

September 22, 2021

Via Electronic Mail

TO: Elizabeth Avery

FROM: Martin J. Hahn
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RE: New Proposition 65 Warning Proposed for Acrylamide in Food

On September 17, 2021, the California's Office of Environmental Health Hazard Assessment (OEHHA), the lead agency that implements California's Proposition 65, proposed a new safe harbor warning regulation to address the content of warnings for exposure to acrylamide in food. ^{1/} In particular, OEHHA proposes to add the following new subsection to its regulations at Section 25607.2.

(b) A warning for food exposures to acrylamide meets the requirements of this subarticle if it is provided: (i) in accordance with subsection (a), or, (ii) via one or more of the methods specified in Section 25607.1 and includes both elements (1) and (2) below.

*(1) The words "**CALIFORNIA WARNING**:" in all capital letters and bold print.*

(2) The words, "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."

The proposed regulation is prompted by the recent litigation involving First Amendment challenges against the acrylamide warning under Proposition 65. Briefly, in the case, *California Chamber of Commerce v Bonta*, the California Chamber of Commerce challenged the existing safe harbor Proposition 65 warning as applied to acrylamide in food, arguing that such warnings are false and

^{1/} OEHHA, "Notice of Proposed Rulemaking New Subsection 25607.2(b) Warning Content for Acrylamide Exposure from Food," available at: <https://oehha.ca.gov/proposition-65/cmr/notice-proposed-rulemaking-new-subsection-256072b-warning-content-acrylamide> (accessed on September 22, 2021).

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misleading and therefore, a violation of the First Amendment rights of its members. ^{2/} The District Court issued a preliminary injunction against the filing of new enforcement actions after March 29, 2021. ^{3/} As part of the ruling, the District Court found that “the State has not shown that the safe-harbor acrylamide warning is purely factual and uncontroversial, and Proposition 65’s enforcement system can impose a heavy litigation burden on those who use alternative warnings.” ^{4/} An intervenor in the case filed an appeal to the Ninth Circuit Court of Appeals, challenging entry of the preliminary injunction. The Ninth Circuit stayed the action for private enforcers, but not public enforcers. While the merits of that case are still being litigated today, a private enforcer (but not a public enforcer) can continue to file or prosecute a new lawsuit to enforce California’s Proposition 65 warning related to acrylamide in food.

In OEHHA’s “Initial Statement of Reasons,” the agency also acknowledged that when proposing the new warning, it has considered the concerns expressed in the District Court’s preliminary injunction order. ^{5/} By using the term “CALIFORNIA WARNING,” OEHHA intends to make it clear that the warning is given under a California law. OEHHA also explains the proposed regulation:

- explains that the person must consume the product to be exposed to acrylamide;
- provides the description that acrylamide is “a probable human carcinogen” for context;
- clarifies that the chemical is not intentionally added by the manufacturer, but it is formed during cooking or processing at high temperatures;
- notes that the frequency and amount of the chemical consumed affect a person’s individual cancer risk; and
- points consumers to a link/location on OEHHA’s warning website where they can obtain guidance on how to reduce exposures and obtain additional information about the chemical.

Interestingly, the proposed regulation comes on the heels of an earlier OEHHA proposal regarding the warning of glyphosate in consumer products under Proposition 65. Like acrylamide, the listing of glyphosate is also being litigated under the First Amendment. The U.S. District Court for the Eastern District of California issued a permanent injunction in June 2020 barring Proposition 65 warnings for glyphosate-based pesticides, which the court ruled are inconsistent with the First Amendment. California’s state AG appealed the case to the 9th Circuit in September, 2020. While the appeal is still pending, on July 23, 2021, OEHHA proposed a new safe harbor warning regulation to address the content of warnings (copied below) for exposure to glyphosate in consumer products. ^{6/}

^{2/} *California Chamber of Commerce v. Bonta*, No. 2:19-cv-02019-KJM-JDP (9th Cir. 27 May 2021).

^{3/} *California Chamber of Commerce v. Xavier Becerra*, No. 2:19-cv-02019-KJM-JDP, Doc. 114 (E.D.C.A. 30 Mar. 2021).

^{4/} *See id.*

^{5/} OEHHA, “Initial Statement of Reasons - Safe Harbor Clear and Reasonable Warnings for Acrylamide Exposures from Food,” *available at*:

<https://oehha.ca.gov/media/downloads/cnr/isoracrylamide091721.pdf> (accessed on September 22, 2021).

^{6/} OEHHA, “Notice of Public Hearing and Extension of the Comment Period for Proposed Rulemaking, Warnings for Exposures to Glyphosate from Consumer Products New Sections 25607.48 and 25607.49,” *available at*: <https://oehha.ca.gov/proposition-65/cnr/notice-public-hearing-and-extension-comment-period-proposed-rulemaking-warnings> (accessed on September 22, 2021).

(2) The words "**CALIFORNIA PROPOSITION 65 WARNING**" in all capital letters and bold print.

(3) The words, "Using this product can expose you to glyphosate. The International Agency for Research on Cancer classified glyphosate as probably carcinogenic to humans. Other authorities, including US EPA, have determined that glyphosate is unlikely to cause cancer, or that the evidence is inconclusive. A wide variety of factors affect your personal cancer risk, including the level and duration of exposure to the chemical. For more information, including ways to reduce your exposure, go to www.P65Warnings.ca.gov/glyphosate."

OEHHA similarly claims the new warning for glyphosate does not have the same First Amendment concerns because it includes information on why the chemical is considered a carcinogen and a statement that the level and duration of exposures affect a person's cancer risk.

Both proposals would set the precedent for OEHHA addressing First Amendment concerns with warnings by modifying the language used in the warning rather than focusing on the fact that any warning, regardless of how worded, presents a First Amendment concern.

The comments for the new glyphosate warning are due on October 7, 2021, and the comments for the acrylamide warning proposal are due on November 8, 2021. SNAC will be coordinating with other interested parties in submitting comments on both of these proposals.

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If you have any questions, please feel free to contact us.