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THE NEW YORK CITY TRANS FAT BAN: A HEALTHY LAW

*Gabriel Edelman**

INTRODUCTION

“[T]he presence of trans fat in foods served in restaurants . . . represents a dangerous and entirely preventable health risk to restaurant goers.” – the New York City Department of Health and Mental Hygiene, describing the purpose of its ban on trans fats in New York City restaurants.¹

Trans fat, once considered the healthy answer to a heart-disease epidemic fueled by saturated fats,² is now not only considered

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¹ DEP’T OF HEALTH & MENTAL HYGIENE BD. OF HEALTH, NOTICE OF ADOPTION OF AN AMENDMENT (§81.08) TO ARTICLE 81 OF THE NEW YORK CITY HEALTH CODE 1, available at <http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art81-08.pdf> (last visited Nov. 1, 2008) [hereinafter Notice § 81.08 NYC]. Although the Notice of Adoption specifically mentions the elimination of *artificial* trans fats, for simplicity this Note will refer to the general elimination of trans fats. It should be noted, however, that trans fats can occur naturally, and the New York City ban does not seek to eliminate such naturally occurring trans fats. See *id.* at 2 (recognizing that “[a]pproximately 20% of [trans fat] is naturally occurring and is found in small amounts in dairy and meat products . . .”).

² See JUDITH SHAW, TRANS FATS: THE HIDDEN KILLER IN OUR FOOD 33–34 (Micki Nuding ed., Pocket Books 2004) (noting that in the 1950’s, saturated fats were the target of national educational campaigns against heart disease, and the solution was a massive migration from butter to margarine). Current supporters of banning trans fats, such as the Center for Science In The Public

unhealthy,³ but is actually considered to be more harmful than saturated fat.⁴ The federal government now requires that trans fat be listed on nutrition labels right below saturated fat.⁵ Many restaurants have voluntarily stopped using trans fat,⁶ and fast-food chains have also changed their stance on trans fat. In its ads, the fast food chain Kentucky Fried Chicken boasts that its fried chicken is now made with zero trans fat.⁷ No longer considered a healthy alternative to saturated fat, trans fat has become recognized as a dangerous “killer fat”⁸—responsible for heart disease—that

Interest (CSPI), were once advocates of switching to trans fats as a healthy oil alternative. See DAVID HARSANYI, *NANNY STATE* 31 (Broadway Books 2007).

³ Notice § 81.08 NYC, *supra* note 1, at 2 (“Scientific evidence demonstrates a clear association between increased trans fat intake and the risk of coronary heart disease.”).

⁴ See SHEILA BUFF, *THE GOOD FAT, BAD FAT COUNTER* 24 (St. Martin’s Press 2002) (“What makes trans fats so very dangerous . . . is that they actually are even *worse* for your heart than saturated fats.”).

⁵ See U.S. Food and Drug Administration, Questions and Answers About Trans Fat Nutritional Labeling, <http://www.cfsan.fda.gov/~dms/qatrans2.html> (last visited Nov. 1, 2008) (stating in section 3, question 5 that “As of January 1, 2006, food manufacturers must list *trans* fat on the nutrition label”).

⁶ See, e.g., The Campaign to Ban Partially Hydrogenated Oils: Project Tiburon, America’s First Trans Fat-Free City, <http://www.bantransfats.com/projecttibur.html> (last visited Nov. 1, 2008) (discussing the fact that restaurants in the California town of Tiburon have voluntarily agreed to remove trans fats from their cooking oils used for frying).

⁷ KFC, <http://www.kfc.com/nutrition/default.asp> (last visited Nov. 1, 2008). While the homepage of Kentucky Fried Chicken currently advertises their “original recipe strips,” <http://www.kfc.com>, clicking on their “Nutrition” link brings up a banner stating: “KFC’s Fried Chicken: Same great taste, but now with [zero] grams of trans fat per serving.” <http://www.kfc.com/nutrition/default.asp>.

⁸ Numerous negative monikers have been attached to trans fats, such as “franken fat” (see DEBORAH MITCHELL, *THE TRANS FAT REMEDY: THE FIRST CONSUMER GUIDE TO OUR FAMILY’S BIGGEST HEALTH THREAT* 3 (New American Library 2004), the “stealth fat,” see RONNI LITZ JULIEN, *THE TRANS FAT FREE KITCHEN* 9 (Health Communications 2006), and the “hidden killer,” see generally Shaw, *supra* note 2. One doctor went as far as to state that “[t]here should be a warning on food made with [trans fats] like there is on nicotine products. It’s that bad for you . . .” KIM SEVERSON, *THE TRANS FAT SOLUTION* 1 (Ten Speed Press 2003).

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our country needs to remove from the national diet. New York City, by banning the use of trans fat in its restaurants, is the first major American city to take a necessary step in protecting its citizens from trans fat.⁹ In doing so, New York City's ban (hereinafter referred to as "the Ban") has created a successful, and necessary, model for other cities and states to follow in order to protect the health of their citizens.

The most effective way to protect against heart disease combines educational initiatives to increase individual awareness of the threats of trans fat to personal health with legislative restrictions. From an individual standpoint, after becoming better informed people can alter their own eating habits by monitoring what foods they eat and how many calories they consume,¹⁰ and can make changes to their exercise habits as well.¹¹ From a legal standpoint, legislators can aid people in making responsible personal choices through laws that regulate nutritional labeling, as well as determine where and how certain foods can be advertised.¹²

⁹ See Thomas J. Lueck & Kim Severson, *New York Bans Most Trans Fats in Restaurants*, N.Y. TIMES, Dec. 6, 2006, at A1 (noting that New York City adopted the nation's "first major municipal ban" on trans fats).

¹⁰ The Surgeon General recommends Americans follow "The Dietary Guidelines for Americans," published by the Department of Health and Human Services (HHS) and the Department of Agriculture (USDA). U.S. DEP'T OF HEALTH & HUMAN SERVS., DIETARY GUIDELINES FOR AMERICANS (2005), available at <http://www.health.gov/dietaryguidelines/dga2005/document/pdf/DGA2005.pdf> [hereinafter DIETARY GUIDELINES]. According to the HHS website, "[t]he Guidelines provide authoritative advice for people two years and older about how good dietary habits can promote health and reduce risk for major chronic diseases." U.S. DEP'T OF HEALTH & HUMAN SERVS., <http://www.health.gov/dietaryguidelines/dga2005/document/default.htm> (last visited Nov. 1, 2008). The Surgeon General also provides "Healthy Weight Advice for Consumers" on the Surgeon General website. U.S. DEP'T OF HEALTH & HUMAN SERVS., Surgeon General's Healthy Weight Advice for Consumers, http://www.surgeongeneral.gov/topics/obesity/calltoaction/fact_advice.htm (last visited Nov. 1, 2008).

