

## Industry Insights: Coffee Products Exempted from Proposition 65

On Monday, June 3rd, California's Office of Environmental Health Hazard Assessment (OEHHA) approved a new regulation exempting coffee from Proposition 65 warnings. The rule states that: "Exposures to chemicals in coffee, listed on or before March 15, 2019 as known to the state to cause cancer, that are created by and inherent in the processes of roasting coffee beans or brewing coffee do not pose a significant risk of cancer." OEHHA announced the approval of the coffee exemption regulation on [Twitter](#) and confirmed that the new rule will take effect on October 1, 2019. OEHHA originally proposed the coffee exemption rule in 2018, shortly after a Los Angeles Superior Court ruled that coffee must carry cancer warnings. The lawsuit, initiated by serial plaintiff Council for Education and Research on Toxics (CERT), alleged that Starbucks, Peet's, Seattle Coffee Co., and other coffee sellers had violated Proposition 65 by failing to warn consumers about acrylamide in their coffee products. OEHHA's new coffee exemption rule, however, may finally end this long-brewing legal battle. The U.S. Food and Drug Administration (FDA) has also weighed in on OEHHA's coffee exemption rule. In August 2018, the FDA issued a public statement asserting that a cancer warning on coffee products, based on the presence of acrylamide, would be more likely to mislead consumers than to inform them. The FDA stated that: "[the] current research on coffee and cancer . . . doesn't support a cancer warning for coffee. In fact, . . . a [Proposition 65] warning could mislead consumers to believe that drinking coffee could be dangerous to their health when it actually could provide health benefits." The FDA further cautioned that a cancer warning on coffee could constitute "mislabeling" in violation of the Federal Food, Drug, and Cosmetic Act. The FDA has long expressed skepticism regarding the utility and legality of Proposition 65 warnings for acrylamide. Last year, a [California Court of Appeal](#) held that a plaintiff's suit seeking to require Proposition 65 acrylamide warnings on certain breakfast cereals was pre-empted by federal nutrition policies aimed at encouraging Americans to consume more whole grains. The Appellate Court relied in part on FDA guidance letters asserting that Proposition 65 warnings should be deferred given the uncertain science on the risks to humans posed by acrylamide in food, and the concern that ominous Proposition 65 cancer warnings may cause consumers to avoid foods that have demonstrable benefits to their health. While the Appellate Court decision was ultimately depublished, the underlying rationale for the court's decision remains strong and has proven effective in discouraging Proposition 65 lawsuits relating to acrylamide in whole grain foods. Given the recent [spike in acrylamide lawsuits](#), food and beverage companies faced with the cudgel of a Proposition 65 notice may increasingly find an unlikely ally in the FDA.

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