



### California [AB 1264](#) creates a process for defining and banning UPF's

- All foods containing ingredients from one of nine categories are designated “ultra processed foods (UPF)” under the Health and Safety Code.
- UPF's are then reviewed by OEHHA (agency that implements Prop 65) to determine if they are “particularly harmful UPF's”.
  - Requires the developed of regulations to define the process and updates every two years.
  - Particularly harmful UPFs would be prohibited from being served in schools.
- Public entities are authorized to enact more stringent restrictions on UPFs or particularly harmful UPFs.

### Concerns with 1264:

- Definition of UPF is overbroad.
  - More than 80% of items would be designated as UPF.
  - Foods specifically designed for the more rigorous nutritional standards for school meals would be designated UPF.
  - These foods would have a negative stigma attached to them. Some examples include (more expansive list provided below):
    - Apple with a natural edible wax on it to prolong shelf life (surface active agent).
    - Yogurt with natural coloring and stevia (color and non-nutritive sweetener).
    - Tomato soup (stabilizer such as rice starch or corn starch)
- “Ultra-processed food” or “Particularly harmful ultra-processed food,” could violate the First Amendment. The Ninth Circuit is increasingly finding certain mandates (and especially warnings, e.g., Prop 65) unconstitutional. In this case it would compel vendors to characterize their products as ultra-processed or particularly harmful based on overexpansive definitions “forces [them] to convey a message fundamentally at odds with [their] mission.”
- Creates a duplicative regulatory program with an agency with little experience.
  - OEHHA lacks the appropriate expertise to serve as the lead agency. Instead, this should be the California Dept. of Public Health Food & Drug Branch.
  - OEHHA has no expertise on nutrition or food ingredients. Its role has always been to evaluate exposure to environmental contaminants. These sometimes occur in food (e.g., mercury in tuna or cadmium in leafy greens), but OEHHA has no public policy or public health expertise on food, food safety, cost tradeoffs, or nutrition.
  - It does not know FDA regulations or guidance, much less issues of food, agriculture, and nutrition policy.
  - It is populated mainly by toxicologists who are adept at evaluating the toxicity of substances but with no understanding of broader contexts or impacts.
  - The DPH Food & Drug Branch has deep expertise in all of these areas and is California's food regulatory agency.
- Creates unnecessary pathway towards litigation.
  - Food related litigation under Prop 65 is currently generating more than a 1,000 notices of intent to sue a year with more than \$100 million in annual settlements.
  - Currently there are more than 3 dozen law firms across the country actively advertising for consumer that have consumed UPFs. First of its kind suit filed alleging consumption of UPFs to diabetes, fatty liver disease etc.

**Categories in AB 1264 of FDA approved food ingredients that would automatically designate a food as Ultra Processed.** (\*\*\*) why are only 9 of the 32 FDA technical effect listed categories under 21 CFR 170.3 a trigger for a UPF definition. Excluded are categories such as: nutritive sweeteners, texturizers, flour treating agents etc?)

**1. Surface-active agents, as defined in 21 CFR 170.3(o)(29):** Substances used to adjust the surface characteristics of liquids in food products, other than emulsifiers, but including solubilizing agents, dispersants, detergents, wetting agents, rehydration enhancers, whipping agents, foaming agents, and defoaming agents, etc.

- EXAMPLES: heavy cream, egg whites, aquafaba (liquid from chickpeas)
- FOOD EXAMPLES: bread, cheese, salad dressing.

**2. Stabilizer and thickeners, as defined in 21 CFR 170.3(o)(28):** Substances used to thicken foods, improve texture, or help keep ingredients evenly mixed, ensuring consistent quality and stability, including suspending and bodying agents, setting agents, jellying agents, and bulking agents, etc.

- EXAMPLES: Gelatin, cornstarch, rice starch, wheat flour
- FOOD EXAMPLES: sauces, jam, soups.

**3. Propellants, aerating agents, and gases as defined in 21 CFR 170.3(o)(25):** Substances used to supply force to expel a product or used to reduce the amount of oxygen in contact with the food in packaging.

- EXAMPLES: Nitrogen, Nitrous Oxide, Carbon dioxide.
- FOOD EXAMPLES: mustard, cooking sprays, crackers.

**4. Color and coloring adjuncts, as defined in 21 CFR 170.3(o)(4):** Substances used to impart, preserve, or enhance the color or shading of a food, including color stabilizers, color fixatives, color-retention agents, etc.

- EXAMPLES: Hibiscus, beet juice, cocoa powder, blueberries
- FOOD EXAMPLES: cereals, condiments, baked goods.

**5. Emulsifiers and emulsifier salts, as defined in 21 CFR 170.3(o)(8):** Substances utilized to promote the uniform mixing of ingredients, ensuring consistency and stability.

- EXAMPLES: mustard powder, tomato paste, egg yolk, honey.
- Food EXAMPLES: peanut butter, meat products, packaged snacks.

**6. Flavoring agents and adjuvants as defined in 21 CFR 170.3(o)(12):** Substances added to impart or help impart a taste or aroma in food. Excludes spices and other natural seasonings and flavorings, as listed in [21 CFR 182.10](#)

- EXAMPLES: Almond extract, orange extract, nutritional yeast, table salt,
- FOOD EXAMPLES: fruit-based products, yogurt, meats.

**7. Flavor enhancers, as defined in 21 CFR 170.3(o)(11):** Substances added to supplement, enhance, or modify the original taste and/or aroma of a food, without imparting a characteristic taste or aroma of its own.

- EXAMPLES: Peanut oil, lemon juice, Table salt, citric acid.
- FOOD EXAMPLES: salads, soups, cooked vegetables.

**8. Surface-finishing agents, as defined in 170.3(o)(30):** Substances used to increase palatability, preserve gloss, and inhibit discoloration of foods, including glazes, polishes, waxes, and protective coatings.

- EXAMPLES: Egg whites, egg yolks, natural waxes
- FOOD EXAMPLES: fruits, nuts.

**9. Non-nutritive sweeteners, as defined in Section 170.3(o)(19):** Substances having less than 2 percent of the caloric value of sucrose per equivalent unit of sweetening capacity.

- Examples: Stevia, monk fruit juice
- FOOD EXAMPLES: baked goods, dairy, condiments.