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Trans Fat Bans:

Policy Options for Eliminating the Use
of Artificial Trans Fats in Restaurants

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Executive Summary

Trans fat is the common name for a particular type of unsaturated fat. Artificial trans fats are created by adding hydrogen to liquid oil through a process called hydrogenation. Trans fat also occurs naturally in low levels in meat and dairy products, but the vast majority of the trans fat that Americans consume is artificially produced. Artificial trans fats have certain properties that make them well suited to commercial food production, such as greater stability, longer shelf life, and low cost, but we are learning that these advantages are achieved at the expense of human health.

Excess trans fat intake is associated with a number of negative health consequences. Several epidemiological studies have demonstrated a strong link between the consumption of trans fat and coronary heart disease. Trans fat intake may also play a role in weight gain and a host of other health conditions, including Alzheimer's disease, breast cancer, diabetes, and infertility. Therefore, leading public health experts and organizations recommend that trans fat consumption be limited as much as possible, while maintaining a nutritionally adequate diet.

Limiting one's trans fat intake is difficult to do, however, in the absence of information. At present, federal law only requires disclosure of the trans fat content of packaged foods. Americans are purchasing meals in restaurants on an increasingly frequent basis, which has led to a rise in our total daily intake of trans fat. But because restaurant foods are exempt from federal nutrition labeling requirements, consumers have no consistent way of determining which restaurant foods contain high levels of artificial trans fat and no practical means of avoiding them.

Recognizing the limits of federal regulation, a number of states and localities have considered legislative proposals to limit or eliminate artificial trans fat use in food service establishments. To date, trans fat bans have passed in roughly a dozen localities and one state, California, has imposed a statewide ban on artificial trans fat in restaurants. Legislation banning the use of artificial trans fats in restaurants has gained currency across the United States as a strategy for increasing consumer access to healthier foods, combating the epidemic of heart disease, and promoting overall public health.

Introduction

While state and local trans fat bans are a promising public health intervention, such laws may be subject to legal challenge on constitutional grounds. Critics have argued that trans fat bans are unduly burdensome and the costs of compliance may jeopardize the livelihoods of smaller, independent restaurants. Critics have also asserted that trans fat bans negatively affect interstate commerce by requiring national restaurant chains to alter their products, thereby disrupting their national distribution chains, depriving them of the economic advantages associated with mass production, and interfering with their national brand image. In addition, some critics have argued that state and local governments lack the authority to ban food ingredients that the U.S. Food and Drug Administration has approved and only the federal government may restrict the use of artificial trans fat.

This policy brief will provide a synopsis of the current policy debate over laws banning the use of artificial trans fat in restaurants. It will discuss arguments in favor of and in opposition to legislation banning trans fat in restaurant foods, highlight representative trans fat regulation proposals at the federal, state, and local levels, and analyze legal considerations pertaining to trans fat bans. It concludes that trans fat bans are a viable policy option for state and local governments to pursue in their efforts to promote healthy eating and prevent chronic disease, and that such bans should survive legal challenge under current law. Finally, this brief provides recommendations for advocates and policymakers who are considering legislation banning the use of artificial trans fat in restaurants in their jurisdictions.

The Public Health Rationale for Banning Artificial Trans Fats

Overview of Artificial Trans Fats and Their Prevalence in the American Diet

Trans fat is the common name for a particular type of fat with trans-isomer fatty acids.¹ Trans fats are derived from natural and artificial sources. Naturally, trans fat occurs in the stomach of ruminant animals and is consumed by humans in low levels in the form of dairy and meat products.² Artificial trans fats are created by adding hydrogen to liquid oil, a process called hydrogenation, which turns the oil into a solid or semi-solid fat.³

Artificial trans fats are inexpensive and easy to produce.⁴ Moreover, hydrogenation provides many qualities that are advantageous to commercial food processing, such as increasing flavor stability, maintaining texture, and acting as a preservative.⁵ Because trans fatty molecules fit together more closely than unsaturated fat molecules, artificial trans fats are more stable and have longer shelf lives than naturally occurring fats.⁶ They can also withstand repeated heating at high temperatures without breaking down, which makes them ideal for commercial deep frying.⁷ As a result of their versatility, artificial trans fats have become a common ingredient in processed and restaurant foods and an increasing element in the American diet in recent decades.⁸

Although trans fat does occur naturally in animal products, the vast majority of trans fat consumed by Americans is artificially produced.⁹ It is estimated that roughly 80 percent of the trans fat Americans consume is from partially hydrogenated vegetable oil.¹⁰ In terms of overall caloric intake, roughly two percent of all calories consumed in the U.S. come from the artificial trans fat in partially hydrogenated vegetable oil.¹¹

U.S. dietary guidelines recommend that individuals consume less than two grams of trans fat daily, an amount which only allows for the consumption of naturally occurring trans fat.¹² According to the U.S. Food and Drug Administration (FDA), however, most American adults eat an average of 5.8 grams of trans fat on a daily basis.¹³ Americans consume excess trans fat because it is present in a wide variety of processed foods that have become an increasing part of our diet, including deep-fried fast foods, baked goods, crackers, chips, and other snack foods.¹⁴ The FDA once estimated that approximately 95 percent of prepared cookies and 100 percent of packaged crackers contained artificial trans fat.¹⁵ Many of the menu items available in fast food restaurants contain disproportionately high amounts of trans fat.¹⁶ Americans are eating meals prepared outside of the home on an increasingly frequent basis,¹⁷ which has led to a rise in our level of away-from-home fat consumption and, specifically, our intake of artificial trans fat.¹⁸

The Health Risks of Trans Fat Consumption

Mounting scientific evidence points to a dramatic link between trans fat intake and increased risk of coronary heart disease (CHD) and related health events, as well as other chronic health conditions. Research has shown that trans fat consumption raises low density lipoprotein (LDL), or “bad cholesterol,” levels, while decreasing levels of high density lipoprotein (HDL), or “good cholesterol.”¹⁹ Elevated LDL cholesterol increases an individual’s risk of developing coronary heart disease.²⁰ Trans fat consumption can also lead to atherosclerosis, a dangerous accumulation of fatty

deposits on the walls of the arteries, which can reduce blood flow and cause heart attack and stroke.²¹ In addition, trans fat intake may promote inflammation at the cellular level.²² Systemic inflammation may trigger risk factors for coronary artery disease and type 2 diabetes.²³ Several studies also suggest that trans fat consumption may impair the functioning of endothelial cells, the cells that line human blood vessels.²⁴ Trans fat intake may play a role in a host of other health conditions, including Alzheimer's disease, breast cancer, diabetes, and infertility.²⁵ Finally, while there is insufficient evidence on which to base a scientific consensus on trans fat and obesity, animal studies have suggested that consuming trans fat promotes insulin resistance and contributes to weight gain.²⁶

Scientific evidence indicates that trans fat, gram per gram, is more harmful than saturated fat and poses a significantly greater risk (2.5- to 10-fold) for cardiovascular disease.²⁷ The Institute of Medicine has declined to set a tolerable upper intake level for trans fatty acids because any increase in trans fat consumption is associated with heightened risk for coronary heart disease.²⁸ According to Harvard researchers, a mere two percent (2%) increase in energy intake from trans fat is associated with a twenty-three percent (23%) increase in the incidence of coronary heart disease.²⁹

A number of epidemiological studies have demonstrated the connection between trans fat consumption and rates of coronary heart disease and heart attack in the United States.³⁰ In 1993, using data from the Nurses' Health Study, Harvard researchers confirmed that trans fat intake was directly related to the risk of developing coronary heart disease.³¹ That same year, a study conducted at Boston area hospitals found a significant relationship between trans fat intake and the risk of acute myocardial infarction.³² According to a comprehensive review of the scientific studies on trans fat published in 2006, eliminating artificial trans fat from the food supply could prevent six to nineteen percent (6-19%) of heart attacks and heart disease-related deaths annually in the U.S.³³ These researchers estimated that artificial trans fat intake causes 72,000 to 228,000 heart attacks, with 30,000 to 100,000 of those being fatal, every year in the United States.³⁴

Therefore, reducing or eliminating artificial trans fat from the American diet may be one of the most important preventative strategies to combat the epidemic of heart disease. Cardiovascular disease, of which coronary heart disease is the principal type, is the single leading cause of death in the United States.³⁵ Every year, heart disease kills more Americans than cancer, diabetes, and accidents combined.³⁶ In 2007, the economic toll of cardiovascular disease, in direct and indirect costs, was estimated to be approximately \$431.8 billion.³⁷

In light of the significant health risks associated with trans fat consumption, a number of leading medical authorities have called for the reduction or elimination of artificial trans fat from the food supply. In 2002, the World Health Organization (WHO) issued a report which recommended that trans fats be limited to less than one percent of overall energy intake.³⁸ That same year, the Institute of Medicine (IOM) issued a declaration that there is no safe level of trans fat consumption.³⁹ The IOM report “recommended that trans fatty acid consumption be kept as low as possible” because trans fat provides “no known benefit” and poses “unknown and unquantifiable health risks.”⁴⁰ In 2007, the American Public Health Association adopted a policy statement on the restriction of trans fats in the American food supply, which called for, among other things, banning and monitoring the use of artificial trans fats in restaurants.⁴¹ These recommendations heightened public awareness about the prevalence of artificial trans fat in the American diet and the health risks of artificial trans fat consumption.

Representative Federal, State, and Local Policies Regulating Artificial Trans Fat

Amid growing scientific and public concern about artificial trans fats, lawmakers began considering a number of policies requiring the disclosure of nutritional information about or restricting the use of artificial trans fats. By 2006, several state and local governments had joined in a legislative movement against trans fat as a strategy to prevent heart disease. A number of policies have been proposed, ranging from trans fat labeling requirements for packaged food products, which can only be imposed under federal law, to complete bans on the use of artificial trans fats in restaurant foods, which have been pursued under state and local law. While this policy brief will focus primarily on state and local laws banning artificial trans fats in food service establishments, it will briefly discuss the federal regulation that mandates disclosure of the trans fat content of packaged foods.

Federal Regulation of Trans Fat

Partially hydrogenated oils are categorized as “Generally Recognized as Safe” (GRAS) by the U.S. Food and Drug Administration,⁴² a designation that is subject to debate in light of the ample scientific research documenting the health risks of trans fat consumption.⁴³ In 2004, the Center for

Science in the Public Interest petitioned the FDA to initiate rulemaking to revoke the GRAS status of artificial trans fats.⁴⁴ In 2007, the American Public Health Association issued a policy statement urging the FDA to revoke the GRAS designation of trans fat containing partially hydrogenated oils.⁴⁵ To date, however, the FDA has declined to reconsider the GRAS status of partially hydrogenated oils and categorize artificial trans fats as unsafe.

