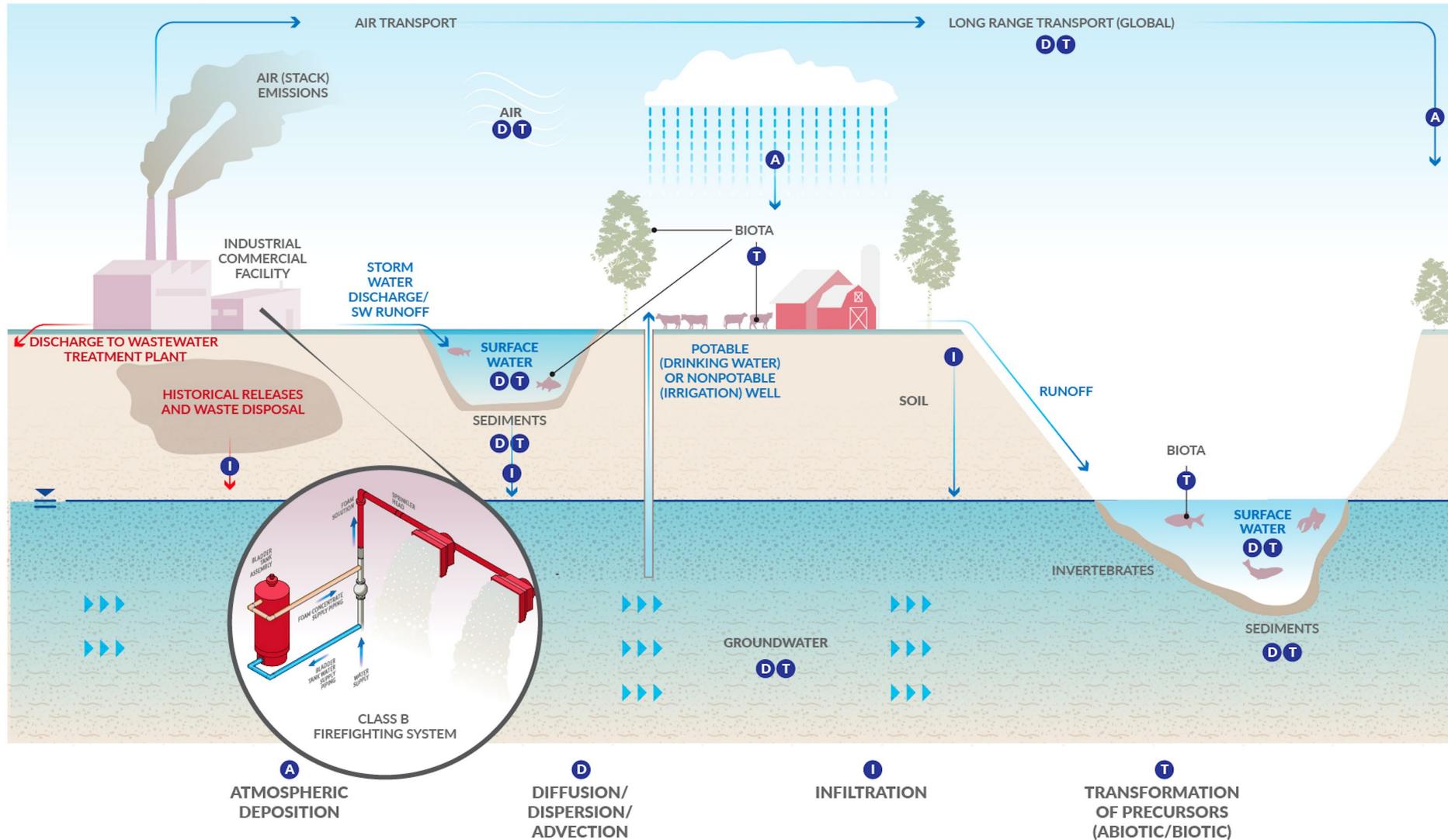
- ▷ “Less than fully understood,” therefore driving anxiety from uncertainty

- ▷ “Pervasive”

# PFAS Risk

- ▶ PFAS Hazard + PFAS Exposure  
= PFAS Risk
- ▶ PFAS risk would be omnipresent if PFAS were ubiquitous and present at levels creating harmful exposure
- ▶ PFAS Risk, therefore, arises in circumstances where PFAS is released (e.g., airports, DOD, landfills) and humans are exposed (e.g., groundwater consumption)
- ▶ 1. Class B Systems 2. PFAS Roadmap

# PFAS Risk from Class B Systems



# Class B Firefighting Systems: Background

- ▶ National Fire Protection Association Foam Standards (NFPA) 11
  - ▷ Class B Fire: a “fire in flammable liquids, combustible liquids, petroleum greases, tars, oils, oil-based paints, solvents, lacquers, alcohols, and flammable gases.”
  - ▷ Class B firefighting systems can be mobile, like a fire truck, or “fixed.”
  - ▷ A “fixed” Class B firefighting system is “a complete installation in which foam is piped from a central foam station, discharging through fixed delivery outlets to the hazard to be protected . . .”

