

## Lawyer Insights

### PFAS: New Targets for Proposition 65 Litigation

Companies should be aware that they are entering a new frontier for potential Proposition 65 litigation.

By Malcolm Weiss, Javaneh Tarter, Jennifer MikoLevine, Nancy Beck and Greg Wall  
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As federal agencies continue to prioritize regulatory initiatives to address per- and polyfluoroalkyl substances (PFAS) as part of a whole-of-government approach, states are marching forward

to implement drastic restrictions and reporting requirements for the use of PFAS in products. California is no exception.

PFAS are now within the purview of the state's most sweeping right-to-know law, the Safe Drinking Water and Toxic Enforcement Act of 1986, better known as Proposition 65. PFAS are a class of chemicals widely used in consumer, commercial and industrial products and can be highly persistent in the environment. Recent actions by California's Office of Environmental Health Hazard Assessment (OEHHA) to add certain PFAS to the list of chemicals "known to the state" to cause cancer or reproductive harm under Proposition 65 have broad-reaching implications throughout the U.S. and the global supply chain.

Consumers in California and in other states may begin to see more Proposition 65 warnings for certain PFAS on food packaging, cookware, textiles, personal care products, carpets and furniture. Warnings may also be required in workplaces or areas of possible exposure to PFAS from air, water or soil.

Companies should be aware that they are entering a new frontier for potential Proposition 65 litigation. In 2020, companies saw a wave of Proposition 65 enforcement actions targeting CBD oil and hemp products in response to the listing of [delta-9-tetrahydrocannabinol](#) ( $\Delta$ 9-THC). Companies may see a similar wave for products containing PFAS.

#### PFAS Added to Proposition 65 List

Proposition 65 requires that businesses provide a "clear and reasonable warning" prior to exposing individuals to chemicals known to the state of California to cause cancer or reproductive harm. The state of California maintains a list of over [900 such chemicals](#) and updates the list annually through [various mechanisms](#), including when authoritative bodies (such as the U.S. Environmental Protection Agency) formally identify such chemicals. In 2017, perfluorooctanoic acid ([PFOA](#)) and perfluorooctane sulfonate ([PFOS](#)) were added to the Proposition 65 list for developmental toxicity.

In 2021, OEHHA also listed PFOS and its salts and transformation and degradation precursors for cancer, and in 2022, PFOA was also listed for cancer. Another PFAS, perfluorononanoic acid ([PFNA](#)) and

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its salts, were listed in 2021 for reproductive toxicity. Finally, perfluorodecanoic acid ([PFDA](#)) and its salts are also under consideration for reproductive toxicity listing.

More PFAS are likely to be considered and added to the Proposition 65 list as other entities evaluate PFAS for cancer or developmental risks. For example, EPA [recently released](#) new lifetime drinking water health advisories in the parts per trillion range for hexafluoropropylene oxide (HFPO) dimer acid and its ammonium salt (referred to as “GenX chemicals”) and perfluorobutane sulfonic acid and its potassium salt (PFBS).

### **Impact of Warning Requirement for Products Containing PFAS**

Given the growing concerns over PFAS exposure, products and places containing PFAS are likely to be targets for future Proposition 65 private enforcement actions and lawsuits. We have seen what may be the tip of the iceberg: [13 NOVs](#) have been filed against companies in the past four years for alleged exposures of PFOA from products like paper straws, cosmetics, personal care products, mineral water and ski wax.

The prospect of Proposition 65 enforcement and litigation for products containing PFAS is uniquely challenging for regulated businesses because of the prevalence of PFAS in many products and environments, and because PFAS can be detected at extremely low levels. Plaintiffs who detect these low levels of PFAS in products, work areas, or the environment can file notices of violation (NOVs) against businesses if they fail to warn under Proposition 65. Further, OEHHA has not established specific safe harbor levels for any of the listed PFAS. This creates challenges for companies who may perform exposure assessments to determine if certain PFAS exposures require a warning.

