

MEMORANDUM

From: Gary Jay Kushner
Xin Tao

Date: August 2, 2017

Re: California's OEHHA Listing of Glyphosate

Effective July 7, 2017, California's Office of Environmental Health Hazard Analysis (OEHHA) has listed glyphosate as a carcinogenic chemical under the Safe Drinking Water and Toxic Enforcement Act of 1986 (also known as Proposition 65). ^{1/} Glyphosate is one of the most heavily used weed control chemicals in food and agricultural production. It is reported that each year more than 300 million pounds of glyphosate-based herbicides are sprayed on food crops, lawns and home gardens in the U.S. This memorandum summarizes the key issues presented by the listing of glyphosate for the food industry.

Proposition 65 Listing of Glyphosate

For background, Proposition 65 requires the Governor of California to publish, at least annually, a list of chemicals known to the State to cause cancer or reproductive toxicity. Businesses are required to provide a "clear and reasonable" warning before knowingly and intentionally exposing anyone in California to a listed chemical. ^{2/} On September 4, OEHHA published a notice of its intent to list glyphosate under Prop 65 as known to cause cancer. ^{3/} Monsanto, the producer of Roundup®, objected to this notice and sued OEHHA to enjoin the listing on January 21, 2016. ^{4/} On March 20, 2017, the Superior Court of California, County of Fresno, ruled for OEHHA and granted OEHHA's motion for a judgment on the pleadings. As of today, Monsanto's appeal is still pending in California's Fifth District. However, the California Supreme Court rejected Monsanto's request that the ruling in question be delayed during the appeal.

On June 26, 2017, OEHHA announced that glyphosate would be listed under Proposition 65 effective July 7, 2017. Proposition 65 provides a one-year exemption from the product warning

^{1/} OEHHA, "Glyphosate Listed Effective July 7, 2017, as Known to the State of California to Cause Cancer," (June 26, 2017), *available at*: <https://oehha.ca.gov/proposition-65/cnrn/glyphosate-listed-effective-july-7-2017-known-state-california-cause-cancer>.

^{2/} Cal. Health & Safety Code § 25249.6.

^{3/} OEHHA, "Notice of Intent to List: Tetrachlorvinphos, Parathion, Malathion, Glyphosate," (Sep. 4, 2015), *available at*: <https://oehha.ca.gov/proposition-65/cnrn/notice-intent-list-tetrachlorvinphos-parathion-malathion-glyphosate>.

^{4/} *Monsanto Co. v. OEHHA*, Case No. 16CECG00183, Petition for Writ of Mandate (Fresno Cty. Super. Ct., Jan. 21, 2016)

requirement. ^{5/} As such, the compliance date for Proposition 65 warning regarding glyphosate-containing products is July 7, 2018.

“Safe Harbor” Exemption

It is important to note that the mere presence of a listed chemical under the Proposition 65 does not automatically trigger the warning requirements. Many companies rely on the Proposition 65 “safe harbor” exemption for not putting warning labels on the products. Under the “safe harbor” exemption, no Proposition 65 warnings are required if the businesses can establish the level of a listed chemical in the products would result in a dietary intake level that is within a “safe harbor.” ^{6/} On March 28, 2017, simultaneous with its second notice of intent to list after the Superior Court’s decision, OEHHA published a Notice of Proposed Rulemaking to establish a No Significant Risk Level (NSRL) of 1,100 µg per day for glyphosate. ^{7/}

The major sources of glyphosate in food products include grains such as barley, oats, and wheat. Businesses that manufacture or market food products that contain these ingredients may expose Californian consumers to glyphosate and should carefully assess whether the dietary intake levels of glyphosate in their products exceed the 1,100 µg per day NSRL safe harbor.

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We will continue to closely monitor all developments related to California’s Prop 65 requirements for glyphosate. If you have any questions, or if we can be of any assistance, please do not hesitate to contact us.

^{5/} Cal. Health & Safety Code § 25249.10.

^{6/} See *id.*

^{7/} OEHHA, “Notice of Proposed Rulemaking: Amendment to Section 25705, Specific Regulatory Levels Posing No Significant Risk: Glyphosate,” (Mar. 28, 2017), *available at*: <https://oehha.ca.gov/proposition-65/cnr/notice-proposed-rulemaking-amendment-section-25705-specific-regulatory-levels>.