

PFAS Regulations Could Open Floodgates to Prop 65 Enforcement – Assess & Manage Your Exposure Now

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The group of chemicals known as PFAS (per- and poly-fluoroalkyl substances) are high on the federal regulatory agenda for 2022, as implementation of EPA's "PFAS Strategic Roadmap" proceeds. One potential consequence will be new additions to California's "Prop 65 List" of chemicals known to cause cancer or reproductive harm. Already, two PFAS substances are subject to Prop 65 warning and labeling requirements (PFOA and PFOS), with a third (PFNA) subject to enforcement starting in 2023. New federal [Health Advisory Levels \(HALs\) announced on June 15, 2022](#) may provide the basis to add another two PFAS to the list (PFBS and GenX).

Prop 65 requires certain warnings at the time of sale and labeling of products containing chemicals that have been identified as posing a potential risk of reproductive harm or cancer, and provides for private enforcement actions. Manufacturers, importers, suppliers, distributors, and retailers of products for sale in California are all potentially liable for ensuring adequate consumer warnings. Prop 65 also requires employers and property owners to provide warnings in workplaces and in buildings where exposure to listed chemicals may occur. The penalty for failure to provide such warnings can be as high as \$2,500 per violation (e.g., per sale for consumer products; per day for workplace/building exposure).

Because of the ubiquity of PFAS and the very low levels at which they are regulated — typically measured in parts per trillion — these and any future listings have far-reaching implications for businesses.

Three PFAS Chemicals Are Already Listed Under Prop 65, More Listings Expected.

Three of the most commonly-regulated PFAS are already on the Prop 65 list of chemicals. The California Office of Environmental Health Hazard Assessment (OEHHA), which administers Prop 65, added the first two PFAS in 2017. Perfluorooctanoic acid (PFOA) and Perfluorooctane sulfonate (PFOS) were identified to have potential reproductive health impacts shortly after EPA established HALs recommending limits on lifetime exposure in 2016. PFOS and PFOA had been mostly phased out of use in the United States by the time they were listed, but were still used in products

manufactured internationally and imported for sale in California. On February 25, 2022, OEHHA broadened its listing of PFOA, adding it to the list of chemicals known to cause [cancer](#). That change will require companies that are warning for PFOA to change their warning language to reference PFOA as a carcinogen.

The most recent PFAS substance to be added to the list for potential reproductive health impacts was [Perfluorononanoic Acid \(PFNA\)](#) on December 31, 2021, initiating a one-year grace period before enforcement actions may be filed.

OEHHA has yet to act on two other PFAS identified as [high priorities for review](#) and potential listing in 2021: Perfluorohexanesulfonic acid (PFHxS), and Perfluoroundecanoic acid (PFUnDA). However, new federal HALs adopted for PFBS and GenX potentially support adding these substances under Prop 65's "authoritative bodies" standard, which recognizes the findings of certain federal agencies and scientific entities.

PFAS Are Common in Consumer Products, Manufacturing and Safety Equipment, Building Materials and Furnishings.

Among their useful properties, PFAS create impervious or repellant barriers and low-friction surfaces, which are very effective at preventing things from sticking, stain resistance, and waterproofing. Common products in which PFAS are found include the following:

- Clothing and footwear, particularly with water resistant properties
- Cookware
- To-go food packaging
- Paper and cardboard
- Cans and containers
- Creams and lotions
- Dental floss and denture cleaners
- Shampoo
- Cosmetics
- Electronics, including computers and cell phones

The presence of listed PFAS in buildings may also have the potential to trigger Prop 65 warnings. Common materials or uses of PFAS with the potential to result in environmental exposure include:

- Upholstered furniture
- Carpets

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- Cleaning products
 - Paints and coatings, such as weatherproofing treatments

PFAS are also a key component of firefighting foams, the use of which is required by safety regulations in some contexts, such as in operations involving highly combustible fuels or chemicals. PFAS are commonly used in manufacturing equipment and to line tubes, pipes, or other conveniences. Among other things, PFAS are used to produce a variety of high-tech products, in communications equipment, and in processes such as 3D printing.

Even Low Levels of PFAS Pose Enforcement Risks.

PFAS pose particular Prop 65 compliance and liability risks because they are being regulated at very low levels. The [Fifth Unregulated Contaminant Monitoring Rule](#) (UCMR 5) issued by EPA on December 27, 2021 requires PFAS monitoring at levels down to 3 parts per trillion (which is 1,000 times lower than many other chemicals). Under UCMR 5, public water systems throughout the United States must monitor drinking water for 29 PFAS starting in 2023. New HALs are below levels that current testing methods can reliably detect: 0.004 parts per trillion (ppt) for PFOA, 0.02 ppt for PFOS, 10 ppt for GenX chemicals, and 2,000 ppt for PFBS.

Regulations that establish thresholds at such low levels reflect concern that even trace amounts of PFAS in products or buildings pose a risk. This may make it difficult for companies to meet Prop 65 exemptions, such as by demonstrating that the exposures they cause are too low to create significant risk of cancer or are significantly below levels observed to cause birth defects or other reproductive harm. OEHHA may establish “safe harbor” levels for listed substances, providing thresholds for regulatory compliance, but has yet to propose such thresholds for any PFAS.

Steps to Manage Prop 65 Risk Associated with PFAS.

There are steps that businesses can take to manage potential litigation and enforcement risks related to PFAS and other potential new Prop 65 listings:

- Track regulatory changes and undertake periodic reviews to ensure compliance with Prop 65 requirements and minimize potential liability.
- If your company identifies a listed substance, you can advocate for OEHHA to establish safe harbor levels. In some cases, it may be prudent to apply for safe use determinations for specific uses, which provide additional protection.
- Adopt procedures and provisions for contractual agreements up and down the supply chain to reduce or limit liability.
- Prepare for litigation now. Responding quickly and appropriately to any claims or Prop 65 Notices will minimize the time and expense required for their resolution.

A Prop 65 listing does not only result in Prop 65 enforcement actions, it can also spur additional regulation. For example, a series of Prop 65 enforcement actions claiming that cosmetic companies failed to properly label products containing PFOA since 2019 spurred California’s passage of [AB](#)

[2762 in 2020](#), which banned the use PFOS, PFOA, PFNA, and nine other PFAS in cosmetics. As of June 2022, a [bill banning all intentionally added PFAS](#) in cosmetics is pending before the Legislature.

If and when more PFAS are added to the Prop 65 list, additional state-level regulatory actions will likely follow. Now is the time for businesses to assess potential PFAS exposure to minimize the risk of enforcement actions and litigation.

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