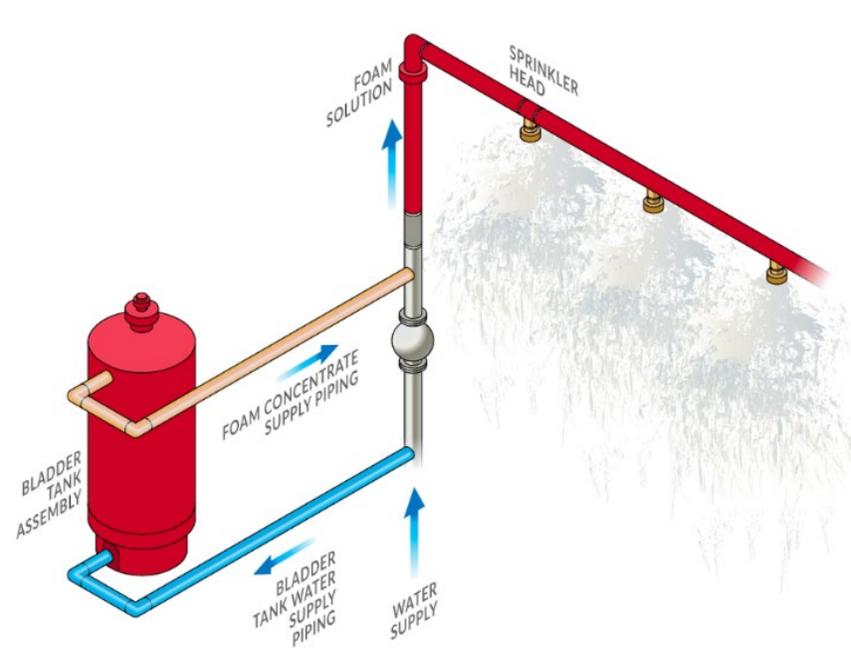


# Class B Firefighting Systems: Background



# Class B Firefighting Systems: Background

- ▶ Purposes:
  - ▷ Control of Class B Fires
  - ▷ Preferred terms for fire insurance



# Class B Firefighting Systems: National Fire Protection Association

- ▶ Maintenance (NFPA 11, Chapter 12):
  - ▷ Requires a *performance evaluation* of the foam, including a flow test of the system proportioner, be conducted as part of annual inspection and testing
  - ▷ Includes discharging foam, commonly for at least 30 seconds and occasionally for up to several minutes
  - ▷ A flow test as short as 30 seconds may result in the production of 1,500 to 3,000 gallons of foam

# Class B Firefighting Systems: National Fire Protection Association

- ▶ Annex E of NFPA 11: “Foam Environmental Issues” (informational purposes only)
  - ▷ “uncontrolled release of foam solutions to the environment should be avoided”
  - ▷ “[t]he foam committee believes that the fire safety advantages of using foam are greater than the risks of potential environmental problems.”
  - ▷ “[t]he primary concerns (with discharging Class B foams to the environment) are toxicity, biodegradability, persistence, treatability in wastewater treatment plants . . . .”
  - ▷ “alternative disposal options” for foam deployed in a testing event should be considered, such as (i) “discharge to a wastewater treatment plant with or without pretreatment . . . .”

# National Fire Protection Association: “Foam Environmental Issues” (cont.)



- ▶ “[g]iven the absence of any past requirements to provide containment, many existing facilities simply allow the foam water solution to flow out of the building and evaporate into the atmosphere or **percolate into the ground.**” (emphasis added)

= PFAS Risk

# U.S.EPA PFAS Strategic Roadmap

## ▶ U.S.EPA's Three-Year Roadmap Approach:

- ▷ Consider PFAS Lifecycle
- ▷ Get Upstream of the PFAS Problem
- ▷ Hold Polluters Accountable
- ▷ Ensure Science-Based Decision-Making
- ▷ Prioritize Protection of Disadvantaged Communities

RESEARCH – RESTRICT – REMEDIATE

# PFAS Hazardous Substance Listing

- ▶ On January 10, 2022, U.S.EPA submitted to the White House Office of Management and Budget (OMB) U.S.EPA's plan to designate two PFAS, PFOA and PFOS, as "hazardous substances" under CERCLA
- ▶ OMB was to provide any objections to U.S.EPA's proposal within 90 days, or by approximately April 11, 2022
- ▶ If there are no objections, U.S.EPA will publish the proposed designation in the Federal Register for public comment with an anticipated final designation by 2023