### **Practical Takeaways for Companies**

Companies should consider the following when evaluating their obligations and potential liability under Proposition 65 for PFAS warnings:

- **Tracking Proposition 65 Developments:** Companies should track Proposition 65 developments and enforcement trends when new PFAS are listed. Hunton Andrews Kurth LLP has a publicly-accessible, interactive [Proposition 65 Notice Tracker](#) dedicated to monitoring NOVs filed with the California Attorney General. This tool can help corporate counsel and risk managers search for and identify enforcement trends—including which plaintiffs are bringing actions and which products and chemicals are being targeted.
- **Assuring Compliance in Contractual Arrangements with Suppliers:** Importers, downstream product assemblers/manufacturers and retailers may not be aware of the presence of PFAS in products they sell or offer to sell to California consumers. These companies should consider obtaining assurances or disclosures from suppliers of products and materials about the presence of PFAS in their products.
- **Testing Products:** In some cases, it can be beneficial to test products to determine if PFAS can be detected and potentially require a warning. But, we recommend that testing be carefully considered within the context of comprehensive compliance assurance programs. We also recommend considering whether testing, if done, should be performed under attorney-client privilege.

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- **Ensuring Consistency with Other PFAS Requirements and Corporate Policies:** Companies that prophylactically provide Proposition 65 warnings to avoid the potential for private enforcement actions need to consider whether this approach to warning could create new liability risks given other state and federal restrictions on PFAS. For example, [California](#) and eight other states have passed legislation that contain broad prohibitions of PFAS in food packaging in the future. Some states have also passed laws to require PFAS reporting and bans on products containing PFAS in the future (such as [Maine](#)). PFAS continue to be the focus of state chemical legislation. Companies will need to track and evaluate their compliance with other state PFAS requirements as they emerge. Companies also should evaluate how PFAS Proposition 65 warnings on their products could impact their own corporate sustainability commitments.
- **Tailoring Warnings:** OEHHA's long-form safe harbor regulations for clear and reasonable warnings require "one or more" chemicals be listed where both endpoints (cancer and reproductive harm) are implicated. Further, OEHHA permits companies to provide a "short form" warning, which does not require naming any chemical for which the warning is being provided. However, the short-form warning regulation may change as OEHHA is considering [proposing revisions](#) to the short-form warning.

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**Malcolm Weiss** is a Partner in the firm's Environmental group in the firm's Los Angeles office. Malcolm is well-versed in a wide range of complex environmental law issues. Clients appreciate his forward-looking, practical approach to solving problems. He can be reached at + [1 \(213\) 532-2130](tel:12135322130) or [mweiss@HuntonAK.com](mailto:mweiss@HuntonAK.com).

**Javaneh Tarter** is a Senior Attorney in the firm's Environmental group in the firm's Washington D.C. office. Javaneh draws on her experience as in-house counsel and in private practice to assist clients with chemical and environmental regulatory and compliance matters. She can be reached at +1 [\(202\) 419-2108](tel:2024192108) or [jtarter@HuntonAK.com](mailto:jtarter@HuntonAK.com).

**Jennifer MikoLevine** is a Senior Attorney in the firm's Environmental group in the firm's Los Angeles office. Jennifer is an environmental litigator with significant experience representing clients throughout the pre-trial and trial stages of litigation. She can be reached at +1 [\(213\) 532-2164](tel:2135322164) or [jmikolevine@HuntonAK.com](mailto:jmikolevine@HuntonAK.com).

**Nancy Beck** is a Director of Regulatory Science in the firm's Environmental group in the firm's Washington D. C. office. Nancy provides industry leaders with advice related to the impact of environmental policy, including chemical regulations and compliance programs, applying her in-depth knowledge and applied public health experience as a PhD toxicologist. She can be reached at +1 [\(202\) 419-2076](tel:2024192076) or [beckn@HuntonAK.com](mailto:beckn@HuntonAK.com).

**Gregory Wall** is a Partner in the firm's Environmental group in the firm's Richmond office. As a former US Environmental Protection Agency (EPA) senior attorney, Greg uses his deep agency, regulatory and enforcement knowledge to assist clients in solving complex environmental matters, with specialized expertise in CERCLA/Superfund, brownfields, RCRA, FIFRA and TSCA legal issues. He can be reached at +1 (804) 344-7801 or [gwall@HuntonAK.com](mailto:gwall@HuntonAK.com).

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