The federal government did respond to scientific and public concern over trans fat consumption in 2003, when the FDA promulgated a regulation requiring manufacturers to disclose trans fat content on the “Nutrition Facts” panel of packaged food labels by January 1, 2006.⁴⁶ Pursuant to the regulation, the nutrition labels of packaged foods and dietary supplements are required to list trans fat content on a separate line under the declaration of saturated fat.⁴⁷ The FDA had previously declined to include trans fat on nutrition labels in 1993 because, in the agency’s view, there was a lack of scientific consensus on the dietary implications of trans fat intake at the time.⁴⁸ However, by 2003, the FDA had become convinced that the scientific evidence demonstrating a connection between trans fat intake and increased heart disease risk was “sufficiently compelling to now warrant trans fatty acid labeling.”⁴⁹

The FDA trans fat disclosure regulation was the first major change to the “Nutrition Facts” panel since the promulgation of the Nutrition Labeling and Education Act’s (NLEA) final implementing regulations in 1993.⁵⁰ Although significant, the regulation left a major gap in limiting the trans fat intake of Americans because it does not apply to restaurant foods, which are expressly exempt from the NLEA’s nutrition labeling requirements.⁵¹ The exclusion of restaurant foods from federal regulation of trans fat labeling is problematic because Americans are consuming an increasing proportion of their meals outside the home.⁵² It is estimated that Americans spend about half their food dollars on products purchased from restaurants and food service establishments,⁵³ and consume about one-third of their total calories from foods prepared outside the home.⁵⁴ Consumers usually have no practical way to avoid trans fat in restaurant foods because food service establishments are not required to disclose whether they use artificial trans fat, and if so, how many grams of trans fat are in a particular menu item.⁵⁵

While the U.S. government has declined to take federal action to restrict artificial trans fat in the American food supply, two European countries have successfully enacted national trans fat bans. In 2003, Denmark became the first country to pass national legislation restricting artificial trans fat. Denmark’s law mandates that all oils and fats used in locally made or imported foods contain less than two percent industrially produced trans fat, which essentially amounts to a ban on partially

hydrogenated vegetable oils and shortenings and limits Danish citizens' trans fat intake to less than one gram per day.⁵⁶ In April 2008, Switzerland followed Denmark's example and enacted a national trans fat ban with similar restrictions.⁵⁷

State and Local Legislation to Restrict Artificial Trans Fat Consumption

In light of growing concern over the health risks of trans fat consumption, and in recognition of the limits of federal regulation, state and local governments began introducing a variety of legislative proposals to restrict the use of artificial trans fats beginning in 2003. California became the first U.S. state to bar restaurants from using artificial trans fats in July 2008, although it was preceded by the U.S. territory of Puerto Rico, which banned artificial trans fat in food service establishments in April 2007.⁵⁸ Many other states have or are presently considering statewide trans fat bans, including Connecticut, Florida, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Mississippi, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, South Carolina, Tennessee, Vermont, and Virginia, among others.⁵⁹ At the local level, legislation banning the use of artificial trans fats in restaurants has been passed in New York City, Albany, Nassau and Westchester Counties in New York; King County (Seattle), Washington; Philadelphia, Pennsylvania; Stamford, Connecticut; Boston, Brookline, and Cambridge, Massachusetts; and Baltimore and Montgomery County, Maryland.⁶⁰

California's Trans Fat Ban

California's statewide trans fat ban is being considered as a model for other states to emulate. Although several localities preceded California in banning artificial trans fats in restaurants, passing such a ban in the nation's most populous state is a major victory for the movement against trans fats.⁶¹ The California trans fat ban is expected to affect more than 88,000 restaurants, bakeries, delicatessens, cafeterias and other food service facilities,⁶² thereby having a significant impact on the trans fat intake of Californians. It is also expected to prompt affected restaurants that also do business in other states to reformulate their products nationwide.

California's trans fat ban, Assembly Bill 97,⁶³ was approved by Governor Schwarzenegger on July 25, 2008. It amends California's Health and Safety Code to require all food facilities in the state, with the exception of public school cafeterias,⁶⁴ to cease using artificial trans fats by January 2011.⁶⁵ Packaged foods in a manufacturer's sealed, original packaging are exempt.⁶⁶ For enforcement purposes, it requires every food facility to maintain the label of any food that is or contains any fat, oil, or shortening and is stored, distributed, served by, or used in the preparation of food by the

facility.⁶⁷ Health inspectors will review these labels when they conduct regular food safety inspections.⁶⁸ Violation of the law is a misdemeanor offense punishable by a fine ranging from \$25.00 to \$1,000.00.⁶⁹

Like its menu labeling law,⁷⁰ California's trans fat ban contains a graduated phase-in period and a delayed implementation date to allow restaurants adequate time for compliance. Restaurants are required to use oils, margarine, and shortening with less than half a gram of trans fat per serving by January 1, 2010 for all food items except deep-fried baked goods.⁷¹ Donuts and other deep-fried baked goods will be prohibited from containing artificial trans fat after January 1, 2011.⁷²

Opposition to California's trans fat ban came primarily from the California Restaurant Association.⁷³ The restaurant association argued that singling out trans fat for regulation was arbitrary because other nutrients, such as saturated fat, can be harmful to cardiovascular health, and such a ban would result in increased use of oils and solid fats containing saturated fat.⁷⁴ The association also argued that a mandate would prove expensive, particularly for small restaurants selling ethnic foods,⁷⁵ and was unnecessary because many of the state's most frequented restaurants had already voluntarily eliminated artificial trans fats from their products.⁷⁶ The restaurant association asserted that only the federal government should have the authority to ban particular food ingredients for health reasons.⁷⁷ Lastly, the association claimed that the ban would not accomplish its public health objectives because Californians still eat most of their meals at home.⁷⁸ While the California Restaurant Association was vocal about its opposition to California's trans fat ban in the press, it has apparently opted not to challenge the law in court.

New York City's Trans Fat Ban

New York City became the first major U.S. city to enact a trans fat ban in December 2006, when its board of health passed a regulation barring the service of products containing artificial trans fat in all food establishments. Under Section 81.08, trans fat is prohibited in all food service establishments required to hold a license from the health department, including restaurants, bakeries, cafeterias, caterers, mobile food vendors, and concession stands.⁷⁹ The regulation contains a graduated phase-in period, allowing restaurants six months (by July 1, 2007) to switch to oils, margarines, and shortening used for frying and spreading, and eighteen months (by July 1, 2008) to replace artificial trans fat used in baking and deep-frying of bakery goods.⁸⁰ Violations of the regulation do not count towards an establishment's food service inspection score, but violations will be posted on the health department's website and are subject to re-inspection.⁸¹ Violators are

subject to fines of \$200.00 to \$2,000.00, depending on an establishment's number of prior violations.⁸²

To assist affected restaurants with compliance, the New York City Department of Health and Mental Hygiene created a Trans Fat Help Center, complete with a hotline and a website,⁸³ and held numerous workshops to teach food preparers how to adapt recipes to substitute trans fat-free oils for partially hydrogenated vegetable oils and vegetable shortening.⁸⁴ The health department also distributed informational brochures to guide establishments' compliance.⁸⁵ The City's educational efforts appeared to be very successful in facilitating compliance with the law. Based on inspections occurring after the first phase of the ban went into effect, the City estimated that 94 percent of affected food service establishments were in compliance.⁸⁶

New York City's successful trans fat ban inspired a number of localities to pass similar laws restricting the use of trans fats in food service establishments.⁸⁷ In February 2007, just two months after New York City's ban passed, Philadelphia became the second major U.S. city to enact a trans fat ban.⁸⁸ Montgomery County, Maryland,⁸⁹ Albany, New York, and Brookline, Massachusetts followed suit just three months later, in May 2007.⁹⁰ King County, Washington and Nassau County, New York enacted trans fat bans in July and September 2007, respectively.⁹¹ In December 2007, Louisville, Kentucky stopped short of banning trans fat, but directed its health department to conduct consumer education campaigns about the health risks of trans fat consumption and to review the matter for regulatory action.⁹² In March 2008, Boston, Massachusetts passed a law banning the use of artificial trans fat by food service establishments, vending machines, and mobile food vendors.⁹³ Four days after Boston's law was passed, Baltimore, Maryland banned the use of artificial trans fat in all food service establishments.⁹⁴

In sum, New York City's successful trans fat ban has served as a catalyst and a model for other jurisdictions.⁹⁵ The high rates of compliance achieved in New York City and other localities where trans fat bans have been enacted demonstrates that eliminating artificial trans fats from restaurants is possible and can be accomplished in a relatively short period of time.⁹⁶

Local Voluntary Trans Fat Elimination Programs

As an alternative to legislation imposing mandatory trans fat bans, some localities have pursued voluntary trans fat elimination programs. In 2004, Tiburon, California became the first community in the nation to eliminate the use of artificial trans fat in restaurants pursuant to a voluntary agreement, under which all restaurants in Tiburon vowed to switch to cooking with trans

fat-free oils.⁹⁷ In November 2007, the County of Los Angeles announced its voluntary Artificial Trans Fat Reduction Program.⁹⁸ In February 2008, San Francisco began implementing a voluntary artificial trans fat elimination program.⁹⁹ Similarly, in Multnomah County (Portland), Oregon, public health officials and the Oregon Restaurant Association collaborated to create a program to voluntarily phase out artificial trans fat use in restaurants and educate consumers about healthier eating.¹⁰⁰

While voluntary trans fat elimination programs have been successful in some localities, they have largely failed at changing restaurant industry practices. For example, New York City's regulation banning artificial trans fat was enacted after a year-long educational campaign urging the city's restaurants to eliminate trans fat voluntarily.¹⁰¹ The percentage of restaurants using artificial trans fats remained essentially unchanged one year later, prompting public health officials to enact the mandatory trans fat ban.¹⁰² Overall, voluntary trans fat elimination programs have not been very effective in changing restaurant industry practices, as evidenced by California and New York City's decisions to discontinue their voluntary programs in favor of trans fat bans.

Political and Legal Considerations for Laws Banning the Use of Artificial Trans Fats in Restaurants

In comparison to menu labeling legislation, laws banning the use of artificial trans fats in restaurants have been less controversial, at least in terms of litigation. Although initially met with disfavor, trans fat bans have not been legally challenged by the restaurant industry. There is now a growing trend in the restaurant industry to voluntarily remove artificial trans fats from restaurant foods. In fact, the gradual phase out of trans fats from restaurant foods is officially supported by the National Restaurant Association.¹⁰³ Numerous national fast food and chain restaurants have voluntarily eliminated or announced their intention to eliminate the use of artificial trans fats in their products, including McDonald's, Burger King, Arby's, Kentucky Fried Chicken, Taco Bell, Wendy's, Applebee's, Denny's, IHOP, Dunkin' Donuts, Au Bon Pain, Panera Bread, The Cheesecake Factory, Red Lobster, Ruby Tuesday, The Olive Garden, Subway, and Starbucks, among others.¹⁰⁴

Changing Restaurant Industry Practices on the Use of Artificial Trans Fats

Although many restaurants no longer use artificial trans fats in their products, voluntary trans fat elimination and product reformulation were the exception rather than the rule just a few

years ago. Legislation banning trans fats certainly played a role in this industry shift. However, even before trans fat bans were enacted, two factors began to influence many restaurants to discontinue using artificial trans fats: (1) changing market conditions, primarily, the increasing availability and cost-competitiveness of trans fat-free oils and shortenings; and (2) mounting negative publicity and public awareness about the health risks of trans fat consumption. These factors have led a growing number of restaurants, from large national chains to small, independent eateries, to voluntarily eliminate artificial trans fats from their products. However, this industry shift is far from complete and has not been without controversy.