¹¹ See, e.g., DIETARY GUIDELINES, *supra* note 10, at ch.4, available at <http://www.health.gov/dietaryguidelines/dga2005/document/html/chapter4.htm> (last visited Nov. 1, 2008).

¹² See David Burnett, *Fast-food Lawsuits and the Cheeseburger Bill: Critiquing Congress's Response to the Obesity Epidemic*, 14 VA. J. SOC. POL'Y

In addition, lawsuits can be brought in order to create changes in the food industry, such as those brought by Steven Joseph's public interest firm against McDonald's and Kraft.¹³ And legislators can, of course, ban the use of specific ingredients that are deemed unhealthy.

It is with such legislation of trans fat, banning them from use, where the fight against trans fat has most recently taken hold of the media's attention.¹⁴ New York City thrust trans fat into the center of the media's focus when its Board of Health unanimously¹⁵ passed its Ban on the acceptable level of trans fats allowed in all New York City restaurants.¹⁶ The Ban recently went into effect,¹⁷ but the food industry and other critics question whether it is the appropriate weapon of choice in the fight against trans fats.¹⁸

& L. 357 (2007) (providing a more comprehensive list of policy suggestions for fighting obesity).

¹³ See Theodore H. Frank, *A Taxonomy of Obesity Litigation*, 28 U. ARK. LITTLE ROCK L. REV. 427, 430–32 (2006) (discussing obesity litigation, including a section on trans fat lawsuits).

¹⁴ “When the health care establishment converges on a message, especially a warning of danger, it becomes front-page news.” KENNETH R. WING, WENDY K. MARINER, GEORGE J. ANNAS & DANIEL S. STROUSE, *PUBLIC HEALTH LAW* 612 (LexisNexis 2007) (citing Rogan Kersh & James A. Morone, *Obesity, Courts, & The New Politics of Public Health*, 30 J. HEALTH POL. POL'Y & L. 839 (2005)).

¹⁵ See Press Release, New York City Dept. of Health and Mental Hygiene, Board of Health Votes to Phase Out Artificial Trans Fat From New York City's Restaurants (Dec. 5, 2006), <http://www.nyc.gov/html/doh/html/pr2006/pr114-06.shtml> (stating that “the New York City Board of Health voted unanimously to . . . requir[e] that all City restaurants remove artificial trans fat”).

¹⁶ See generally Notice § 81.08 NYC, *supra* note 1. New York City adopted a resolution to ban the amount of trans fats allowed in restaurants on December 5, 2006. See Lueck & Severson, *supra* note 9 (“[T]he regulation governing trans fats has again thrust New York to the forefront of a significant public issue.”).

¹⁷ Notice § 81.08 NYC, *supra* note 1, at 4 (setting July 1, 2007 as the “effective date of the restriction on use of oils, margarines and vegetable shortenings containing artificial trans fats that are used for frying and as spreads”).

¹⁸ A spokesman for the National Restaurant Association described the Ban as a “misguided attempt at social engineering by a group of physicians who don't understand the restaurant industry.” Lueck & Severson, *supra* note 9; see

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Although New York City's Department of Health and Mental Hygiene (hereinafter referred to as the "Board of Health") has cited many reasons in support of the creation of the Ban on trans fat,¹⁹ the Ban is meeting initial resistance from critics who give common sense reasons to oppose its creation. First, lovers of fried foods worry that removing trans fat might cause unappetizing changes to the flavor and texture of foods.²⁰ Second, restaurants fear that pricier alternatives could raise their costs, which they would then be forced to pass on to consumers.²¹ Third, political critics worry that such regulation on ingredients crosses a line into dictating dietary choice that impinges on personal freedom.²² And fourth, an unfortunate reality, is that the Ban might face challenges because alternatives to trans fat are too scarce in quantity.²³

The Ban must overcome legal and political hurdles as well on local, state, and federal levels. First, questions about the Ban's constitutionality are bound to arise when a municipality is setting

also Opinion, *A Trans Fat Ban Goes a Bit Too Far*, THE REPUBLICAN, Aug. 25, 2008, at A06 (positing that a voluntary move away from trans fats would be preferable to required bans of the ingredient).

¹⁹ See generally Notice § 81.08 NYC, *supra* note 1.

²⁰ One restaurant owner noted that a trans fat ban would "force [me] to reconfigure recipes that date back more than 40 years." Sam Wood & Jan Hefler, *The Trans Fat is in the Fire: Proposed Ban in N.J. Draws Angry Response*, THE PHILADELPHIA INQUIRER, Oct. 13, 2006, at A01.

²¹ Monica Davey, *Chicago Weighs New Kind of Prohibition*, N.Y. TIMES, July 18, 2006, at A17 (describing how costs could leap as much as \$50,000 a year for some restaurants who switch from trans fat oils to healthier substitutes).

²² As Mayor Daley of Chicago stated: "Is the [Chicago] City Council going to plan our menus?" *Id.*

²³ "[E]xperts say that oil suppliers could be increasingly hard-pressed to keep pace with the foodservice industry's growing demand for alternatives [to trans fats], especially if legal mandates to ban trans fats escalate." Carolyn Walkup, *Trans Fat's Domino Effect: Oil Supplies May Lag Behind*, NATION'S RESTAURANT NEWS, June 11, 2007, at 4. *But see, e.g., Future of Biotech Crops on Display at Iowa Farm Show*, ABERDEEN AMERICAN NEWS, Sept. 5, 2008 (noting a new soybean developed to remove trans- and saturated- fats); *No Trans Fats? No Problem!*, DRUG WEEK, Sept. 5, 2008 (describing Whole Harvest's line of trans fat free commercial cooking oil, which is "ready to meet the needs of restaurants and institutions throughout [California]").

the regulations for what people can or cannot do in a restaurant.²⁴ Second, it is appropriate to ask whether action at the federal or state level, rather than bans at the municipal level, might be the proper forum to make a stand against trans fats.²⁵ The federal government has already taken some steps against trans fat at the national level, including enacting legislation that requires the listing of trans fat on product labels.²⁶ Advocacy groups, such as the Washington-based Center for Science and the Public Interest, have petitioned the Federal government to expand these types of regulations to force restaurants to disclose their use of trans fat.²⁷ At the national and state levels, however, lobbying by restaurants has stymied these efforts to increase public awareness of the dangers of trans fat.