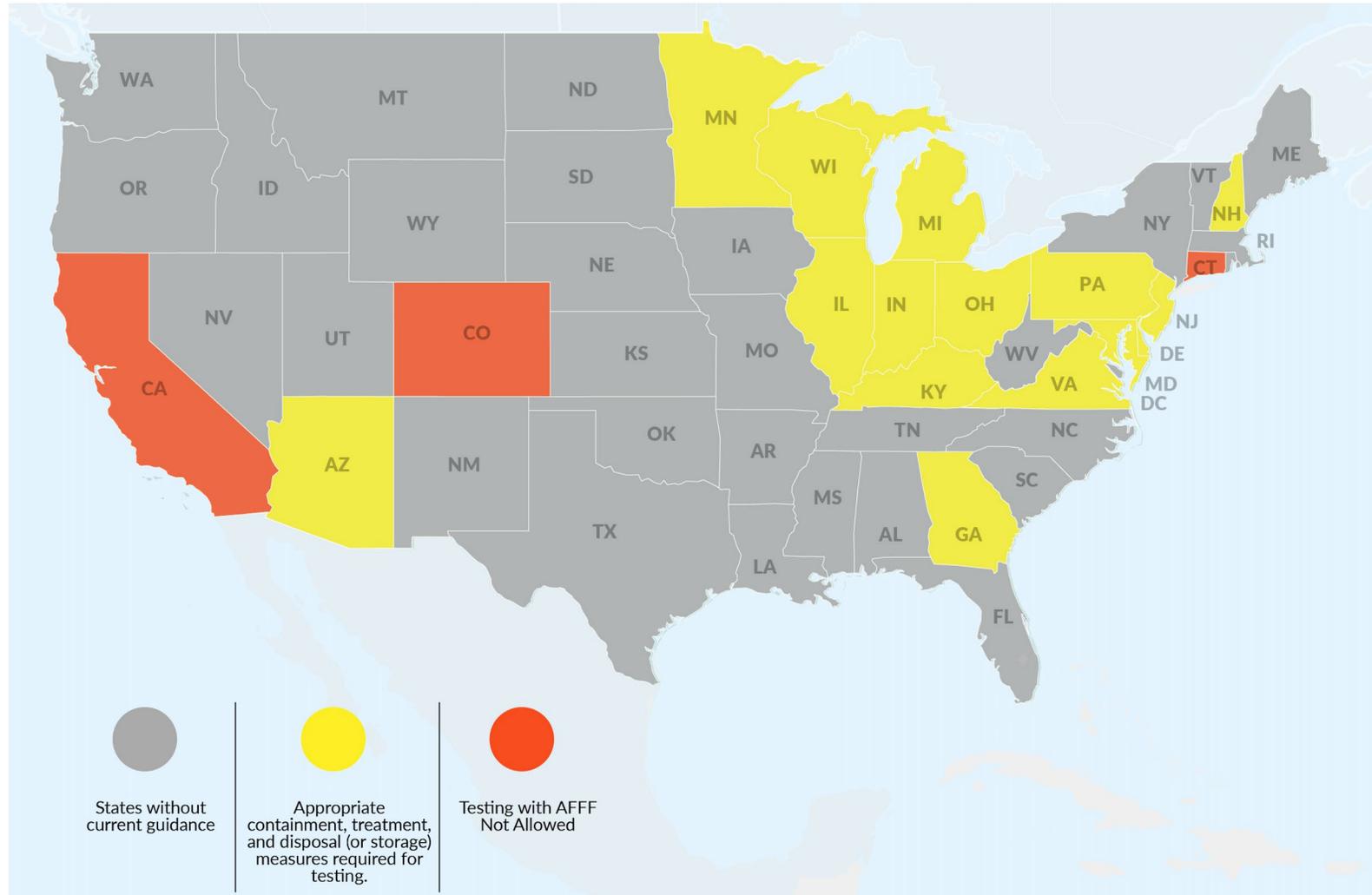
# PFAS Hazardous Substance Listing: Likely Consequences

- ▶ Release Notification Responsibilities
- ▶ Federal Maximum Contaminant Level
- ▶ Effect on Existing CERCLA Sites
- ▶ Influence on PFAS Cleanups
- ▶ Federal vs. State Matters
- ▶ New PFAS CERCLA Sites
- ▶ Existing Litigation
- ▶ Transactions
- ▶ Effect on Municipalities
- ▶ Exemptions