Restaurant Industry Objections to Trans Fat Bans

When trans fat bans first started gaining momentum, the restaurant industry raised a number of objections.¹⁰⁵ The industry claimed that food quality would suffer and customers would be dissatisfied with the taste and texture of trans fat-free foods.¹⁰⁶ National chain restaurants worried that local trans fat bans would interfere with their national product distribution systems.¹⁰⁷ Large fast food chains also seemed to fear that local trans fat bans would harm their nationwide brand image by causing, for example, McDonald's French fries in New York City to taste different from those served in other cities.¹⁰⁸ The restaurant industry also questioned whether suitable trans fat-free alternatives were readily available. Restaurants asserted that the costs of switching to alternative fats were too onerous, and would result in higher food costs being passed onto consumers, as well as a disproportionate burden being placed on small, independent restaurants.¹⁰⁹ The restaurant industry also suggested that trans fat bans would lead restaurants to replace partially hydrogenated oils with products that, although trans fat-free, are high in saturated fat and cholesterol, such as palm and coconut oils and butter.¹¹⁰ The industry argued that laws banning the use of artificial trans fats in restaurants would not substantially impact public health because Americans still eat the majority of their meals at home.¹¹¹ Finally, the restaurant industry criticized trans fat bans on philosophical grounds, complaining that such laws are paternalistic and it is not the role of the government to dictate restaurants' business decisions and consumers' food choices.¹¹²

Experience with trans fat bans has refuted most of the restaurant industry's objections. Consumers have apparently not missed the presence of trans fat in restaurant foods.¹¹³ Sales of French fries, donuts, and other fried, formerly trans-fat laden fast foods have not decreased significantly in the localities that have implemented trans fat bans.¹¹⁴ In addition, the costs of switching to trans fat-free alternatives have apparently not resulted in higher restaurant prices. Although research is lacking on the impact of trans fat bans on restaurant food prices in the United

States, European studies have shown that Denmark's trans fat ban has not affected the price of food.¹¹⁵ In theory, restaurant food prices should not increase as a result of a trans fat ban because the contribution of the fat cost to the final price of a menu item is quite low.¹¹⁶ Moreover, even if a trans fat ban did result in slightly higher restaurant food prices, the health care savings to consumers of reducing rates of coronary heart disease and other health conditions would far outweigh any minimal increase in food prices.

In terms of market availability, trans fat-free alternatives have proven to be readily available to restaurants because cooking oil and seed companies anticipated the shift away from hydrogenated oils years before trans fat bans went into effect. Companies began investing in research and accelerating production of trans fat-free alternatives in the 1990s, when the first major studies were released revealing the health risks of trans fat consumption.¹¹⁷ Therefore, when laws banning the use of artificial trans fats in restaurants went into effect, the cooking oil industry was already poised to respond to increased market demand for trans fat-free oils. Numerous companies now manufacture or distribute trans fat-free oils in the United States, giving restaurants a wide variety of options to choose from.¹¹⁸ For frying, restaurants can replace partially hydrogenated vegetable oils with traditional trans fat-free oils such as soy, corn, or canola oils.¹¹⁹ In addition, several new oils made from varieties of soybeans, safflower, sunflower, and other seeds have been developed.¹²⁰ Some of these newer oils have longer "fry lives" than partially hydrogenated oils and have actually resulted in cost savings for restaurants because they do not have to be replaced as often.¹²¹ For baking, many reformulated trans fat-free margarines and shortenings made from combinations of non-hydrogenated vegetable oils are now available.¹²²

With regard to economic feasibility, the costs associated with switching to trans fat-free oils have proved to be relatively low for restaurants, regardless of their size. According to a spokesman for Wendy's, which replaced partially hydrogenated oils with a blend of corn and soybean oil in all of its restaurants in 2006, the switch was "cost neutral."¹²³ John Neal, the owner of Kentucky Fried Chicken's third largest franchise, was quoted as saying the cost of switching to trans fat-free oils was merely "pennies."¹²⁴ The cost-effectiveness of switching to trans fat-free oils has also been attested to by smaller, independent restaurants.¹²⁵

Given that trans fat-free alternatives are widely available and have not resulted in significantly increased costs, restaurants have little objective basis for opposing trans fat bans. Therefore, many large restaurant chains appear to have made the decision to voluntarily eliminate trans fat from their foods, and reap the benefits of positive publicity for doing so, rather than be

forced to comply with mandatory trans fat bans. However, this shift did not occur in a vacuum. It was precipitated by market conditions, as described above, as well as increasing media attention and public awareness about the health risks of trans fat consumption.

The Impact of Consumer Protection Lawsuits on Restaurants' Use of Artificial Trans Fats

The negative press generated by consumer protection lawsuits likely played a role in influencing national chain restaurants' decisions to stop using artificial trans fats.¹²⁶ From 2003 to 2007, consumer protection lawsuits were filed against three major fast food chains—McDonald's, Kentucky Fried Chicken, and Burger King—over the restaurants' use of artificial trans fat.¹²⁷ Although all three lawsuits were resolved short of trial, the publicity they generated succeeded in increasing consumer awareness about the health risks of trans fat consumption and placing public pressure on fast food restaurants to alter their use of artificial trans fats.¹²⁸

Plaintiffs' litigation against the use of artificial trans fats in restaurants began in 2003, when Ban.Trans.Fats.com, Inc., a California-based nonprofit organization, filed a class action lawsuit against McDonald's for failing to replace partially hydrogenated cooking oil with trans fat-free oil, as the corporation had promised to do.¹²⁹ McDonald's had pledged to replace partially hydrogenated oil in its restaurants in 2002, but then delayed the switch, claiming its iconic French fries did not taste the same cooked in trans fat-free oil.¹³⁰ After considerable negative publicity,¹³¹ McDonald's agreed to settle the class action in 2005 for \$8.5 million, consisting of a \$7 million grant to the American Heart Association for a trans fat education campaign and \$1.5 million on publications about its trans fat initiative.¹³²

In June 2006, the Center for Science in the Public Interest (CSPI) joined in a class action lawsuit against Kentucky Fried Chicken (KFC) over the chain's use of artificial trans fat in its signature fried chicken and other foods.¹³³ KFC's parent company, Yum! Brands, initially stated that the lawsuit was frivolous and vowed to defend its products.¹³⁴ However, by October 2006, the company announced that it would replace partially hydrogenated vegetable oil with a trans fat-free soybean oil in all of its KFC restaurants by April 2007.¹³⁵ CSPI withdrew from the lawsuit upon Yum!'s announcement.¹³⁶ The lawsuit was ultimately dismissed in May 2007 by a federal district court judge, on the grounds that the lead plaintiff had failed to prove that he and other members of the class had actually been harmed by consuming KFC's products.¹³⁷

In May 2007, CSPI filed a lawsuit against Burger King over its use of artificial trans fat, alleging that Burger King was in violation of the District of Columbia's consumer protection act by selling foods containing trans fat without warning consumers of the health risks of trans fat

consumption, thereby misleading consumers into thinking that such foods were safe.¹³⁸ CSPI requested that the court either order Burger King to cease using trans fat or to post warning notices on restaurant menu boards.¹³⁹ Burger King vigorously defended the lawsuit, filing a motion to remove the case to federal court and arguing that it should be dismissed. The federal district court denied Burger King's motion to dismiss and granted CSPI's motion to remand, or return, the case to the superior court.¹⁴⁰ Although the case was ultimately dismissed by the superior court, on the grounds that CSPI had not established that anyone had actually been injured by consuming Burger King's food,¹⁴¹ the negative publicity generated by the lawsuit appeared to influence the company's practices. Within two months of the lawsuit being filed, by July 2007, Burger King announced that its over 7,000 U.S. restaurants would begin the switch to using trans fat-free oils, with phase-out anticipated to be complete by the end of 2008.¹⁴² Burger King accomplished eliminating trans fats from its products by October 2008.¹⁴³

While trans fat litigation has not resulted in judgments for plaintiffs, the publicity it generated has helped to raise public awareness about the risks of trans fat consumption. These lawsuits have also been instrumental in effectuating some change in restaurant industry practices. Therefore, before trans fat bans gained widespread currency, trans fat litigation helped to reduce the amount of trans fat in the American food supply by directing nationwide media attention to the dangers of trans fats and applying public pressure on three major fast food chains to alter their use of artificial trans fats.

Potential Legal Challenges to Laws Banning the Use of Artificial Trans Fats in Restaurants

To date, all of the litigation over restaurants' use of artificial trans fats has involved plaintiffs' consumer protection lawsuits. When New York City's trans fat ban spurred a wave of similar legislation across the country, the National Restaurant Association publicly threatened litigation to overturn local trans fat bans on several occasions.¹⁴⁴ Litigation never ensued, however, presumably because the restaurant association concluded that the outcome was uncertain and it was not worth the public relations risk of being identified as the supporter of "metabolic poison."¹⁴⁵ Although trans fat bans have yet to be challenged by the restaurant industry in court, several legal arguments could be invoked against them. The following discussion will outline some of the potential legal challenges that might be raised against trans fat bans.

Preemption

Preemption refers to the ability of a higher level of government to prevent or prohibit certain actions by a lower level of government. The doctrine of preemption stems from the Supremacy Clause of the U.S. Constitution, which declares federal law to be the supreme law of the land.¹⁴⁶ The Supremacy Clause allows for acts of Congress or federal agencies to preempt state or local laws on the same subject. Likewise, at the state level, state statutes or regulations can preempt local laws.

There is a basic presumption against federal preemption of state or local law.¹⁴⁷ That presumption is stronger when the state or local law in question implicates public health.¹⁴⁸ Laws aimed at protecting public health, safety, and welfare are traditionally considered matters of local concern, to be carried out by state and local governments pursuant to their police powers.¹⁴⁹ Despite this presumption, federal laws or regulations can preempt state or local public health laws when federal law expressly or impliedly occupies the entire field of regulation in a particular area.¹⁵⁰ Congress may expressly state in a federal law, or a court may conclude based on legislative history, that uniform federal regulation is desirable in a particular context. Similarly, state law may exclusively regulate certain matters that impact public health, depriving local governments of the ability to pass ordinances or regulations on the same subject.