Litigation is another possible avenue to reduce the use of trans fat, rather than attempting to ban trans fat outright. It is theoretically possible that the food industry could be convinced through litigation-related damages to drop trans fat from its ingredients. To this end, several cases have been brought recently against corporations who use trans fat in their foods.²⁸ While not

²⁴ One New York City group brought a lawsuit in response to New York legislation banning smoking in restaurants, based upon the theory that such a ban was unconstitutional. On April 8, 2004, a federal judge ruled that New York's smoking ban was not unconstitutional. A summary of the proceedings is available at <http://nycclash.com/Lawsuit.html> (last visited Sept. 7, 2008). One author believes the Ban is an unconstitutional taking of property. See Carmen Filosa, *Trans Fat Bans: The Next Regulatory Taking?*, 29 J. LEGAL MED. 99, 104 (2008) (discussing how "trans fat bans may be considered a regulatory taking").

²⁵ Sarah A. Kornblet, *Fat America: The Need For Regulation Under The Food, Drug, and Cosmetic Act*, 49 ST. LOUIS U. L.J. 209, 210 (2004) ("The best way to resolve the increasing litigation against fast-food restaurants is for the FDA to promulgate uniform regulations in this area.").

²⁶ See generally U.S. Food & Drug Admin., Questions and Answers About Trans Fat Nutritional Labeling, <http://www.cfsan.fda.gov/~dms/qatrans2.html#s2q3> (last visited Nov. 1, 2008).

²⁷ "The Washington-based Center for Science and the Public Interest has petitioned the U.S. Food and Drug Administration (FDA) to require restaurants to disclose their use of trans fat." *Restaurants Are Slow to Drop Menu Choices With Trans Fat*, HEALTH & MED. WK., Mar. 21, 2005, at 481.

²⁸ See, e.g., *Hoyte v. Yum! Brands, Inc.*, 489 F. Supp. 2d 24 (D.D.C. 2007);

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all of these cases have been successful,²⁹ several have created inroads into major food suppliers' uses of trans fat.³⁰ Because of the negative publicity and possible monetary damages that arise from court decisions, litigation is a powerful method of forcing specific restaurants and chains to change their menus without forcing everyone to change their selection of ingredients.

Notwithstanding the arguments against a municipal trans-fat ban, there are several advantages stemming from this Ban. The knowledge that a major metropolis such as New York City is willing to ban trans fat can influence others to follow.³¹ It has already encouraged some cities to remove trans fat from their restaurants by creating similar bans.³² And recently, California has passed legislation that will ban trans fat from the entire state's restaurant industry,³³ with Massachusetts considering a similar

Kraft Foods North Am., Inc. v. Banner Eng'g. Sales, Inc., 446 F. Supp. 2d 551 (E.D. Va. 2006).

²⁹ See *Hoyte*, 489 F. Supp. 2d at 26 (granting defendant's motion to dismiss complaint that "KFC failed to disclose the presence of trans fat in its food and made misleading statements to the public concerning the content of its food").

³⁰ In 2003, lawsuits brought by attorney Stephen Joseph against McDonald's were settled, with McDonald's agreeing to inform the public of its use of trans fat oils, and to donate \$7 million to the American Heart Association. See BanTransFats.com, The McDonald's Settlement, <http://www.bantransfats.com/mcdonalds.html> (last visited Nov. 1, 2008).

³¹ For example, in removing trans fat from pizzas in the schools of Niagara, New York, the chief medical officer of health for the region noted that "New York City has banned trans fat in all eateries, yet pizzerias flourish there." Paul Forsyth, *Pizza Days Can Live On*, NIAGARA THIS WEEK, Sept. 5, 2008, at 61. In attempting to garner support for removal of trans fat from the state of Massachusetts, the state's public health commissioner said he "plans to visit New York City . . . and learn from its experience." Carey Goldberg, *Bid to Ban Trans Fat Statewide Gets a Boost: Health Chief Backs Lawmaker's Request*, BOSTON GLOBE, Aug. 21, 2008, at 1.

³² Karen Matthews, *Trans Fat is Officially Banned in New York City. Since Law Passed, Other Places Have Taken Similar Action*, CHARLESTON DAILY MAIL, July 2, 2007, at 5D ("Since New York passed the trans fat ban last year, Philadelphia, Montgomery County in Maryland and the Boston suburb of Brookline have followed with similar measures Several other states and cities . . . are also considering trans fat prohibitions.").

³³ On July 26, 2008, California signed into law a statewide ban on trans fats in restaurants, becoming the first state to do so. See Douglas Morino, *Trans Fats*

ban.³⁴ The media attention garnered by the Ban can make it an effective tool in the fight against trans fat as corporations often look to the media to determine their marketing strategies.³⁵ In addition, the feedback on the Ban to date has been positive, thus demonstrating that such a ban can effectively be placed into action.³⁶

Through an analysis of the benefits and drawbacks that stem from health regulations like banning the use of a food-product, this Note comes to the conclusion that the New York City Ban is necessary, and that it should serve as a model for other trans fat bans. It is difficult to measure the success of a bill that has only recently come into full effect.³⁷ The total effect on the health of New York City residents is not immediately obvious,³⁸ and it will always be difficult to directly correlate the removal of trans fat from restaurants to collectable health data such as heart attack

on Way Out, Just for the Health of it: 2010: Law Gives Eateries Ample Time, DAILY NEWS LOS ANGELES, California, Aug. 2, 2008, at A1; Office of the Governor Press Release: Governor Schwarzenegger Promotes Health and Nutrition by Signing Nation-Leading Trans Fat Bill, <http://www.gov.ca.gov/index.php?/print-version/press-release/10291/> (last visited Nov. 1, 2008).

³⁴ Massachusetts' public health commissioner was supportive of his agency banning trans fats on a statewide level, after the Massachusetts House of Representatives passed a statewide ban on trans fats that was delayed as the Senate did not vote on it in time. See Goldberg, *supra* note 31, at 1.

