

# Client Alert



Environmental, Health and Safety

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## California Proposes Designating PFOA as a Carcinogen under Proposition 65

### Designation of PFOA as a Carcinogen Will Increase Litigation Risks and Expand Proposition 65 Labeling Obligations

On March 19, 2021, California's Office of Environmental Health Hazard Assessment (OEHHA) announced that it intends to list perfluorooctanoic acid (PFOA) as a chemical known to the State to cause cancer under California's Safe Drinking Water and Toxic Enforcement Act of 1986. The law, also known as Proposition 65, requires the State to publish a list of chemicals known to cause cancer or reproductive toxicity. Businesses must provide "clear and reasonable" warnings before exposing anyone to a listed chemical, including exposures to consumer products and occupational and environmental exposures.

PFOA compounds are part of a group of synthetic compounds collectively known as per-and polyfluoroalkyl substances (PFAS) that have gained recent notoriety as "forever chemicals" in the media by politicians, government agencies, and the public. PFOA is used in several industrial applications including carpeting, upholstery, apparel, floor wax, textiles, fire fighting foam (AFFF), and sealants. It was also used in the manufacture of consumer products that included nonstick applications, including clothing and cookware. While PFOA is no longer produced in the United States, it is still regularly detected in the environment and is still present in certain imported products.

OEHHA's proposed designation of PFOA as a carcinogen is significant because it increases litigation risks for many companies operating and selling products in California. Proposition 65 provides different mechanisms by which the State can designate a chemical as a carcinogen. One such method is the "authoritative bodies" mechanism,



which permits OEHHA to rely on the reports and conclusions of “authoritative bodies” regarding the reproductive toxicity or carcinogenicity of a constituent. Here, OEHHA is relying on the National Toxicology Program’s (NTP) 2020 report on PFOA. Specifically, OEHHA determined that NTP found that PFOA causes increased incidences of combined malignant and benign tumors and increased the incidence of rare malignant tumors in male rats. NTP’s 2020 report was the strongest statement from an authoritative body regarding the potential carcinogenicity of PFOA and many stakeholders, including the American Chemistry Council, have expressed concern regarding the science upon which NTP’s report is based. OEHHA’s endorsement of the NTP report’s conclusions will provide further fodder for negligence and product liability litigation regarding PFOA.

PFOA’s designation as a carcinogen by OEHHA may also create additional warning obligations for companies operating or selling in California. Many companies may already have signage or product labels warning of PFOA exposures because PFOA is listed as a reproductive toxin under Proposition 65, but companies may need to update their signage or product labels to ensure compliance if the designation of PFOA as a carcinogen is not covered by existing warnings. The requirement to warn will apply one year after the listing is final.

OEHHA has invited comments on the proposed rules by May 3, 2021. Affected manufacturers, consumer product companies, importers, distributors and retailers should consider submitting comments regarding the scope and impact of these proposed rules on their businesses.

King & Spalding’s national Environmental, Health & Safety practice includes attorneys experienced with Proposition 65 and its requirements. If you have questions about OEHHA’s proposed amendments, please contact our lawyers noted in the contact section.

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