Local ordinances banning the use of artificial trans fat in restaurants could conceivably be challenged on federal or state preemption grounds. Although trans fat bans have yet to be legally challenged on the basis of federal preemption, the restaurant industry has publicly raised the issue of whether local trans fat bans are preempted by the federal Food, Drug, and Cosmetic Act. Given that the Food and Drug Administration has authorized the use of artificial trans fat in food products in the United States, the restaurant industry might argue that state and local trans fat bans frustrate the federal government's intent to promulgate a uniform national policy on trans fat. When New York City's trans fat ban was enacted, the National Restaurant Association questioned the ability of a municipality to outlaw a product that the FDA had approved.¹⁵¹ Similarly, prior to the passage of California's trans fat ban, the California Restaurant Association argued that banning artificial trans fats for health reasons was only within the purview of the federal government, not the states.¹⁵²

However, it seems unlikely that a challenge to a state or local trans fat ban would succeed on federal preemption grounds. Federal law does not expressly preempt state and local laws banning the use of artificial trans fat in restaurants. The only federal laws or regulations regarding trans fat are the FDA's grant of "Generally Recognized as Safe" status to trans fat and the FDA regulation

requiring the disclosure of trans fat content on the nutrition labels of packaged foods.¹⁵³ State and local governments are free to set and enforce more rigorous standards than the federal government regarding trans fat, provided that the state or local laws do not create a conflict in complying with federal law or are not so broad as to frustrate the purpose of federal law.¹⁵⁴ Although this is an untested area of law, it seems unlikely that a court would find that a state or local trans fat ban conflicts with or frustrates the purpose of federal policy in this area, given the limited scope of federal regulation of trans fat.¹⁵⁵

Although federal preemption is unlikely to bar local laws banning the use of artificial trans fat in restaurants, preemption by state law may be an issue in certain jurisdictions. Prior to the passage of California's statewide trans fat ban, Los Angeles and San Francisco pursued voluntary trans fat reduction programs in lieu of mandatory trans fat bans, in part, out of concern that local regulations would conflict with state law. Shortly after New York City's trans fat ban was passed, similar legislation was proposed in Los Angeles.¹⁵⁶ The Los Angeles County Department of Public Health immediately began a study to assess the feasibility of a trans fat ban in L.A.¹⁵⁷ The study concluded that city or county attempts to regulate trans fat would "likely conflict with State law."¹⁵⁸ Therefore, until California's statewide trans fat ban was passed, trans fat regulation in Los Angeles was limited to a voluntary artificial trans fat reduction program.¹⁵⁹ While state preemption of local trans fat legislation is unlikely to be an issue in most jurisdictions (for example, state law does not appear to pose a barrier to local trans fat regulation in Minnesota), it is nevertheless an issue that policymakers should be aware of when considering trans fat bans at the local level.

Dormant Commerce Clause

It seems apparent that state and local governments have the authority to enact trans fat bans under their police powers because the purpose of such legislation is to protect public health.¹⁶⁰ However, the national character of the fast food and chain restaurant industry means that local regulation of trans fat in restaurants may have nationwide economic impact.¹⁶¹ Trans fat restrictions imposed in one locality will likely affect the national food processing and distribution chains of fast food and chain restaurants.¹⁶² Therefore, some critics have argued that trans fat bans are susceptible to legal challenge on the grounds that they interfere with the interstate food chain in violation of the Dormant Commerce Clause.¹⁶³

The Commerce Clause of the U.S. Constitution expressly grants Congress the power to enact legislation that regulates commerce between the states.¹⁶⁴ Under the Commerce Clause, Congress may regulate the following: (1) the channels of interstate commerce; (2) the

instrumentalities of interstate commerce or persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce.¹⁶⁵ The theory behind what is often called the “Dormant” Commerce Clause is that this affirmative grant of federal power also impliedly prohibits state regulations that improperly burden or discriminate against interstate commerce.¹⁶⁶

When analyzing a law under the Dormant Commerce Clause, the first step is to analyze whether the law facially discriminates against out-of-state actors or has the effect of favoring in-state economic interests over out-of-state interests.¹⁶⁷ Discriminatory laws motivated by economic protectionism are subject to strict scrutiny and have been held to be virtually per se invalid.¹⁶⁸ If the law is not facially discriminatory, but still has some impact on interstate commerce, the law is subject to a balancing test under which the burden on interstate commerce is weighed against the local benefits of the law.¹⁶⁹ If the burden upon interstate commerce outweighs the local benefits, the law is deemed invalid.¹⁷⁰ But the interstate burden must be significant. A state or local public health regulation is a valid exercise of the police power unless it imposes a burden on commerce that is “clearly excessive in relation to the putative local benefits.”¹⁷¹ The Supreme Court has said that “[t]he fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.”¹⁷²

Trans fat bans are likely to survive the first level of a Dormant Commerce Clause analysis. Trans fat bans are not facially discriminatory. They prohibit all foods containing artificial trans fat from being served in all restaurants in a given jurisdiction, regardless of geographical origin. In theory, one could argue that a trans fat ban favors locally produced fats, such as in-state dairy products or non-hydrogenated soy-based oils and shortenings, over out-of-state fats. But this argument would likely fail because trans fat bans, on their face, operate even handedly and restrict all foods containing artificially produced trans fats, regardless of where the foods are produced. Because trans fat bans do not protect local economic interests over out-of-state interests, they are unlikely to be held to violate the Dormant Commerce Clause on facial discrimination grounds.¹⁷³ (This conclusion would be less certain if a trans fat ban exempted certain kinds of food service establishments as, for example, Philadelphia has done in exempting small “mom and pop” bakeries from the requirements of its trans fat ban.)¹⁷⁴

It is less clear that trans fat bans would survive the second step of a Dormant Commerce Clause analysis. It could be argued that trans fat bans are discriminatory in effect. One might assert that trans fat bans prevent chain restaurants with in- and out-state locations from reaping the economic benefits of mass production.¹⁷⁵ Some fast food chains might mass prepare their menu

items in certain states, using trans fats in the process, before freezing them and shipping them to restaurants in states or localities where trans fats are prohibited. A trans fat ban might be perceived as burdening interstate commerce by preventing the sale, purchase, or end use of out-of-state producers' or distributors' goods. A trans fat ban might also diminish the economic advantages of mass food production by requiring an investment in different ingredients, equipment, and frying processes, as well as changes in product labeling and storage methods.¹⁷⁶ Therefore, a trans fat ban might be challenged by restaurants who would otherwise use food containing trans fat shipped from another state at a cost advantage, on the grounds that the ban, in its practical effect, increases their costs of doing business to a certain extent; this, they would argue, imposes an impermissible burden on interstate commerce.

Such a challenge would likely fail, however, if the state or locality could demonstrate that the local health benefits resulting from artificial trans fat elimination outweigh any incidental burden on interstate commerce.¹⁷⁷ A trans fat ban would be deemed unconstitutional only if its interstate burden clearly exceeded its local benefit. It seems likely that a court would find that the costs to restaurants of using trans fat-free oils do not exceed the benefits of reducing disease and potentially saving lives. The government could cite the ample scientific evidence that eliminating artificial trans fat may significantly reduce the incidence of coronary heart disease and CHD-related events, such as heart attack and stroke, in the local population. Because of the significant, scientifically proven benefits of reducing artificial trans fat intake, trans fat bans are likely to survive a Dormant Commerce Clause challenge under this balancing analysis.

Takings Clause

It has also been suggested that the economic impact of trans fat bans on restaurants might constitute a "taking" in violation of the U.S. Constitution.¹⁷⁸ When New York City's trans fat ban was initially passed, the restaurant industry claimed that it would cause increased production costs and impose significant monetary losses on restaurants, particularly smaller, independently-owned restaurants lacking the resources of larger chains to absorb the costs of switching to trans fat-free alternatives.¹⁷⁹ Given the potential for economic harm, a restaurant might claim that a trans fat ban constitutes a "regulatory taking" entitling it to just compensation.¹⁸⁰

The Takings Clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, provides that private property shall not "be taken for public use, without just compensation."¹⁸¹ Most state constitutions contain similar guarantees. The U.S. Supreme Court has recognized two categories of takings: physical and regulatory. The government seizure of land

for eminent domain purposes constitutes a physical taking. The government can also regulate private property for a public purpose, which, under certain circumstances, may constitute a regulatory taking. A regulatory taking occurs when a government action so interferes with an owner's use of property that it has the same practical effect as a physical appropriation of land.¹⁸² The test for whether a regulatory taking has occurred is whether the government action in question regulates property to such a degree that it denies an owner of all economically viable use of the property or interferes with another fundamental attribute of property ownership.¹⁸³ If so, the regulation will be deemed to have "taken" the owner's property and the owner will be entitled to just compensation.

The difficulty in a regulatory takings analysis is determining at what point a government regulation so impairs the use of private property that it constitutes a taking. The U.S. Supreme Court has said that a regulation does not constitute a taking if it "substantially advance[s] legitimate state interests" and does not "deny an owner economically viable use of his land."¹⁸⁴ To determine whether a regulation constitutes a regulatory taking, a court considers the character of the government action and the economic impact of the regulation on the business owner, as well as the extent to which the regulation interferes with the business owner's investment-backed expectations.¹⁸⁵ The court must balance the liberty interest of the property owner against the government's need to protect the public through imposition of the regulation.¹⁸⁶

It seems likely that a trans fat ban would survive a regulatory takings challenge. Trans fat bans do not deprive restaurant owners of all economically viable use of their property; indeed, there is no evidence that they result in any substantial diminution of property values. Although trans fat bans may negatively impact restaurant owners by slightly increasing their costs of doing business, such bans should not result in substantial reduction of restaurants' values because the costs of switching to trans fat-free oils are relatively low and eliminating artificial trans fat has not resulted in decreased sales for restaurants. Moreover, even if economic losses could be proven, increased business costs and lost profits, standing alone, are insufficient to establish a taking.¹⁸⁷ One might argue that a trans fat ban interferes with a restaurant owner's investment-backed expectations, if, for example, a restaurant owner had invested in recipes or food preparation equipment that were not amenable to trans fat-free alternatives.¹⁸⁸ However, this argument would likely fail, given that trans fat-free oils appear to have been readily substituted for partially hydrogenated oils, with relatively minor modifications, in the localities that have implemented trans fat bans. Further, because scientific evidence has established a clear link between trans fat intake and the risk of coronary heart

disease, the government has a strong interest in reducing trans fat consumption to protect public health. Finally, regulations that broadly confer a public benefit by imposing a burden on only a few select business owners are more likely to be viewed as takings.¹⁸⁹ Because most trans fat bans apply to all food service establishments in a given jurisdiction, they operate even-handedly and do not target particular types of restaurants for regulation, and thus, are less likely to be construed as takings.

In conclusion, it appears that state and local trans fat bans are likely to be upheld against legal challenges under current law. There will be costs associated with artificial trans fat elimination. However, these costs are relatively minor when compared with the staggering economic impact of cardiovascular disease in this country, in terms of human fatalities, health care costs, and lost productivity. In the final analysis, the public health benefits of reducing artificial trans fat in the American food supply should outweigh the relatively minor inconvenience and investment to be borne by restaurants in complying with trans fat bans.