³⁵ See CHIP HEATH & DAN HEATH, MADE TO STICK 169–70 (Random House) (2007). The authors describe how an advertising campaign against cigarette smoking took on a life of its own, to the point that Philip Morris included an “anti-vilification” clause into its litigation settlements, and even created its own anti-smoking ads as a part of a settlement with the tagline “Think. Don’t Smoke.” *Id.*

³⁶ Jordan Lite, *N.Y. Trans Fat Ban Working*, SAN JOSE MERCURY NEWS, Sept. 26, 2007 (noting that 94 percent of New York City’s restaurants have complied with the ban since it went into effect in July, 2007).

³⁷ The first phase of the ban went into effect on July 1, 2007, and the second phase went into effect on July 1, 2008. Notice § 81.08 NYC, *supra* note 1, at 5.

³⁸ The removal of trans fats is expected to in the long run lead to lowered rates of heart disease in New York City. See Notice § 81.08 NYC, *supra* note 1, at 2. However, changes in data will not occur overnight, and it may require years of analysis to study overall health trends.

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victims.³⁹ This is because many factors can influence these figures, including changes to dietary and exercise habits.⁴⁰ Despite these complicating factors, the Ban's success can be indirectly measured by looking at the success of the Ban to date in New York City, as well as the effect it has had on the removal of trans fat from other cities, states, and the food industry as a whole.

Part I of this Note provides an overview of trans fat and the problems that it presents both for individuals and the nation as a whole. Part II of this Note examines the Ban in detail, tracing the steps that led to its enactment as well as the specifics of the Ban itself. Part III respectively weighs the arguments for and against the Ban on both a local and national level, and argues that the Ban is a necessary piece of legislation, and that it successfully reduces trans fat in our diets, and thus removes a dangerous ingredient that costs lives. Because the Ban is able to meet its goal of saving lives, it should serve as a successful model for future bans on trans fat.

I. TRANS FAT: THE KILLER FAT

Food critics describe the modern food environment as “toxic” because of the dangers that have been created by artificially altering our diet.⁴¹ By explaining what trans fat is and the health threats it poses, this section will show that the removal of trans fat from diets reduces this toxicity.

³⁹ However, according to the Board of Health, “[s]cientific evidence demonstrates a clear association between increased trans fat intake and the risk of coronary heart disease.” *Id.*

⁴⁰ For example, in researching the links between saturated fats and breast cancer, “[m]ost investigators believe that multiple factors are at work to increase the risk of breast cancer—including genetics, menstrual history, sedentary lifestyle, body fat, and overall diet—so it’s difficult to pin the cause on saturated fat alone.” See MAGGIE GREENWOOD-ROBINSON, *GOOD FOOD VS. BAD FOOD* 208 (Berkley Books 2004).

⁴¹ See WING, *supra* note 14, at 574–75 (citing KELLY BROWNELL & KATHERINE BATTLE HORGAN, *FOOD FIGHT* (McGraw-Hill 2004)).

A. Defining Trans Fat

The term “trans fat” refers to “trans fatty acids,” one of several types of fat that exist in our diet.⁴² Fat cells come in three different varieties—saturated, monounsaturated and polyunsaturated.⁴³ Trans fat is created by artificially adding hydrogen atoms to polyunsaturated fat.⁴⁴ Trans fat can be produced through a process of partial hydrogenation where “solid fats [are] produced . . . by heating liquid vegetable oils in the presence of metal catalysts and hydrogen.”⁴⁵ The natural unsaturated fatty acid remains in a liquid form at room temperature because it has carbon atoms that align in a bent shape.⁴⁶ However, the artificial variety can remain in a solid form at room temperature because the carbon atoms are bonded in a straight configuration.⁴⁷ It is this solid form that makes artificial trans fat so useful in the food industry because it can be stored at a lower cost and used for longer periods of time.⁴⁸

⁴² The term “trans” comes from the chemical makeup of the fat cells, where identical hydrogen atoms are attached on opposite sides to a double-bond of carbon atoms in a fat cell, or in the “trans” position. *See* SEVERSON, *supra* note 8, at 5; interview by Richard A. Passwater, Ph.D. with Dr. Mary Enig, Director of the Nutritional Sciences Division of Enig Associates, Inc., <http://www.healthy.net/asp/templates/Interview.asp?Id=162> (last visited Nov. 1, 2008).

⁴³ *See* Jane Allen, *Snack Makers Targeting Trans Fats*, L.A. TIMES, Sept. 30, 2002, at S-1. A fat is considered ‘saturated’ when the maximum amount of hydrogen atoms have attached to the carbon atoms of the fat cells. ‘Monounsaturated’ fat occurs “when some hydrogen is missing and two carbons attach by a double bond.” *Id.* Finally, ‘polyunsaturated’ fat is when “there are several missing hydrogen atoms and multiple double bonds.” *Id.*

⁴⁴ *See generally* Alberto Ascherio, Meir J. Stampfer & Walter C. Willett, *Trans Fatty Acids and Coronary Heart Disease*, 340 NEW ENG. J. MED. 1994 (1999). The process of creating trans fats dates back over one hundred years, with the first trans fat patent recorded in 1903. *See* SEVERSON, *supra* note 8, at 4.

⁴⁵ Ascherio, *supra* note 44.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ SHAW, *supra* note 2, at 7 (noting that hydrogenated oils are a food manufacturer’s “dream come true,” as they are inexpensive, flavorless, and have a long shelf life).

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In its solid partially-hydrogenated form, trans fat appears in products such as vegetable shortening and margarine.⁴⁹ Partial hydrogenation can also be used to prevent other fats from becoming rancid over time,⁵⁰ thus increasing the shelf life of foods such as cookies and other doughy products.⁵¹ In addition, the ability of trans fat to last over time makes it preferable to other fats, as trans-fatty oil can be reused in frying without losing its value.⁵² This makes trans fat a popular choice for cooking french fries and other fried fast foods.⁵³

B. The Dangers of Trans Fat Justify Its Removal from Our Diet

It should come as no surprise that fat actually serves a useful purpose in our diet. To a certain extent, fat provides our bodies with energy and nutrients,⁵⁴ and aids in the production of hormones and other necessary bodily functions.⁵⁵ There are some fatty acids that are actually required by the body, generally referred to as “essential fatty acids.”⁵⁶ Non-essential fats can be healthy as well. For example, the benefits of olive oil, which contains a high

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Lueck & Severson, *supra* note 9 (“Long used as a substitute for saturated fats in baked goods, fried foods, salad dressings, margarine and other foods, trans fats also have a longer shelf life than other alternatives.”).

