

# The California Prop 65 Acrylamide Saga Continues

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Before the close of 2022, California's Office of Environmental Health Hazard Assessment ("OEHHA") officially finalized two big acrylamide regulations under the state's Proposition 65 program. First, after nearly three years in the making, OEHHA issued its final "[Exposures to Acrylamide in Cooked or Heat Processed Foods](#)" rule ("Exposures Rule") aimed at limiting the [inundation of Prop 65 actions](#) related to acrylamide formed as a result of cooking or heat processing. Second, OEHHA adopted new Prop 65 "safe harbor" label language for providing warnings about potential exposures to acrylamide in food (the "Safe Harbor Rule").

When the Exposure Rule was first introduced in August 2020, the proposal established that consumption of foods containing acrylamide does not represent an "exposure" requiring a Prop 65 warning so long as the concentrations are "reduced to the lowest level currently feasible using appropriate quality control measures." Similarly, the proposal adopted specific acrylamide concentration limits for specified food items deemed by OEHHA to be the lowest currently feasible. Thus, concentrations of acrylamide at or below these thresholds would not require a warning.

OEHHA initiated the Exposure Rule rulemaking in August 2020, issuing a series of proposals and revisions in response to comments. After the California Office of Administrative Law ("OAL") rejected a version of the proposed rule in March 2022, OEHHA promulgated further revisions in October. This version was finalized on December 23, 2022.

The final rule – which reflects OAL's criticisms of earlier versions of the rulemaking, as well as public input – narrows the chemicals covered from all *listed* chemicals created by cooking or heat processing to only *acrylamide* in food created by those processes. Additionally, the new text replaces the term "quality control measures," a vague and unhelpful string of words, and instead incorporates the United Nations' Codex Alimentarius Code of Practice for the Reduction of Acrylamide in Foods, a helpful (and long) string of words which guide "quality control measures" with dramatically more precision. Notably, the final rule did not change the list of foods/food groups or the exposure levels of acrylamide in such foods that would trigger Prop 65 warning obligations.

The regulation becomes effective on April 1, 2023. The Final Regulation Text is available [here](#). The Notice of Adoption is available [here](#).

In finalizing the Safe Harbor Rule, OEHHA altered the warning language by providing for heightened specificity. The final text of the Safe Harbor Warning Regulation for Exposures to Acrylamide from Food, available online [here](#), requires that the words "**CALIFORNIA WARNING**" be provided (instead of simply the word "**WARNING**") in all capital letters and bold text. That phrase must then be followed by the statement:

Consuming this product can expose you to acrylamide, a probable human carcinogen formed in

some foods during cooking or processing at high temperatures. Many factors affect your cancer risk, including the frequency and amount of the chemical consumed. For more information including ways to reduce your exposure, see [www.P65Warnings.ca.gov/acrylamide](http://www.P65Warnings.ca.gov/acrylamide).

The Safe Harbor Rule became effective on **January 1, 2023**.

Litigation on the acrylamide issue is certain to continue, and, in fact, challenges already have been brought against the Safe Harbor Rule. In early 2022, the Ninth Circuit upheld and extended an [injunction issued in 2021 by a federal court judge in the Eastern District of California](#) on the basis that the warning is “compelled speech” that is not “purely factual and uncontroversial” and, therefore, raises First Amendment concerns.