Policy Considerations for Laws Banning the Use of Artificial Trans Fats in Restaurants

The trans fat bans that are considered to be leading legislative examples, such as New York City's regulation and California's statewide law, contain similar policy elements. In general, trans fat bans contain the following common provisions: (1) an amendment to the health code restricting the use of artificial trans fat in all food service establishments (as that term is defined) in a given jurisdiction; (2) a graduated phase-in or implementation period allowing businesses time to make the necessary adjustments to product recipes and purchasing practices; (3) a 0.5 gram of trans fat threshold, to allow for the presence of naturally occurring trans fat; and (4) an exemption for food sold in a manufacturer's sealed, original packaging.¹⁹⁰

Despite these common elements, states and localities have a range of policy options to consider when designing a state law or local ordinance banning the use of artificial trans fats in food service establishments. Some of these policy choices may be influenced by jurisdiction-specific legal requirements and political considerations. Therefore, this issue brief does not attempt to recommend one definitive approach to legislation banning artificial trans fats. The following list of policy elements can serve as a starting point for advocates and policymakers who are considering enacting trans fat bans in their communities. While trans fat bans may have local variations, it is

recommended that the following list of policy components be considered in drafting legislation banning the use of artificial trans fats in restaurants.

- ***Application to all “food service establishments”*** – Most trans fat bans apply evenly to all food service establishments, regardless of their size or number of locations. Policymakers will need to determine how broadly or narrowly to define the term “food service establishment,” keeping in mind that the term may be previously defined elsewhere in the given city, county, or state’s health code. In some jurisdictions, trans fat bans primarily restrict the use of artificial trans fats by restaurants, caterers, and mobile food vendors. Other jurisdictions define the term “food service establishment” more broadly and also prohibit artificial trans fat use by school and hospital cafeterias, church kitchens, and food service facilities in grocery and convenience stores (e.g., delis or salad bars in supermarkets).
- ***Scope of prohibition on foods containing artificial trans fat*** – Most trans fat bans prohibit any food containing artificial trans fat from being stored, served, or used in the preparation of any menu item in any food service establishment. In other words, trans fat bans typically apply to all prepared foods containing artificial trans fat as an ingredient, as well as artificial trans fats used for frying and spreading. A food will be deemed to contain artificial trans fat if it is labeled as, contains as an ingredient, or is cooked in vegetable shortening, margarine, or any kind of partially hydrogenated vegetable oil.
- ***Exemptions*** – Existing trans fat bans exempt foods that are sold in a manufacturer’s original, sealed packaging. Trans fat bans also exempt foods containing less than half a gram (< 0.5 gram) of trans fat per serving, to allow for the small amounts of naturally occurring trans fat in animal products.
- ***Food label (or other acceptable documentation) retention requirements*** – Most trans fat bans require that food service establishments either: (1) retain the original labels (including the brand and common names, ingredients lists, and nutrition facts panels) of all food products that are or that contain fats, oils, or shortenings; or (2) maintain other documentation acceptable to the enforcement agency (e.g., letters from the food product manufacturers) that indicates whether food products contain vegetable shortening, margarine, or partially hydrogenated vegetable oil, or indicates their trans fat

content. These labels or other documentation are then made available for review by health inspectors during regularly scheduled licensing inspections.

- ***Graduated implementation or “phase out” period*** – To allow food service establishments adequate time for compliance and to facilitate enforcement, most trans fat bans include a graduated implementation period for phasing out the use of artificial trans fat.
 - In the first phase of such a ban, generally within the first six months, establishments are required to use oils, margarines, and shortenings for frying and spreading that contain less than half a gram of trans fat per serving.
 - In the second phase, generally after eighteen months, establishments are required to use oils, margarines, and shortenings in baked goods (such as yeast dough and cake batter) and all other foods that contain less than a half a gram of trans fat per serving.
- ***Other enforcement provisions*** – Effective enforcement provisions are an essential component of any trans fat ban. Policymakers might consider the following non-exhaustive list of enforcement considerations when drafting a law banning the use of artificial trans fats in food service establishments.
 - The law, ordinance, or regulation will be enforced by the city or county department (or board) of health or its authorized designees;
 - Compliance will be monitored at the same time that public health inspectors conduct other regularly scheduled food safety and licensing inspections;
 - Meaningful fines will be imposed for failing to comply with the law (e.g., \$200.00 to \$2,000.00),¹⁹¹ with repeat violations being sanctioned more heavily than initial violations; and
 - Violation of the law will be treated as a misdemeanor or a civil infraction. If violators are subject to civil penalties, an administrative procedure will be provided for adjudicating civil penalties.

Conclusion

Artificial trans fat consumption is indisputably harmful to human health. State and local government regulation of artificial trans fats in restaurants is an appropriate intervention to the nation's heart disease epidemic, given the increasing frequency with which Americans are eating out and the fact that existing law does not require restaurants to disclose the trans fat content of their foods. State and local trans fat bans are consistent with existing legal standards and should withstand constitutional challenges. The high rates of compliance achieved under existing trans fat bans, as well as the current trend towards restaurants' voluntary elimination of partially hydrogenated oils, demonstrate that artificial trans fats can be replaced with economically feasible substitutes in a relatively short period of time. In conclusion, banning the use of artificial trans fat in restaurants is a legitimate policy option for increasing consumer access to healthier foods, preventing heart disease and other chronic health conditions, and promoting overall public health.

Appendix of Relevant Resources

Select Publications/Websites:

- Dariush Mozaffarian, *Trans Fatty Acids and Cardiovascular Disease*, 354 NEW ENGLAND J. OF MED. 1601 (2006).
- Walter Willett & Albert Ascherio, *Trans Fatty Acids: Are the Effects Only Marginal?*, 85 AM. J. OF PUBLIC HEALTH 722 (1994).
- Center for Science in the Public Interest, *Trans Fat: Going ... Going ...* (2005), available at http://www.cspinet.org/new/pdf/trans_report.pdf.
- Center for Science in the Public Interest (website), Trans Fats, <http://www.cspinet.org/transfat/index.html>.
- Ban Trans Fats: The Campaign to Ban Partially Hydrogenated Oils (website), <http://www.bantransfats.com/>.

Select Legislation:

- New York City Health Code § 81.08 (New York City's trans fat ban).
- California Assembly Bill 97 (California's statewide trans fat ban).

Select Model Policies:

- Center for Science in the Public Interest, Sample Legislation to Ban Trans Fat From Restaurants, available at <http://cspinet.org/new/pdf/modellegislation.pdf>.

Endnotes

- ¹ Carmen Filosa, *Trans Fat Bans: The Next Regulatory Taking?*, 29 J. LEGAL MED. 99, 100 (2008).
- ² *Id.*; Dariush Mozaffarian et al., *Trans Fatty Acids and Cardiovascular Disease*, 354 NEW ENGLAND J. MED. 1601, 1601 (2006).
- ³ Filosa, *supra* note 1, at 100.
- ⁴ HARVARD SCHOOL OF PUBLIC HEALTH, THE NUTRITION SOURCE: SHINING THE SPOTLIGHT ON TRANS FATS, at <http://www.hsph.harvard.edu/nutritionsource/nutrition-news/transfats/> (last visited Dec. 15, 2008).
- ⁵ Esther Choi, *Trans Fat Regulation: A Legislative Remedy for America's Heartache*, 17 S. CAL. INTERDISC. L.J. 507, 516 (2008).
- ⁶ Walter Willett & Albert Ascherio, *Trans Fatty Acids: Are the Effects Only Marginal?*, 85 AM. J. PUB. HEALTH 722, 722 (1994).
- ⁷ HARVARD SCHOOL OF PUBLIC HEALTH, *supra* note 4.
- ⁸ Choi, *supra* note 5, at 516; Willett & Ascherio, *supra* note 6, at 722.
- ⁹ AMERICAN PUBLIC HEALTH ASS'N, POLICY STATEMENT: RESTRICTING TRANS FATTY ACIDS IN THE FOOD SUPPLY (2007), available at <http://www.apha.org/advocacy/policy/policysearch/default.htm?id=1366>.
- ¹⁰ U.S. DEP'T OF HEALTH AND HUMAN SERVICES & U.S. DEP'T OF AGRICULTURE, DIETARY GUIDELINES FOR AMERICANS 2005 (2005), available at <http://www.health.gov/dietaryguidelines/dga2005/document/pdf/DGA2005.pdf>.
- ¹¹ Willett & Ascherio, *supra* note 6, at 722.
- ¹² *Id.*
- ¹³ U.S. FOOD & DRUG ADMINISTRATION, REVEALING TRANS FATS, 37 FDA CONSUMER MAG. (2003), available at http://www.fda.gov/FDAC/features/2003/503_fats.html.
- ¹⁴ Mozaffarian, *supra* note 2, at 1601.
- ¹⁵ HARVARD SCHOOL OF PUBLIC HEALTH, *supra* note 4.
- ¹⁶ CENTER FOR SCIENCE IN THE PUBLIC INTEREST, TRANS FAT: GOING ... GOING ... (2005), available at http://www.cspinet.org/new/pdf/trans_report.pdf. According to this report, as of 2005, KFC's Chicken Pot Pie contained 14 grams of trans fat and Taco Bell's Nachos Bel Grande contained 7 grams of trans fat. *Id.* at 6. At McDonald's, a 5-piece Chicken Selects contained 4.5 grams of trans fat and a medium order of French fries had 4 grams of fat. *Id.* These amounts are quite high when one considers that U.S. dietary guidelines recommend that individuals limit trans fat intake to 2 grams or less for the entire day. *Id.*
- ¹⁷ ROBERT WOOD JOHNSON FOUNDATION, HEALTHY EATING RESEARCH, RESTAURANT REALITIES: INEQUALITIES IN ACCESS TO HEALTHY RESTAURANT CHOICES 1, 4 (2008).
- ¹⁸ Americans now consume roughly 38 percent of their total fat intake in restaurants and other food establishments, as compared to 18 percent in the late 1970s. BHING-HWAN LIN ET AL., U.S. DEPARTMENT OF AGRICULTURE, ECONOMIC RESEARCH SERVICE, BULL. NO. 749, AWAY-FROM-HOME FOODS INCREASINGLY IMPORTANT TO QUALITY OF AMERICAN DIET (1999) (concluding that 38% of total fat consumption occurred outside of the home in 1995, as compared to 18% in 1977-78).
- ¹⁹ Mozaffarian, *supra* note 2, at 1602.
- ²⁰ U.S. FOOD & DRUG ADMINISTRATION, QUESTIONS AND ANSWERS ABOUT TRANS FAT NUTRITION LABELING (2003) (updated in January 2006), available at <http://www.cfsan.fda.gov/~dms/qatrans2.html>.
- ²¹ Filosa, *supra* note 1, at 101.
- ²² Dariush Mozaffarian et al., *Dietary Intake of Trans Fatty Acids and Systemic Inflammation in Women*, 79 AM. J. CLINICAL NUTRITION 606 (2004).
- ²³ *Id.* at 610; Mozaffarian, *supra* note 2, at 1602-03.
- ²⁴ Mozaffarian, *supra* note 2, at 1603; Mozaffarian, *supra* note 22, at 610.
- ²⁵ Some studies have suggested that the negative health consequences of trans fat consumption go beyond cardiovascular risks. At present, there is insufficient evidence on which to base a scientific consensus that trans fat intake causes other chronic health conditions. However, studies have suggested links between trans fat consumption and the development of Alzheimer's disease, breast cancer, diabetes, and infertility, among other conditions. For example, a 2003 study suggested that trans fat consumption may promote the onset of Alzheimer's disease. Martha Morris et al., *Dietary Fats & the Risk of Incident Alzheimer Disease*, 60 ARCH. NEUROLOGY 194 (2003). A 2008 study found ties between trans fat intake and breast cancer. Veronique Chajes et al., *Association Between Serum Trans-monounsaturated Fatty Acids and Breast Cancer Risk in the E3N-EPIC Study*, 167 AM. J. EPIDEMIOLOGY 1312 (2008). A

connection between trans fat intake and type 2 diabetes was demonstrated by a 2001 study. Jorge Salmeron et al., *Dietary Fat Intake and the Risk of Type 2 Diabetes in Women*, 73 AM. J. CLINICAL NUTRITION 1019 (2001). Finally, a 2007 study found that every 2% increase in energy intake from trans fats was associated with a 73% greater risk of ovulatory infertility. Jorge Chavarro et al., *Dietary Fatty Acid Intakes and the Risk of Ovulatory Infertility*, 85 AM. J. CLINICAL NUTRITION 231 (2007). Further research is underway to assess the non-cardiovascular health impacts of trans fat consumption.