⁵³ *See id.*

⁵⁴ *See generally* Karen Wilk Rubin, *Due For An Oil Change? Fat Provides Many Useful and Functional Properties, Yet Fat – Especially Trans Fat – Remains A Controversial Subject*, FOOD SERVICE DIRECTOR, May 15, 2005, at 37.

⁵⁵ Certain fatty acids “make cell membranes more permeable so that nutrient-carrying fluids can pass into cells and waste materials can leave.” GREENWOOD-ROBINSON, *supra* note 40, at 194. Other fatty acids help prevent “platelets in the blood from abnormal clotting, and . . . reduce inflammation.” *Id.* at 195.

⁵⁶ BUFF, *supra* note 4, at 70. Examples of essential fatty acids are linolenic acid and linoleic acid, which “your body must have . . . and can get . . . only from your food or supplements.” *Id.*

level of monounsaturated fat, have been extolled for protecting “against heart disease and certain kinds of cancer,” as numerous studies demonstrate.⁵⁷

At the same time, an overabundance of fat in one’s diet can lead to numerous health problems, including diabetes and heart failure.⁵⁸ In 1957, the American Heart Association first began alerting the public that reducing saturated dietary-fat intake would reduce the risks of heart attack.⁵⁹ The public embraced this concept, and started turning to alternatives to saturated fats.⁶⁰

For quite some time, trans fat was thought to be a healthy alternative to the problems caused by the over-consumption of saturated fat, and indeed⁶¹ some researchers still believe that trans fat that occurs naturally in food sources is actually healthy.⁶² Unfortunately, current research has shown quite the opposite for artificial trans fat: ingesting artificial trans fat is worse for one’s cardiac system than ingesting saturated fat.⁶³ Compared to saturated fat, trans fat may be more likely to raise the level of low-density lipoprotein cholesterol (“LDL” or “bad cholesterol”) in the human bloodstream, while lowering the level of high-density lipoprotein cholesterol (“HDL” or “good cholesterol”).⁶⁴ The risk of coronary heart disease is sharply raised by the combination of trans fats lowering HDL and increasing triglyceride levels.⁶⁵ Given this increased risk of heart attack, contemporary views on artificial trans fat have shifted to see the ingredient as a dangerous addition

⁵⁷ *Id.* at 67–69.

⁵⁸ *See infra* notes 63–70 and accompanying text.

⁵⁹ SEVERSON, *supra* note 8, at 6.

⁶⁰ *Id.*

⁶¹ Editorial, *Trans Fats: Ban Them, or Let Them Die Out?*, THE NEW TRIBUNE (Tacoma, WA), July 26, 2007 (“Trans fats . . . were thought to be healthy for most of the 20th century.”).

⁶² Kim Severson, *Trans Fat Fight Claims Butter as a Victim*, N.Y. TIMES, Mar. 7, 2007, at F1 (“Some researchers believe that trans fat that occurs naturally in butter, meat, milk and cheese might actually be healthy.”).

⁶³ *See* BUFF, *supra* note 4, at 24.

⁶⁴ SEVERSON, *supra* note 8, at 8.

⁶⁵ *See* BUFF, *supra* note 4, at 24 (“[T]he combination of low HDL and high [triglycerides] raises your risk of heart disease sharply.”).

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to the food industry.

In addition to cardiac risks, several other serious health risks are caused by consuming trans fat. Increased intake of trans fat can raise the risk of diabetes more than any other form of fat.⁶⁶ Whereas saturated fat may conserve good omega-3 fatty acids,⁶⁷ trans-fatty acid causes tissues to lose omega-3.⁶⁸ In addition, trans fat inhibits the body's use of the hormone insulin,⁶⁹ as well as possibly contributing to infertility.⁷⁰ As the scientific evidence regarding the dangers of trans fat continues to become more precise, it is all the more clear that removal of trans fat is increasingly an integral part of creating a healthier American diet.

In addition to trans fat increasing numerous health risks, trans fat should be removed from our diet because it does not provide

⁶⁶ See *id.* at 28 (“Recent research strongly suggests that of all the dietary fats, trans fats are the ones most closely related to developing diabetes.”); see also Jorge Salmeron et al., *Dietary fat intake and risk of type 2 diabetes in women*, 73 AM. J. OF CLINICAL NUTRITION 1019 (2001) (Concluding that “total fat and saturated and monounsaturated fatty acid intakes are not associated with risk of type 2 diabetes in women, but that *trans* fatty acids increase . . . risk”).

⁶⁷ Omega-3 fatty acids are an important part of our diet. “A deficit of omega-3s leaves us with less perception of pain, compromised cell membranes, which can lead to structurally damaged blood vessels, and robs us of a natural blood thinner.” SHAW, *supra* note 2, at 81 (citation omitted).

⁶⁸ See BanTransFats.com, Trans versus Sat, <http://bantransfats.com/transvssat.html> (last visited Nov. 1, 2008) (“(3) saturated fatty acids conserve the good omega-3 fatty acids, whereas trans fatty acids cause the tissues to lose these omega-3 fatty acids; (4) saturated fatty acids do not inhibit insulin binding, whereas trans fatty acids do inhibit insulin binding.”). See also GREENWOOD-ROBINSON, *supra* note 40, at 210 (“Trans fatty acids inhibit the body’s ability to properly use essential fatty acids (the good fats [such as omega-3]).”).

⁶⁹ BanTransFats.com, Trans versus Sat, <http://bantransfats.com/transvssat.html> (last visited Nov. 1, 2008). Insulin is a “hormone that decreases blood glucose levels by moving glucose into cells to be used for fuel.” GREENWOOD-ROBINSON, *supra* note 40, at 346. Diabetes is a failure of the body to produce enough insulin, or to use insulin properly. *Id.* at 343.

