

Insights

PROPOSITION 65 – OEHHA PROPOSES SAFE HARBOR CONCENTRATIONS AND BLANKET PROTECTIONS FOR EXPOSURES TO ACRYLAMIDE AND OTHER LISTED CHEMICALS IN COOKED OR HEAT PROCESSED FOODS

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SUMMARY

Acrylamide in food products has been one of the most significant drivers for recent Proposition 65 enforcement actions, frustrating many in the food industry, particularly because acrylamide is not added to those products. Acrylamide forms naturally when starches are heated during the cooking or baking process. Out of the 1,923 60-day notices issued this year as of August 5th, 202 were based on allegations of acrylamide exposure. After years of costly litigation and industry consternation, it appears that OEHHA has offered a possible solution to provide clarity, and potentially reduce the risk of enforcement actions for the presence of acrylamide, furfuryl alcohol, and other listed chemicals formed during the cooking process.

On August 4, 2020, the Office of Environmental Health Hazard Assessment (OEHHA), the lead agency that implements Proposition 65 and has the authority to promulgate and amend regulations, released a [proposed regulation](#) providing that intake of listed chemicals formed by cooking or heat processing foods would not represent an exposure for the purposes of Proposition 65 if the concentrations are reduced to the lowest level currently feasible. The proposed regulation would also establish maximum concentration levels for acrylamide in specific foods that are deemed by OEHHA to be the lowest levels currently feasible. Concentrations of acrylamide at or below the level identified for the specified products would not require a warning. **Public comments concerning this proposed action must be received by OEHHA by October 6, 2020.**

Proposition 65 prohibits a person in the course of doing business from knowingly and intentionally exposing any individual to a chemical that has been listed as known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual. An exemption from the warning requirement is provided when the exposure is below established safe harbor levels.

Currently, there are regulatory exceptions from the warning requirement for exposures to naturally occurring chemicals in foods, specific concentrations of naturally occurring arsenic in rice, and for certain exposures to listed chemicals in water or air. The proposed regulation would create an additional exception from the warning requirement for listed chemicals that are unavoidably created in foods during cooking or heat processing and that have been reduced to the lowest level currently feasible, creating a strong incentive for businesses to reduce such chemicals to these levels.

With respect to the acrylamide maximum concentration levels, OEHHA proposes the following:

<u>Foods/Food groups</u>	<u>Maximum average concentration level (ppb)</u>	<u>Maximum unit concentration level (ppb)</u>
<u>Almonds, roasted, roasted almond butter, and chocolate-covered almonds</u>	<u>225</u>	<u>=</u>
<u>Bread, non-wheat-based products including loaves, rolls, buns, baguettes</u>	<u>100</u>	<u>=</u>

<u>Bread, wheat-based products including loaves, rolls, buns, baguettes</u>	<u>50</u>	<u>=</u>
<u>Cookies, animal and animal crackers (sweet)</u>	<u>75</u>	<u>100</u>
<u>Cookies, thin and crispy</u>	<u>281</u>	<u>300</u>
<u>Cookies, sandwich wafers</u>	<u>115</u>	<u>=</u>
<u>Crackers, savory, including crispbread</u>	<u>350</u>	<u>490</u>
<u>Potato products, French fried potatoes</u>	<u>280</u>	<u>400</u>
<u>Potato or sweet potato products, not otherwise specified, such as hash browns and potato puffs</u>	<u>350</u>	<u>490</u>
<u>Potato or sweet potato products, sliced chips</u>	<u>281</u>	<u>350</u>
<u>Prune juice, 100% (not from concentrate)</u>	<u>=</u>	<u>250</u>
<u>Prune juice, made with concentrate</u>	<u>=</u>	<u>150</u>
<u>Waffles</u>	<u>280</u>	<u>=</u>

The proposal would amend Title 27, California Code of Regulations, by adopting Section 25505 – Exposures to Listed Chemicals in Cooked or Heat Processed Foods.

The proposed regulation is expected to receive significant public comments from all sides of the Proposition 65 community, so the form that it will take if and when it is ultimately adopted is very much up for debate. Companies should therefore consider revising their manufacturing processes to ensure that they are reducing the concentration to the lowest level feasible, or meeting the maximum concentration levels discussed above, but should be aware that both standards may change in the final version of the regulation.

More information on our Proposition 65 Team and our relevant experience is available by clicking [here](#). Please reach out to us for any advice or assistance in evaluating your company's strategy regarding OEHHA's proposal.

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