²⁶ Kylie Kavanaugh et al., *Trans Fat Diet Intake Induces Abdominal Obesity and Changes in Insulin Sensitivity in Monkeys*, 15 OBESITY 1675 (2007).

²⁷ AMERICAN PUBLIC HEALTH ASS'N, *supra* note 9. Findings from the Nurses' Health Study indicate that a given amount of trans fat is a far more potent cause of heart disease than an equivalent amount of saturated fat. Frank Hu et al., *Dietary Fat Intake and the Risk of Coronary Heart Disease in Women*, 337 NEW ENGLAND J. MED. 1491 (1997).

²⁸ INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, DIETARY REFERENCE INTAKES FOR ENERGY, CARBOHYDRATE, FIBER, FAT, FATTY ACIDS, CHOLESTEROL, PROTEIN, AND AMINO ACIDS (2002).

²⁹ Mozaffarian, *supra* note 2, at 1605.

³⁰ See studies cited in Willett & Ascherio, *supra* note 6, at 723.

³¹ Walter Willett et al., *Trans-fatty Acid Intake in Relation to Risk of Coronary Heart Disease Among Women*, 341 LANCET 581 (1993).

³² Albert Ascherio et al., *Trans-fatty Acids Intake and Risk of Myocardial Infarction*, 89 CIRCULATION 94 (1994).

³³ Mozaffarian, *supra* note 2, at 1611.

³⁴ *Id.*

³⁵ U.S. CENTERS FOR DISEASE CONTROL & PREVENTION, DIVISION FOR HEART DISEASE & STROKE PREVENTION, ADDRESSING THE NATION'S LEADING KILLERS 2008, AT A GLANCE (2008), available at <http://www.cdc.gov/NCCDPHP/publications/AAG/pdf/dhdsp.pdf>.

³⁶ AMERICAN HEART ASS'N, HEART DISEASE & STROKE STATISTICS, 2008 UPDATE AT-A-GLANCE 8 (2008), available at http://www.americanheart.org/downloadable/heart/1200078608862HS_Stats%202008_final.pdf.

³⁷ Wayne Rosamund et al., *Heart Disease and Stroke Statistics – 2007 Update: A Report From the American Heart Association Statistics Committee and Stroke Statistics Subcommittee*, 115 CIRCULATION e69, e162 (2007).

³⁸ WORLD HEALTH ORGANIZATION, DIET, NUTRITION, AND THE PREVENTION OF CHRONIC DISEASES: REPORT OF A JOINT WHO/FAO EXPERT CONSULTATION (2002), available at http://www.who.int/hpr/NPH/docs/who_fao_expert_report.pdf.

³⁹ INSTITUTE OF MEDICINE, *supra* note 28.

⁴⁰ *Id.* at 423-24.

⁴¹ AMERICAN PUBLIC HEALTH ASS'N, *supra* note 9.

⁴² Under Section 201(s) of the federal Food, Drug and Cosmetic Act, the use of an ingredient is “Generally Recognized as Safe” (GRAS) if it is generally recognized, among experts qualified by scientific training and experience to evaluate its safety, to be safe under the conditions of its intended use. See U.S. FOOD & DRUG ADMINISTRATION, FREQUENTLY ASKED QUESTIONS ABOUT GRAS (2004), available at <http://www.cfsan.fda.gov/~dms/grasguid.html#Q1>. A list of substances that the FDA has affirmed as GRAS as direct food ingredients for general or specific uses can be found in the Code of Federal Regulations. See 21 C.F.R. pt. 184. The FDA approvals for using hydrogenated vegetable oils in food dressings and margarine were published in 1977 and are still in effect. See, e.g., 21 C.F.R. § 166.110 (setting standards for margarine).

⁴³ See Choi, *supra* note 5, at 538-41 (describing the FDA's authority to regulate the use of artificial trans fat and arguing for the removal of partially hydrogenated vegetable oil from the GRAS list).

⁴⁴ Center for Science in the Public Interest, Petition for Rulemaking to Revoke the Authority for Industry to Use Partially Hydrogenated Vegetable Oils in Foods, May 18, 2004, available at http://cspinet.org/new/pdf/trans_fat_petition_may_18.pdf.

⁴⁵ AMERICAN PUBLIC HEALTH ASS'N, *supra* note 9.

⁴⁶ Food Labeling: Trans Fatty Acids in Nutrition Labeling, 68 Fed. Reg. 41,434 (July 11, 2003) (codified at 21 C.F.R. § 101.62). The text of the final FDA trans fat labeling rule can be accessed at <http://www.fda.gov/OHRMS/DOCKETS/98fr/03-17525.htm>.

⁴⁷ *Id.* at 41,434.

⁴⁸ *Id.*

⁴⁹ *Id.* at 41,445.

⁵⁰ U.S. FOOD & DRUG ADMINISTRATION, *supra* note 20.

⁵¹ The Nutrition Labeling and Education Act (NLEA) mandates nutrition labeling of most processed food products. Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (1990) (codified in relevant part at 21 U.S.C. §§ 343(q) and (r)). However, the NLEA expressly exempts restaurant foods from its mandatory labeling requirements. 21 U.S.C. § 343(q)(5)(A)(i).

⁵² Center for Science in the Public Interest, Petition to Require Restaurants to Indicate That the Food They Serve Contains Trans Fat From Partially Hydrogenated Vegetable Oils, July 22, 2004, at 1. A copy of CSPI's petition to the FDA can be accessed at <http://cspinet.org/new/pdf/transrestaurantpetitionfinal.pdf>.

⁵³ THE KEYSTONE CENTER, KEYSTONE FORUM ON AWAY-FROM-HOME FOODS: OPPORTUNITIES FOR PREVENTING WEIGHT GAIN AND OBESITY 25 (2006).

⁵⁴ ROBERT WOOD JOHNSON FOUNDATION, BALANCE - 2007 END OF YEAR REPORT: A REPORT ON STATE ACTION TO PROMOTE NUTRITION, INCREASE PHYSICAL ACTIVITY AND PREVENT OBESITY 49 (2008).

⁵⁵ Center for Science in the Public Interest, *supra* note 52, at 7.

⁵⁶ Mozaffarian, *supra* note 2, at 1609-10. See also MSNBC News Services, *Denmark: Lower Trans Fat or Go to Jail*, Oct. 17, 2006, <http://www.msnbc.msn.com/id/15307763/>.

⁵⁷ Maggie Stanfield, *The Truth About Trans Fat*, U.K. SUNDAY TIMES, May 4, 2008.

⁵⁸ CENTER FOR SCIENCE IN THE PUBLIC INTEREST, CITY AND STATE LEGISLATION TO LIMIT TRANS FAT IN RESTAURANTS (2008), available at http://cspinet.org/new/pdf/trans_fat_bans_in_restaurants_and_schools_-_pending_legislation_-08.pdf.

⁵⁹ *Id.*; NATIONAL CONFERENCE OF STATE LEGISLATURES, TRANS FAT AND MENU LABELING LEGISLATION, available at <http://www.ncsl.org/programs/health/transfatmenulabelingbills.htm>. See also AMERICAN HEART ASS'N, STATUS OF TRANS FAT REGULATORY PROPOSALS FOR RESTAURANTS AND SCHOOLS (2008), at <http://www.americanheart.org/presenter.jhtml?identifier=3050768>.

⁶⁰ CENTER FOR SCIENCE IN THE PUBLIC INTEREST, *supra* note 58.

⁶¹ Jennifer Steinhauer, *California Bars Restaurant Use of Trans Fats*, N.Y. TIMES, July 26, 2008.

⁶² *Id.*

⁶³ A.B. 97 (Cal. 2007) (codified at Cal. Health & Safety Code § 114377). The text of Assembly Bill 97 can be accessed at http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0051-0100/ab_97_bill_20080725_chaptered.pdf.

⁶⁴ California law already bans artificial trans fats in public schools. In 2007, the California legislature passed and the governor signed Senate Bill 490. The law prohibits schools and school districts, through a vending machine or school food service establishment, from making foods containing artificial trans fat available to students or using of artificial trans fat in the preparation of food items served to students, commencing July 1, 2009. S.B. 490 (Cal. 2007) (codified at Cal. Educ. Code § 49431.7). The text of Senate Bill 490 can be accessed at http://info.sen.ca.gov/pub/07-08/bill/sen/sb_0451-0500/sb_490_bill_20071013_chaptered.pdf. Oregon law also prohibits the sale of snack foods containing artificial trans fat in public schools. H.B. 2650 (Or. 2007).

⁶⁵ CAL. HEALTH & SAFETY CODE § 114377(b)(2).

⁶⁶ *Id.* § 114377(c).

⁶⁷ *Id.* § 114377(a).

⁶⁸ Steinhauer, *supra* note 61.

⁶⁹ CAL. HEALTH & SAFETY CODE § 114377(f).

⁷⁰ S.B. 1420 (Cal. 2008).

⁷¹ CAL. HEALTH & SAFETY CODE § 114377(b)(1).

⁷² *Id.* § 114377(b)(2).

⁷³ Steinhauer, *supra* note 61.

⁷⁴ Jim Sanders, *California Legislature Serves Up a Restaurant Trans Fat Ban*, SACRAMENTO BEE, July 15, 2008.

⁷⁵ *Id.*; Patrick McGreevy, *Schwarzenegger Signs Law Banning Trans Fats in Restaurants*, L.A. TIMES, July 26, 2008.

⁷⁶ Steinhauer, *supra* note 61.

⁷⁷ *Id.*

⁷⁸ McGreevy, *supra* note 75.