⁷⁰ Jorge E. Chavarro, Janet W. Rich-Edwards, Bernard A. Rosner, and Walter C. Willett, *Diet and Lifestyle in the Prevention of Ovulatory Disorder Infertility*, 110 OBSTETRICS & GYNECOLOGY 1050, 1052 (2007) (noting that lower intake of trans fat was associated with a high “fertility score” in a study of dietary patterns and ovulatory disorder infertility).

any nutritional advantages.⁷¹ Not only has trans fat been found to provide no apparent health benefit,⁷² but it has been suggested that there is no reasonable level of trans fat that should be in one's diet, and that it should be eliminated entirely.⁷³ While trans fat may not be the only ingredient to cause harm to our bodies, trans fat is an easier ingredient to eliminate; the vast majority of trans fat in the food supply is of the artificial variety, and thus, easier to remove than naturally occurring ingredients.⁷⁴ Finally, there are no foods or baked goods that actually require the use of trans fat.⁷⁵ And even for the foods that do use trans fat, healthier alternatives are available, such as grape-seed and palm oils.⁷⁶

⁷¹ See MARION NESTLE, *FOOD POLITICS* 386 (University of California Press 2d ed. 2007) (“[B]ecause removing [trans fats] from the food supply is feasible, getting rid of *trans* fats had become a focal point of advocacy for changes in the food environment.”).

⁷² “[F]rom a nutritional standpoint, the consumption of trans fatty acids results in considerable harm but no apparent benefit.” Dariush Mozaffarian, Martijn B. Katan, Alberto Ascherio, Meir J. Stampfer & Walter C. Willett, *Medical Progress: Trans Fatty Acids and Cardiovascular Disease*, 354 *NEW ENG. J. MED.* 1601 (2006).

⁷³ A study conducted by the Institute of Medicine determined that trans fats “are not required at any level in the diet.” INST. OF MED., *DIETARY REFERENCE INTAKE FOR ENERGY, CARBOHYDRATE, FIBER, FAT, FATTY ACIDS, CHOLESTEROL, PROTEIN, AND AMINO ACIDS* 5 (2002). The report was released in July 2002 at the Food and Drug Administration’s request, in order to aid its decision to add trans fats to food labels. *Id.*

⁷⁴ “Approximately 80% of dietary trans fat is found in industrially-produced PHVO [partially hydrogenated vegetable oil], which is used for frying and baking and is present in many processed foods.” Notice § 81.08 NYC, *supra* note 1, at 2.

⁷⁵ “No cooking, baking, or frying, domestic or commercial, *requires* the use of partially hydrogenated vegetable oil.” SHAW, *supra* note 2, at 12. In one taste test of trans-fat free cannolis from New York City versus those with trans fat from New Jersey, consumers “had trouble telling the difference, but almost all liked what they tasted.” *Can’t Find Fat Tooth. The News’ Taste Test Shows N.Y.ers OK With Trans-ition*, N.Y. *DAILY NEWS*, July 2, 2008, at 17.

⁷⁶ Ironically, the rise of trans fats may have led in part to the downfall of such alternative sources of oil. See SEVERSON, *supra* note 8, at 6.

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II. BACKGROUND

A. *Stephen Joseph Leads The Way*

Stephen Joseph (“Joseph”) is often credited with bringing the movement against trans fat into the national spotlight.⁷⁷ One of Joseph’s best-known projects was a campaign that he began in 2004 in Tiburon, California, to get restaurants to voluntarily remove trans fat from their menus.⁷⁸ While the town had only 18 restaurants, Joseph was successful in convincing all of them to go trans fat free.⁷⁹ News of this success has reached across the country, so much so that “[w]hen New York City officials . . . look[ed] for a healthy cooking model for their . . . restaurants, they wound up in Tiburon.”⁸⁰ When New York City wanted to create a voluntary trans fat removal education program as a part of its legislation, it followed a campaign similar to Tiburon’s.⁸¹ Joseph began working with New York City in 2005 because, as he put it, “if New York happens, then it can happen in any other city.”⁸²

Joseph’s other well-known contributions to the trans fat fight stemmed from his work as a private-practice lawyer.⁸³ He was able to bring the trans fat battle to two of the largest names in the food industry, Kraft foods (“Kraft”) and McDonald’s, by filing suits against both of them. In 2003, Joseph earned the moniker “cookie

⁷⁷ See, e.g., Jim Staats, *Tiburon’s Trans Fat Ban Started National Movement*, MARIN INDEPENDENT J., Feb. 3, 2007, at 1 (describing how Stephen Joseph’s efforts in the town of Tiburon to get restaurants to go trans fat free started a national movement, and how New York City looked to Joseph for guidance in instituting its trans fat ban); Carol Ness, *Cookie Monster: Tiburon Lawyer Getting the Trans Fat Out*, S.F. CHRON., Feb. 4, 2007, at C-1 (calling Joseph the “Don Quixote of trans fat”).

⁷⁸ See Ness, *supra* note 77.

⁷⁹ Staats, *supra* note 77.

⁸⁰ *Id.*

⁸¹ *Id.* (quoting Sara Markt from the NYC Board of Health as saying that the “legislation in New York . . . followed a voluntary education campaign similar to Tiburon’s”).

⁸² *Id.*

⁸³ Joseph has garnered attention and praise for his trans-fat litigation against such industry giants as Kraft and McDonald’s. See Ness, *supra* note 77.

monster” for bringing suit against Kraft for its use of trans fat in Oreo cookies.⁸⁴ In addition, he brought two suits against McDonald’s⁸⁵ that both settled in 2005, and resulted in McDonald’s both informing the public of its use of trans-fat oils and donating \$7 million to the American Heart Association.⁸⁶ This set the stage for movement against the use of trans fat through government intervention, and while Joseph himself has noted that there is still work to be done,⁸⁷ his actions grabbed the media’s attention and got the ball rolling on a national scale.

B. The Food and Drug Administration Instituted Changes To Nutrition Labeling to Single Out Trans Fat

In July 2003, the Food and Drug Administration (“FDA”) made a major impact on the national trans fat landscape by requiring that food companies disclose the trans fat content of their

⁸⁴ Joseph sought an injunction to prevent Kraft from marketing Oreo cookies to children in the state of California until the cookies were trans fat free. The lawsuit gained a substantial amount of media attention, prompting Rush Limbaugh to call the suit “crazy,” “loony” and “absolutely ridiculous.” Ness, *supra* note 77. Kraft quickly issued a statement that it would reduce or eliminate trans fats in all Oreo cookies, and Joseph declared a victory and dropped the suit. See BanTransFats.com, The Oreo Case, <http://www.bantransfats.com/theoreocase.html> (last visited Nov. 1, 2008).