# Class B Systems: State Laws

## AFFF (PFAS-Laden Foams)

Testing Use Restrictions by State – Enacted or Proposed



# Regulation of Class B Firefighting Systems: the Wisconsin Model



- ▶ The Wisconsin Department of Natural Resources (WDNR) views PFAS as a hazardous substance under the Wisconsin “Spills” law (Wis. Stats. § 292.11)
- ▶ WDNR interprets, and the regulated community has generally accepted, during the nearly 40-year application of the Spills Law, that § 292.11 extends:
  - ▷ to accidental or sudden releases, like PFAS firefighting foam released in an emergency or testing event, and
  - ▷ to latent historical releases that may be discovered, for example, in a Phase II site investigation of groundwater

# Regulation of Class B Firefighting Systems: the Wisconsin Model

- ▶ Wisconsin law prohibits the use of a Class B firefighting foam that contains “intentionally added PFAS” except in two scenarios:
  - ▷ For a fire emergency (i.e., a real fire) or
  - ▷ For testing purposes when a “testing facility has implemented appropriate *containment, treatment and disposal or storage measures to prevent discharges of the foam to the environment*”
- ▶ Any person testing subject to exemptions must *immediately notify the WDNR of the use or discharge of such PFAS-containing foam and any discharge of the foam to the environment*
- ▶ Under current interpretations of Wisconsin law, a discharge of PFAS into the environment triggers an immediate spill notification obligation and self-implemented response actions under § 292.11

# The Class B Clash

- ▶ Class B systems
  - ▷ Represent sound practice for risk management
  - ▷ Qualify for favorable fire insurance
- ▶ Historic NFPA standards and Risk Management
  - ▷ Required/require performance testing
  - ▷ In prior standards, condoned letting discharged foam percolate into ground
- ▶ State and (soon) Federal Law
  - ▷ May now (or will soon) impose liability for PFAS releases
  - ▷ May require notification of system testing and PFAS release

# Class B System Best Practices

- ▶ Be Proactive to Implement Preventative Measures
  - ▷ Wrap PFAS into internal audit/investigation
    - ▶ Consider duty to disclose that might be triggered by investigations
    - ▶ Consider privilege opportunities by performing investigation with outside counsel
  - ▷ In transactions, conduct thorough due diligence to minimize risk of exposure to PFAS concerns
  - ▷ Consider environmental insurance
  - ▷ Evaluate insurance coverage (CGL (occurrence) EIL (claims made))
  - ▷ Evaluate supply chain and potential sources of contamination, and review indemnities with suppliers and customers
  - ▷ Make sure client is supported by informed and experienced technical and legal team

# Class B System Best Practices

- ▶ Evaluate a Possible Upgrade of Class B System
  - ▷ But first, confirm that Class B system is necessary, in relation to original intent and current operations
  - ▷ Given the potential for residual PFAS to remain in the legacy Class B system, and the chemical differences between fluorine free foam (F3) and AFFF affecting performance, it is likely that much of the existing infrastructure and possibly the apparatus itself, will need replacement
  - ▷ F3 functionality is limited to the foam blanket mechanism only.
  - ▷ Relative to AFFF, more F3 material, more time for extinguishment, or both, will likely be needed to extinguish a Class B fire
  - ▷ Consult with the Class B system manufacturer or a qualified fire suppression engineer to review system upgrade options

# Class B System Best Practices

- ▶ Manage AFFF (and maybe Class B system) as hazardous substance
  - ▷ appropriate containment, storage and disposal of PFAS-laden foams must be ensured
  - ▷ State collection programs
  - ▷ Secondary containment for AFFF/facility risk management programs
  - ▷ Employ systems to contain AFFF released from fire event/testing
- ▶ If AFFF is discharged:
  - ▷ Determine if “release” to “environment” (or other applicable legal standard) has occurred
  - ▷ Determine notification and response legal obligations
  - ▷ Identify pathways and receptors
  - ▷ Engage technical and legal team for support

# Class B System Best Practices

## ▶ Be Prepared for Potential Litigation

- ▷ Current universe of plaintiffs in AFFF claims, including in ~1,800 case MDL in SC:
  - ▶ Residents near military bases, airports, and PFAS manufacturing facilities whose wells have been impacted by PFAS
  - ▶ Public water suppliers
  - ▶ Municipalities where facilities utilizing PFAS are located or downgradient from same
  - ▶ States and state regulators
  - ▶ Military and civilian firefighters exposed during work activities
  - ▶ Farmers
- ▷ It is possible that the litigation may expand to include end users such as facilities utilizing Class B firefighting systems with historic releases from NFPA related performance testing
- ▷ Retain environmental legal counsel expert in PFAS matters
- ▷ Include local counsel for state specific laws and claims

# Thank You

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[G&K PFAS Resources](#)

[ABA Class B Article](#)

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