



September 28, 2001

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RE: Proposition 65 Notices Concerning Hershey and Mars Chocolate

Dear Mr. Carrick and Ms. Corash:

In May of this year, we received sixty-day notices under Proposition 65 from the American Environmental Safety Institute, alleging that certain chocolate products made by Hershey Foods Corporation and Mars, Incorporated, require warnings under Proposition 65 due to the presence of lead and cadmium. Because these products are consumed by millions of Californians, we determined that the matter should be investigated especially carefully. Our investigative efforts have included our own research, consultation with independent experts, analytical testing of numerous products, and the review of substantial information provided by the representatives of both the noticing party and the alleged violators.

As you know, Proposition 65 does not apply to low levels of chemicals in foods that are deemed "naturally occurring" within the meaning of California Code of Regulations, Title 22, section 12501. Under this regulation, the company providing a food product is not responsible for "naturally occurring chemicals" in food if certain criteria are met. This regulation was designed to avoid ubiquitous warnings on many foods due to the existence of small quantities of some chemicals in the air, ground, and water, which results in their being present in food. The validity of the regulation was upheld in *Nicolle-Wagner v. Deukmejian* (1991) 230 Cal.App.3d 652. To fall within the terms of this regulation, however, the chemical cannot be present in the food as the result of any "known human activity," and it must be reduced to the "lowest level currently feasible" through processing, handling, or other techniques.

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Based on the information obtained in this investigation, we have concluded that the lead present in the products is not present due to known human activity, as that term is used in section 12501. In considering whether lead is present at the “lowest level currently feasible” within the meaning of section 12501, we note the recent lead levels proposed by the Committee on Cocoa Products and Chocolate of the Codex Alimentarius Commission of the World Health Organization. That committee proposed a standard of 1 ppm for cocoa powder, 1 ppm for chocolate liquor and 0.1 ppm for cocoa butter. Although that standard was not adopted by the full Codex Commission, we believe that products meeting those strict levels qualify as being within the “lowest level currently feasible” under the regulation. Accordingly, based on the information we have obtained, lead levels falling under those levels would qualify as “naturally occurring” under the regulation.

In addition, the notices we received alleged that the products required warnings based on the presence of cadmium. While cadmium is a listed carcinogen, regulations specifically provide that it poses no significant risk of cancer where the exposure is through ingestion. (22 CCR § 12707(b)(3).) Cadmium also is a listed reproductive toxicant, and the Office of Environmental Health Hazard Assessment has proposed a regulatory safe-harbor level, i.e., the level deemed to be 1-1,000th of the No Observable Effect Level (for reproductive toxicity), of 4.1 micrograms per day. (See June 8, 2001 Notice of Proposed Rulemaking.) Based on the information we have obtained, the products in question fall well below this level, even before determining whether the chemical is “naturally occurring.”

It is unusual for the Attorney General to publicly state that he has reviewed a matter under Proposition 65 and determined that it is not appropriate to proceed on the claim. We expect such public statements to continue to be extremely rare. Nonetheless, because these products are consumed by so many Californians, we think it is important for the public to be aware that the Attorney General’s decision not to commence a civil action in this matter is based on a conclusion that the action would lack merit, after thorough consideration by this office.

Sincerely,

EDWARD G. WEIL
Deputy Attorney General

For **BILL LOCKYER**
Attorney General