⁸⁵ In 2002, McDonald’s had announced that it was in the process of changing to cooking oils with less trans fats, and that this transition would be complete by early in 2003. However, the change did not occur, and Joseph filed a lawsuit alleging that McDonald’s did not sufficiently inform the public that the change never occurred. In addition, Joseph represented a plaintiff suing McDonald’s in a class-action suit, seeking damages for McDonald’s failure to inform the public that it had not replaced trans fats with healthier alternatives. See BanTransFats.com, The McDonald’s Settlement, <http://www.bantransfats.com/mcdonalds.html> (last visited Nov. 1, 2008).

⁸⁶ McDonald’s was to spend up to \$1.5 million to ensure the public was aware of their trans fat initiative, \$7,500 to BanTransFats.com, \$7,500 to the plaintiff Joseph represented in the class-action suit, as well as legal fees, costs and expenses to Joseph. *Id.*

⁸⁷ See Ness, *supra* note 77 (“Steve Joseph says the trans-fat campaign has been won—but there’s still much to do.”).

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ingredients on packages.⁸⁸ The FDA regulation required that trans fat be listed on food nutrition labels directly under the line for saturated fat by January 2006.⁸⁹ This represented a major step in food regulation, given that it was the “first significant change on the Nutrition Facts panel since it was established in 1993.”⁹⁰ The FDA premised this regulation on the concept that providing consumers with more information regarding trans fat would lead to healthier diets, thus reducing the “costs of illness and disease for Americans.”⁹¹

The FDA regulation was successful in reducing trans fat usage in general by creating a labeling change: by the time the 2006 deadline came up, food manufacturers were using adequate substitutes, and it was uncommon to find trans fat listed as anything but “0” grams.⁹² There are two caveats to this success, the first being that the FDA stated that “*trans* fat does not have to be listed if the total fat in a food is less than 0.5 gram[s] (or 1/2 gram[s]) per serving and no claims are made about fat, fatty acids or cholesterol content.”⁹³ Some have considered this to be an

⁸⁸ See Press Release, United States Department of Health & Human Services, HHS to Require Food Labels to Include Trans Fat Contents (July 9, 2003), <http://www.hhs.gov/news/press/2003pres/20030709.html>.

⁸⁹ *Id.* The full text of the rule is available at <http://www.cfsan.fda.gov/~lrd/fr03711a.html>. The regulation was enacted in response “in part, to a citizen petition from the Center for Science in the Public Interest (CSPI), and is based on recently published human studies and health expert advice on *trans* fat.” U.S. Food and Drug Administration, Questions and Answers About Trans Fat Nutritional Labeling, *supra* note 5, at Section 5.

⁹⁰ Press Release, United States Department of Health & Human Services, *supra* note 88.

⁹¹ *Id.* The FDA estimated that the changes in the regulations would save “between \$900 million and \$1.8 billion each year in medical costs, lost productivity and pain and suffering.” *Id.*

⁹² NESTLE, *supra* note 71, at 387 (“By the time the FDA labeling requirement went into effect in January 2006, food manufacturers had managed to find acceptable substitutes. By then, it was already difficult to find a Nutrition Facts label listing anything other than 0 grams *trans* fats.”).

⁹³ U.S. Food and Drug Administration, Questions and Answers About Trans Fat Nutritional Labeling, *supra* note 5, at Section 3 (“If it is not listed, a footnote will be added stating that the food is ‘not a significant source of *trans* fat.’”).

unnecessary loophole, and there is currently legislation in the works to create a “Trans Fat Truth in Labeling Act” which would require the listing of trans fat even if the level were below 0.5 grams.⁹⁴ The second caveat is that the FDA determined at this stage not to ban “food manufacturers from using *trans* fat in packaged foods.”⁹⁵ Therefore, restaurants and bakeries were not directly affected by this regulation, as they were still free to use products no matter what level of trans fat were included in the ingredients.⁹⁶

C. The Ban

Bolstered by Joseph’s success⁹⁷ and the labeling changes made by the FDA,⁹⁸ in December 2006 the Board of Health determined that the time was right to introduce its trans fat amendment, section 81.08, known as “the trans fat ban.”⁹⁹ The Ban was promulgated to manage the “presence of trans fat in foods served in restaurants, which represents a dangerous and entirely preventable health risk to restaurant goers.”¹⁰⁰ The general aim of the Ban was to help

⁹⁴ See Lorraine Heller, *New Bill Proposes Stricter Trans Fat Labeling*, Oct. 11, 2007, <http://www.foodnavigator-usa.com/Legislation/New-bill-proposes-stricter-trans-fat-labeling>. The author explains that Congressman Steve Israel proposed the bill, which is supported by the American Heart Association and Center for Science in the Public Interest. While Congressman Israel does not propose a ban on trans fats entirely, he wants to ensure that consumers know exactly what trans fats they are consuming. *Id. But see* Notice § 81.08 NYC, *supra* note 1, at 4 (explaining that the threshold level of 0.5 grams was chosen by the FDA to allow for naturally occurring trans fat in certain foods, as well as “newer ‘low trans fat’ foods”).

⁹⁵ U.S. Food and Drug Administration’s Questions and Answers, *supra* note 5, at Section 5.

⁹⁶ NESTLE, *supra* note 71, at 387.

⁹⁷ See *supra* Part II.A.

⁹⁸ The Ban references the FDA’s mandatory listing of trans fat content as a basis for restricting service of products containing artificial trans fat. Notice § 81.08 NYC, *supra* note 1, at 2.

⁹⁹ *Id.* at 1.

