

CALIFORNIA PROPOSITION 65 ACTIONS EXPECTED TO TARGET FURFURYL ALCOHOL IN FOOD AND BEVERAGES

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The next wave of lawsuits involving California Proposition 65 and food products may allege exposure to furfuryl alcohol, a chemical commonly found in a wide variety of thermally processed foods and listed as a carcinogen under Proposition 65. The warning requirement for furfuryl alcohol took effect on September 30, 2017. As of the date of this post, there have been no 60-day notices alleging exposure without a warning. Given the prevalence of this chemical, however, future enforcement actions seem likely.

Furfuryl alcohol forms when amino acids react with sugar in a process known as the “Maillard reaction” that gives many foods a golden brown color. Much like acrylamide, which has been the subject of numerous 60-day notices and lawsuits, furfuryl alcohol can be found in a wide variety of foods, including:

- baked goods
- coffee
- pasteurized milk
- alcoholic beverages such as wine and beer
- ice cream
- juice beverages
- toasted nuts

It remains to be seen whether furfuryl alcohol is created in other foods commonly associated with acrylamide, such as French fries and vegetable chips.

No safe harbor level: Proposition 65 requires businesses to provide a warning before exposing consumers to a chemical known to California to cause cancer or reproductive harm. For some of the listed chemicals, California’s Office of Health Hazard Assessment (OEHHA) has established safe

harbor levels, in the form of No Significant Risk Levels (NSRLs) for carcinogens and Maximum Allowable Dose Levels (MADLs) for chemicals causing reproductive harm. Exposure below these levels does not require a warning. No NSRL has been established for furfuryl alcohol.

What can retailers and manufacturers do to assess and reduce their risk? Dr. Rachel Novick, a toxicologist and supervising health scientist with Cardno ChemRisk, recommends that, even in the absence of an NSRL, businesses can still perform a risk assessment. To conduct the analysis a toxicologist will use guidance documents and risk assessment principles provided by OEHHA to derive a daily exposure level that poses no significant risk of cancer. Businesses could then test their products to determine whether consumer exposure exceeds that level based on consumption data.

It is important to note, however, that these industry-derived exposure levels are not an automatic bar to enforcement, because they are not official NSRLs or MADLs promulgated by OEHHA. For increased protection from lawsuits, manufacturers, retailers and in particular trade associations should request that OEHHA approve a chemical limit for particular products through a Safe Use Determination (SUD).

Potential defense: Typically a NSRL is based on the level of exposure that would cause no more than one in 100,000 instances of cancer over a lifetime of exposure. However, there may be an alternative level where “chemicals in food are produced by cooking necessary to render the food palatable or to avoid microbiological contamination.” 27 Cal. Code Regs. § 25703(b)(1).

This defense was raised recently in the Proposition 65 trial against Starbucks and more than 70 other defendants alleging exposure to acrylamide in coffee. The court’s ruling is expected within the next few months. The same defense is likely to be raised in a trial next year involving acrylamide in vegetable chips and other products.

Next steps: There has been extensive litigation related to acrylamide in food and beverage products, and furfuryl alcohol poses a similar risk. Food and beverage companies should consider taking steps to assess their exposure and reduce their risk. Bryan Cave has extensive experience counseling and defending businesses in [Proposition 65 matters](#).

For questions or more information, or to schedule a free Proposition 65 presentation or webinar, contact the authors: Merrit Jones at Merrit.Jones@bryancave.com or (415) 675-3435, and Tom Lee at Tom.Lee@bryancave.com or (415) 675-3447. You can also contact Rachel Novick at Rachel.Novick@cardno.com or (415) 618-3202.

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