⁷⁹ N.Y.C. HEALTH CODE § 81.08. The Notice of Final Adoption of Section 81.08 can be accessed at <http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art81-08.pdf>.

⁸⁰ *Id.*

⁸¹ NEW YORK CITY DEP'T OF HEALTH & MENTAL HYGIENE, 'THE REGULATION TO PHASE OUT ARTIFICIAL TRANS FAT IN NEW YORK CITY FOOD SERVICE ESTABLISHMENTS – HOW TO COMPLY: WHAT RESTAURANTS, CATERERS, MOBILE FOOD-VENDING UNITS AND OTHERS NEED TO KNOW 6 (2007), available at <http://www.nyc.gov/html/doh/downloads/pdf/cardio/cardio-transfat-bro.pdf>.

⁸² *Id.*

⁸³ See CITY OF NEW YORK, TRANS FAT HELP CENTER, <http://www.citytech.cuny.edu/notransfatnyc/>.

⁸⁴ Anemona Hartocollis, *New York Prepares for Life After Trans Fats*, INT'L HERALD TRIBUNE, June 22, 2008.

⁸⁵ See, e.g., NEW YORK CITY DEP'T OF HEALTH & MENTAL HYGIENE, *supra* note 81.

⁸⁶ Press Release, City of New York, 94% of Inspected Restaurants in Compliance with First Phase of Trans Fat Regulation (Sept. 17, 2007), available at <http://www.nyc.gov/html/doh/html/pr2007/pr080-07.shtml>.

⁸⁷ Choi, *supra* note 5, at 533.

⁸⁸ PHILADELPHIA HEALTH CODE § 6-307. The text of Philadelphia's original ordinance banning artificial trans fats in restaurants, enacted in February 2007, can be located at <http://webapps.phila.gov/council/attachments/3332.pdf>. Philadelphia's trans fat ban was amended in October 2007 after "mom and pop" bakeries lobbied the city council for an exemption on economic hardship grounds. See Mark McDonald, *Local Bakeries Win Right to Use Trans Fats*, PHILADELPHIA DAILY NEWS, Oct. 26, 2007. Philadelphia's trans fat ban now exempts any bakery with no more than three (3) retail sales locations within the city. See PHILADELPHIA DEP'T OF PUBLIC HEALTH, COMPLYING WITH THE PHILADELPHIA TRANS FAT BAN: A GUIDE FOR RESTAURANTS, CATERERS, MOBILE FOOD-VENDING UNITS AND OTHER FOOD SERVICE ESTABLISHMENTS 2 (2007), available at http://www.phila.gov/Health/units/DCDP/pdf/Philadelphia_Trans_FatInformation_Packet_2007.pdf.

⁸⁹ CENTER FOR SCIENCE IN THE PUBLIC INTEREST, *supra* note 58. Montgomery County's ban is significant for two reasons. First, Montgomery County was the first county to pass a trans fat ban in May 2007. Second, the Montgomery County trans fat ban prohibits the use of artificial trans fat not only in restaurants but in all food service facilities, including grocery store salad bars and delis, school and hospital cafeterias, and churches. *Id.*; Miranda Spivack, *Montgomery Bans Trans Fats in Restaurants, Markets*, WASHINGTON POST, May 16, 2007.

⁹⁰ CENTER FOR SCIENCE IN THE PUBLIC INTEREST, *supra* note 58.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*; Stephen Smith & Andrew Ryan, *Trans Fats Now Banned in Boston Restaurants*, BOSTON GLOBE, Sept. 13, 2008. Legislation that would have banned trans fats statewide passed the Massachusetts House of Representatives but stalled in the state Senate. *Id.* The Massachusetts Department of Health was asked to review whether it could pass regulations banning artificial trans fats in food service establishments, but the agency concluded that it lacked the legal authority to do so and a statewide prohibition on trans fat could only be imposed by the legislature. *Id.*

⁹⁴ CENTER FOR SCIENCE IN THE PUBLIC INTEREST, *supra* note 58.

⁹⁵ Choi, *supra* note 5, at 533-34; Elizabeth Spivey, *Trans Fat: Can New York City Save Its Citizens from this "Metabolic Poison"?*, 42 GA. L. REV. 273, 290 (2007).

⁹⁶ David B. Caruso, *NYC Eateries Ready for Trans Fat Switch*, WASHINGTON POST, June 26, 2007.

⁹⁷ See BAN TRANS FATS, PROJECT TIBURON, at: <http://www.bantransfats.com/projecttiburon.html>. See also Jim Staats, *Tiburón's Trans-Fat Ban Started National Movement*, MARIN INDEPENDENT J., Feb. 3, 2007.

⁹⁸ Press Release, County of Los Angeles Public Health, L.A. County is Proud to Offer 0 Grams Artificial Trans Fat (Nov. 15, 2007). See also County of Los Angeles Public Health, Voluntary Artificial Trans Fat Reduction (ATFR) Program, available at <http://www.publichealth.lacounty.gov/phcommon/public/eh/transfat/ATFR%20Trifold.pdf>.

⁹⁹ Wyatt Buchanan, *San Francisco Targets Artery-clogging Trans Fats*, SAN FRANCISCO CHRON., Jan. 30, 2008.

¹⁰⁰ Press Release, Oregon Restaurant Association, Oregon Restaurant Association Praises Multnomah County Commissioners for Commitment to Public Education on Healthy Lifestyle Choices (Jan. 26, 2007). See also Matthew Greever, *To Ban or Not to Ban? That's*

the Question About Trans Fat, STATE HEALTH NOTES (Sept. 2007), available at <http://www.ncsl.org/programs/health/shn/2007/sn498a.htm>.

¹⁰¹ Press Release, City of New York, Health Department Asks Restaurateurs and Food Suppliers to Voluntarily Make an Oil Change and Eliminate Artificial Trans Fat (Aug. 10, 2005), available at <http://www.nyc.gov/html/doh/html/pr/pr083-05.shtml>.

¹⁰² *Id.* See also Russell Berman, *City Wants to Ban Some Fatty Foods in Restaurants*, N.Y. SUN, Sept. 27, 2006.

¹⁰³ See NATIONAL RESTAURANT ASSOCIATION, PUBLIC POLICY ISSUE BRIEFS, TRANS FAT BANS, <http://www.restaurant.org/government/issues/issue.cfm?Issue=Transfat> (last visited Dec. 8, 2008).

¹⁰⁴ See Choi, *supra* note 5, at 532. See also Steinhauer, *supra* note 61; McGreevy, *supra* note 75.

¹⁰⁵ Spivey, *supra* note 95, at 288-89.

¹⁰⁶ Thomas Lueck & Kim Severson, *New York Bans Most Trans Fats in Restaurants*, N.Y. TIMES, Dec. 6, 2006.

¹⁰⁷ Thomas Lueck & Kim Severson, *Big Brother in the Kitchen? New Yorkers Balk*, N.Y. TIMES, Sept. 28, 2006.

¹⁰⁸ Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1135 (2007). See also MSNBC News Services, *New York City Passes Trans Fats Ban*, Dec. 5, 2006, <http://www.msnbc.msn.com/id/16051436/>; ERIN SCHLOSSER, FAST FOOD NATION: THE DARK SIDE OF THE AMERICAN MEAL 5 (2002) (stating that uniformity is “[t]he key to a successful [fast food] franchise ... [f]ranchises and chain stores strive to offer exactly the same product ... at numerous locations”).

¹⁰⁹ Emily Schmall, *Trans Fat War Threatens Restaurants*, FORBES, Dec. 21, 2006, available at http://www.forbes.com/home/business/2006/12/20/trans-fat-bans-biz-cz_es_1221fats.html (asserting that the costs of complying with New York City’s trans fat ban would force restaurants to raise their prices by five to ten percent (5-10%)). See also Berman, *supra* note 102; Steinhauer, *supra* note 61 (quoting the manager of a two-location hamburger restaurant business in California, who stated that the costs of complying with the state’s trans fat ban would force it to raise the price of its French fries by a dollar an order).

¹¹⁰ Spivack, *supra* note 89; Sanders, *supra* note 74.

¹¹¹ See McGreevy, *supra* note 75 (quoting statements by California Restaurant Association spokesman Daniel Conway).

¹¹² Berman, *supra* note 102 (quoting Walter Olson, a Senior Fellow at the Manhattan Institute, as saying the Bloomberg administration was treating New Yorkers “like tiny, tiny children” in passing the New York City trans fat ban; and quoting Charles Hunt, Executive Vice President of the New York State Restaurant Association, as stating the use of trans fat “should be up to the restaurants and the customers to decide, not the government”).

¹¹³ For example, in October 2007, Dunkin’ Donuts announced that it had eliminated trans fat from its donuts months in advance of the New York City and Philadelphia compliance deadlines. Prior to announcing the switch, the company conducted a blind taste test in the spring of 2007 to gauge consumer reaction to the reformulated donuts. Dunkin’ Donuts closely watched sales and customer response at locations where the test donuts were sold. The company reportedly sold 50 million donuts and received no negative consumer feedback. Customers did not seem to notice the change and product sales remained strong. MSNBC News Services, *Dunkin’ Donuts Going Zero Grams Trans Fat*, Aug. 27, 2007, <http://www.msnbc.msn.com/id/20450512/>. Even McDonald’s, which initially asserted that eliminating trans fat would negatively impact the taste of and consumer satisfaction with their iconic French fries, now says that its switch to trans fat-free oils in thousands of restaurants has gone unnoticed by customers. Caruso, *supra* note 96.

¹¹⁴ Caruso, *supra* note 96.

¹¹⁵ Most of the evidence about the economic impact of trans fat bans in the United States is anecdotal at this point, because these laws are relatively new and few have been fully implemented. However, studies analyzing the impacts of Denmark’s national trans fat ban suggest that banning artificial trans fats does not result in higher food prices. In 2003, Denmark passed national legislation mandating that all oils and fats used in locally made or imported foods contain less than two percent (2%) industrially produced trans fat. The law essentially outlawed the use of partially hydrogenated vegetable oils in Denmark. According to national studies of Denmark’s trans fat ban, government and restaurant industry representatives agreed that the ban did not “appreciably affect the quality, cost, or availability of food.” Mozafarian, *supra* note 2, at 1610 (citing two Danish studies published in 2005).

¹¹⁶ STATE OF MARYLAND, DEP’T OF HEALTH AND MENTAL HYGIENE, TRANS FAT FACTS, available at <http://www.carolinehd.org/pdf/TransFatFAQ.pdf>.

¹¹⁷ Caruso, *supra* note 96.

¹¹⁸ Ban.Trans.Fats.com, Ban Trans Fats: The Campaign to Ban Partially Hydrogenated Oils, <http://www.bantransfats.com/> (listing over 20 companies that manufacture or distribute trans fat-free oils in the United States) (last visited Dec. 15, 2008).

¹¹⁹ HARVARD SCHOOL OF PUBLIC HEALTH, *supra* note 4.

