

New PFAS Additions to the Proposition 65 List

Publications

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Over the past week, several new per- and polyfluoroalkyl substances (PFAS) have been added to California's Proposition 65 list. In March 2021, California's Office of Environmental Health Hazard Assessment (OEHHA) selected perfluorooctane sulfonate (PFOS) and its salt and transformation and degradation precursors for evaluation by California's Carcinogenic Identification Committee (CIC). OEHHA also selected perfluoronanoic acid (PFNA) and perfluoroundecanoic acid (PFDA) for evaluation by California's Reproductive Toxicant Identification Committee (DARTIC).

Several industry groups submitted comments in opposition to adding these PFAS chemicals to the Proposition 65 lists. For example, even though PFOS has been voluntarily phased out of production in the United States, the American Chemistry Council opposed listing PFOS as a carcinogen under Proposition 65, claiming that the available data doesn't support a conclusion that PFOS presents a carcinogenic risk to humans.

Notwithstanding this industry opposition, on December 6, 2021, the CIC voted 8-2 with one abstention to add perfluorooctane sulfonate (PFOS) and its salt and transformation and degradation precursors to the Proposition 65 list of chemicals known to the State of California as causing cancer. It is important to note that PFOS had previously been on the Proposition 65 list due to its alleged reproductive toxicity.

On December 14, 2021, DARTIC voted to add PFNA to the Proposition 65 list of reproductive toxicants. However, DARTIC did not add PFDA to the list of reproductive toxicants. DARTIC relied in part on a recent assessment prepared by OEHHA that evaluated the reproductive effects of both PFNA and PFDA.

Unlike PFAS, these particular PFAS chemicals have not been phased out and are used as processing aids in fluoropolymer manufacturing as well as in certain cosmetic products. As such, the inclusion of these chemicals on the Proposition 65 list will trigger new warning obligations.

Once a chemical is added to the Proposition 65 list, companies have one year to provide the requisite Proposition 65 warnings and companies that fail to provide these warnings are often the target of "claims" by private party Proposition 65 enforcers. It should also be noted that OEHHA has yet to develop "safe harbor" levels for any of these PFAS chemicals and so any exposure to these PFAS chemicals will require a Proposition 65 warning.

These particular PFAS chemicals are commonly found in firefighting foam, stain-resistant fabrics, and food packaging. Companies that distribute and sell these types of products in California would be well served to evaluate whether their products contain any of these chemicals and take steps to either eliminate these chemicals from their products or ensure that the products have the requisite Proposition 65 warnings in the next year.

We will continue to provide updates regarding Proposition 65 at the *Corporate Environmental Lawyer* blog.

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