¹²⁰ *Id.*

¹²¹ For example, Dow AgroSciences has created seeds called Nexera that yield an oil with zero trans fat and high levels of monounsaturated (omega-9) fat. According to the company, high omega-9 oils can allow up to fifty percent (50%) longer fry life than partially hydrogenated soybean oil and other commonly used frying oils. Dow AgroSciences, Omega-9 Oils, <http://www.omega-9oils.com/performance/> (last visited Nov. 30, 2008).

¹²² For example, Crisco has introduced several commercial shortenings that are made from combinations of vegetable oils that are not hydrogenated. See CNN Money, *Crisco Cuts the Trans Fat*, Jan. 27, 2007, <http://money.cnn.com/2007/01/25/news/companies/crisco/index.htm>.

¹²³ Lueck & Severson, *supra* note 106 (quoting a Wendy's spokesperson as stating "[t]he switch [to trans fat-free oils] is cost neutral").

¹²⁴ Albany County Board of Health, Resolution No. 237, May 14, 2007 (quoting John Neal's statement, which was originally published in *Advertising Age* magazine, in its findings on the fiscal impact of a trans fat ban).

¹²⁵ Lueck & Severson, *supra* note 106; Spivey, *supra* note 95, at 289. For example, according to the owner of Ina's, a single-location, locally-owned café in Chicago, switching to high omega-9 canola oil has been relatively cost neutral. *Trans Fat-free Oils and Fryers*, FOOD SERVICE EQUIPMENT AND SUPPLIES MAGAZINE, May 1, 2008. Although the canola oil may cost more than partially hydrogenated vegetable oil, Ina's has found that the higher initial cost is offset by the longer fry life of the canola oil. *Id.*

¹²⁶ Choi, *supra* note 5, at 530.

¹²⁷ *Id.*

¹²⁸ *Id.* at 532.

¹²⁹ Katherine Fettke v. McDonald's Corp., No. 044109 (Cal. Sup. Ct. filed Oct. 2003).

¹³⁰ Schmall, *supra* note 109; Press Release, Center for Science in the Public Interest, McDonald's Panned for Broken "McPromise" on Trans Fat (Sept. 24, 2004), available at <http://www.cspinet.org/new/200409241.html>.

¹³¹ The negative publicity included a full-page ad in the New York Times entitled "A Broken 'McPromise,'" depicting a heart attack victim receiving CPR. Center for Science in the Public Interest, *supra* note 130. The "Broken 'McPromise'" advertisement can be viewed at http://cspinet.org/new/pdf/broken_mcpromise_final.pdf.

¹³² Press Release, Ban.Trans.Fats.com, Plaintiff's Press Release on Settlement of McDonald's Trans Fat Litigation (Feb. 11, 2005) available at <http://www.bantransfats.com/images/Trans%20Fat%20Litigation%20Plaintiffs%27%20Press%20Release.pdf>. See also *McDonald's Settles Fat Lawsuit for \$8.5 Million*, INSURANCE J., Feb. 15, 2005.

¹³³ Arthur Hoyte v. Yum Brands, Inc. d/b/a KFC, No. 06-1127 (D.C. Sup. Ct. filed June 13, 2006). A copy of the Hoyte complaint can be accessed at http://www.cspinet.org/new/pdf/final_complaint.pdf. See also Press Release, Center for Science in the Public Interest, Press Conference Announcing Lawsuits Against KFC (June 13, 2006), available at http://cspinet.org/new/pdf/mfj_kfc_statement.pdf.

¹³⁴ Jerry Hirsch, *Health Risks Spur Suit Against KFC Over Trans Fats*, L.A. TIMES, June 14, 2006.

¹³⁵ Bruce Horowitz, *KFC Plans Important Trans Fat Milestone*, USA TODAY, Oct. 30, 2006; Andrew Martin, *The Colonel is Phasing Out Trans Fat From the Menu*, N.Y. TIMES, Oct. 31, 2006.

¹³⁶ Press Release, Center for Science in the Public Interest, CSPI Withdraws From Lawsuit After KFC Cuts Trans Fat (Oct. 30, 2006), available at <http://www.cspinet.org/new/200610301.html>.

¹³⁷ Arthur Hoyte v. Yum! Brands, Inc. d/b/a KFC, 489 F.Supp.2d 24 (D. D.C. 2007). See also Associated Press, *Trans Fat Lawsuit Against KFC Tossed Out*, May 3, 2007, available at <http://www.law.com/jsp/article.jsp?id=1178096682546>.

¹³⁸ Center for Science in the Public Interest v. Burger King Corp., No. 3363-07, (D.C. Sup. Ct. filed May 16, 2007), Compl. ¶ 9. A copy of the *CSPI v. Burger King* complaint can be accessed at http://cspinet.org/new/pdf/bk_complaint.pdf.

¹³⁹ *Id.* ¶ 47.

¹⁴⁰ Center for Science in the Public Interest v. Burger King Corp., No. 07-1092 (D. D.C. Feb. 19, 2008) (order granting plaintiff's motion to remand and denying defendant's motion to dismiss). A copy of the federal district court's opinion can be located at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2007cv1092-22. See also Press Release, Center for Science in the Public Interest, Court Rebuffs Burger King in Trans Fat Case (Feb. 25, 2008), available at <http://www.cspinet.org/new/200802252.html>.

¹⁴¹ *Restaurant News: Court Dismisses BK Lawsuit*, QSR MAGAZINE, Dec. 19, 2008, available at <http://www.qsrmagazine.com/articles/news/story.phtml?id=7771>.

¹⁴² MSNBC News, *Burger King to Shift to Trans Fat-free Oil*, July 6, 2007, <http://www.msnbc.msn.com/id/19629720/>.

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- ¹⁴³ MSNBC News, *Burger King Eliminates Trans Fats*, Oct. 2, 2008, <http://www.msnbc.msn.com/id/26994314/>.
- ¹⁴⁴ Schmall, *supra* note 109 (quoting National Restaurant Association spokesperson Sue Hensley, who stated the organization was considering a lawsuit to challenge New York City's trans fat ban). *See also* Lueck & Stevenson, *supra* notes 106 and 107.
- ¹⁴⁵ Spivey, *supra* note 95, at 307 (quoting Harvard School of Public Health Professor Dr. Walter Willett).
- ¹⁴⁶ U.S. CONST. ART. VI.
- ¹⁴⁷ Sarah Romero, *Local Bans on Trans Fats: A New (and Legal) Way Forward*, HARVARD LAW & POLICY REVIEW ONLINE (2007), at http://www.hlpronline.com/2007/04/romero_01.html.
- ¹⁴⁸ *Id.*
- ¹⁴⁹ LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 95 (2d ed. 2008).
- ¹⁵⁰ *Id.* at 80.
- ¹⁵¹ Press Release, National Restaurant Association, National Restaurant Association Statement on the Trans Fat Ban and Menu Labeling Mandate in New York City (Dec. 5, 2006), available at <http://www.restaurant.org/pressroom/pressrelease.cfm?ID=1347> (stating that “there are serious legal concerns about a municipal health agency banning a product or ingredient that the Food and Drug Administration has already approved”). *See also* MSNBC News Services, *supra* note 112 (quoting statement Dan Fleshler, a spokesman for the National Restaurant Association).
- ¹⁵² Steinhauer, *supra* note 61.
- ¹⁵³ Romero, *supra* note 147.
- ¹⁵⁴ *Id.*
- ¹⁵⁵ *Id.*
- ¹⁵⁶ Choi, *supra* note 5, at 534.
- ¹⁵⁷ *Id.*
- ¹⁵⁸ JONATHAN FIELDING, COUNTY OF LOS ANGELES DEP'T OF PUBLIC HEALTH, TRANS FAT REGULATION AND CALORIE LABELING (2007). *See also* Tony Barboza, *County Can't Ban Trans Fat*, L.A. TIMES, Jan. 27, 2007.
- ¹⁵⁹ Press Release, County of Los Angeles Public Health, L.A. County is Proud to Offer 0 Grams Artificial Trans Fat (Nov. 15, 2007).
- ¹⁶⁰ Spivey, *supra* note 95, at 293-94.
- ¹⁶¹ *Id.* at 293.
- ¹⁶² *Id.*
- ¹⁶³ *Id.* at 295-305. *See also* Lueck & Severson, *supra* note 106.
- ¹⁶⁴ U.S. CONST. ART I, § 8, cl. 3.
- ¹⁶⁵ United States v. Lopez, 514 U.S. 549, 558-59 (1995).
- ¹⁶⁶ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 317 (2001).
- ¹⁶⁷ *Id.* at 318.
- ¹⁶⁸ *See* City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).
- ¹⁶⁹ Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
- ¹⁷⁰ *Id.*
- ¹⁷¹ *Id.*
- ¹⁷² Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 126 (1978).
- ¹⁷³ Romero, *supra* note 147.
- ¹⁷⁴ *See supra* note 88 and accompanying text.
- ¹⁷⁵ Spivey, *supra* note 95, at 299-300.
- ¹⁷⁶ *Id.*
- ¹⁷⁷ *Id.* at 301.

¹⁷⁸ Filosa, *supra* note 1, at 104-12.

¹⁷⁹ Berman, *supra* note 102. *See also* Russell Berman, *Ban on Trans Fat in Restaurants is Approved by New York City*, N.Y. SUN, Dec. 6, 2006.

¹⁸⁰ Filosa, *supra* note 1, at 104.

¹⁸¹ U.S. CONST., AMEND V; U.S. CONST., AMEND. XIV, § 1.

¹⁸² INSTITUTE FOR LOCAL GOVERNMENT, TAKINGS LAW IN PLAIN ENGLISH (2004).

¹⁸³ *Id.*

¹⁸⁴ *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

¹⁸⁵ *Penn Central Transportation Co. v. City of New York*, 439 U.S. 104, 125 (1978).

¹⁸⁶ *Cienga Gardens v. U.S.*, 331 F.3d 1319, 1337-38 (Fed. Cir. 2003).

¹⁸⁷ The Supreme Court has said that regulations that prevent the most profitable use of property or lead to diminution in value are not necessarily takings and “the interest in anticipated gains ... unaccompanied by any physical property restriction, provides a slender reed upon which to rest a takings claim.” *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979). *See also* *City of Tucson v. Grezaffi*, 23 P.3d 675, 684 (Ariz. Ct. App. 2001) (stating that “deprivation of the most beneficial use of property and diminution in value are not sufficient in and of themselves to constitute a taking”).

¹⁸⁸ Filosa, *supra* note 1, at 110-11.

¹⁸⁹ *Penn Central*, 439 U.S. at 123-24.

¹⁹⁰ *Choi*, *supra* note 5, at 533.

¹⁹¹ This is the range of fines imposed for violations of New York City’s trans fat regulation. N.Y.C. Department of Health and Mental Hygiene Administrative Tribunal hearing officers may assess a fine of \$200.00 for an initial violation and up to \$2,000.00 for subsequent violations. *See* NEW YORK CITY DEP’T OF HEALTH & MENTAL HYGIENE, *supra* note 81.

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