¹⁰⁰ *Id.* The Ban itself defines food that contains trans fats to be “deemed to contain artificial trans fat if the food is labeled as, lists as an ingredient, or has vegetable shortening, margarine or any kind of partially hydrogenated vegetable

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“restaurant patrons [who] currently have no practical way to avoid this harmful substance . . . [by restricting] the service of products containing artificial trans fats at all FSEs [Food Service Establishments].”¹⁰¹ More explicitly, the Ban was intended to “restrict [the] use of artificial trans fat in food service establishments in New York City in an effort to decrease the well-documented risk of ischemic heart and other disease conditions associated with consumption of such products.”¹⁰²

The Board of Health stated that its “basis for restricting service of products containing artificial trans fat”¹⁰³ was due to the connection between trans fat and heart disease, noting that “[h]eart disease is New York City’s leading cause of death.”¹⁰⁴ The Board of Health noted a “clear association between increased trans-fat intake and the risk of coronary heart disease.”¹⁰⁵ According to the Board of Health, replacing trans fat with healthier alternative oils could lead to a conservatively estimated six percent reduction in coronary heart disease events because of a decrease in cholesterol levels.¹⁰⁶ It also noted that through observations of large groups of people over time, an estimated “23% of coronary heart disease events could be avoided by replacing trans fat with healthy alternatives.”¹⁰⁷ The Board of Health additionally justified the Ban

oil.” *Id.* at 5. The Ban does not, however, consider food to contain artificial trans fat if the content is listed on the nutrition label or other documentation from the manufacturer as less than 0.5 grams of artificial trans fat per serving. *Id.*

¹⁰¹ *Id.* at 1.

¹⁰² *Id.* at 6.

¹⁰³ Notice § 81.08 NYC, *supra* note 1, at 2.

¹⁰⁴ *Id.* “In 2004, 23,000 New York City residents died from heart disease and nearly one-third of these individuals died before the age of 75.” *Id.* (citation omitted). It is interesting to note that the actual impetus for Stephen Joseph’s fight against trans fats was also heart disease. Joseph’s stepfather died of a heart attack in 2001, and Joseph linked this death to his stepfather’s consistent use of margarine, which he thought was a healthier alternative to butter. Joseph attributed his stepfather’s death to loading up on the dangerous trans fats in the butter-substitutes. *See* Staats, *supra* note 77.

¹⁰⁵ Notice § 81.08 NYC, *supra* note 1, at 2.

¹⁰⁶ *Id.* (citation omitted).

¹⁰⁷ *Id.* (citing Joanne F. Guthrie et al., *Role of Food Prepared Away from Home in the American Diet, 1977–78 Versus 1997–96: Changes and*

by noting the negative impact trans fat has on “good” cholesterol,¹⁰⁸ and the fact that the United States Department of Agriculture (“USDA”)¹⁰⁹ and the American Heart Association¹¹⁰ both recommend that trans fat intake be minimized.

In finding evidence that the Ban would be successful, the Board of Health further noted the success of trans-fat bans in both Denmark and Canada as support that “dietary trans fat . . . can be replaced with currently available healthy alternatives.”¹¹¹ Both Denmark and Canada have devised their own methods for removing trans fat from their food supply.¹¹² In 2003, Denmark

Consequences, 34 J. NUTRITION EDUC. & BEHAV. 140 (2002)).

¹⁰⁸ *Id.* The Board of Health cites a review conducted by the Institute of Medicine (“IOM”) which concluded that there is a “positive linear trend between trans fatty acid intake and total and LDL [“bad” cholesterol] concentration, and therefore increased risk of coronary heart disease.” *Id.* (citing INST. OF MED., LETTER REPORT ON DIETARY REFERENCE INTAKES FOR TRANS FATTY ACIDS 24 (2002), available at <http://www.iom.edu/Object.File/Master/13/083/TransFattyAcids.pdf>).

¹⁰⁹ “The 2005 Dietary Guidelines for Americans, issued by the United States Department of Agriculture (“USDA”), recommends that dietary intake of trans fat be ‘as low as possible.’” *Id.* (citing DIETARY GUIDELINES, *supra* note 10, at viii (2005), available at <http://www.health.gov/dietaryguidelines/dga2005/document/pdf/ExecutiveSummary.pdf>).

¹¹⁰ “[T]he American Heart Association guidelines issued in June 2006 recommend that trans fat intake be kept below 1% of total energy intake.” *Id.* (citing Alice H. Lichtenstein et al., *Diet and Lifestyle Recommendations Revision 2006: A Scientific Statement From the American Heart Association Nutrition Committee* 114 CIRCULATION 82 (2006) available at <http://circ.ahajournals.org/cgi/reprint/CIRCULATIONAHA.106.176158>).

¹¹¹ Notice § 81.08 NYC, *supra* note 1, at 3.

¹¹² Other countries such as Great Britain and Australia have also seen changes with regards to trans fats, albeit in less comprehensive forms than Canada and Denmark. Several of Great Britain’s largest supermarket chains have announced that they are in the process of removing trans fat from their own products. See *Retailers to stop trans-fat use*, BBC NEWS, Jan. 31, 2007, <http://news.bbc.co.uk/1/hi/health/6314753.stm>. In Australia, state and federal health ministers have not moved to impose regulations on the food industry, but the Australia and New Zealand Food Regulation Ministerial Council has “warned regulation was a strong possibility if progress was not made.” Australian Associated Press, *Ministers Decide Against Trans Fat Laws*, THE AGE, May 4, 2007, available at <http://www.theage.com.au/news/National/>

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was the first country to introduce regulations strictly limiting trans fat usage.¹¹³ The Danish Health Ministry reported in 2006 that since the ban was instituted, “cardiovascular disease has fallen by 20 percent.”¹¹⁴ The Board of Health also noted that the Danish restrictions on trans fat “did not appreciably affect the quality, cost or availability of food.”¹¹⁵ To the Board, this fact demonstrated that “artificial trans fat can be replaced without consumers noticing an effect.”¹¹⁶ The Board of Health also noted that in 2006, the Canadian Trans Fat Task Force recommended that “Canada limit trans fat in food service establishments to 2% of total fat content in margarine and vegetable oils and 5% of total fat content in all other food ingredients.”¹¹⁷ These bans in other countries were an important step toward creation of the Ban, but New York City decided to first attempt other domestic solutions.

Despite the existence of successful trans fat bans abroad, the

Ministers-decide-against-trans-fat-laws/2007/05/04/1177788382478.html.

¹¹³ Associated Press, *Denmark: Lower Trans Fat or Go to Jail*, MSNBC.com, Oct. 17, 2006, <http://www.msnbc.msn.com/id/15307763/> (“Denmark declared war on artery-clogging oils, making it illegal for any food to have more than 2 percent trans fats. Offenders now face hefty fines — or even prison terms Denmark is the only country to have so sharply limited trans fats”). A review of Denmark’s ban is available at tFX.org, *Denmark’s trans fat law*, <http://www.tfx.org.uk/page116.html> (last visited Nov. 1, 2008). “From 1 June 2003, the content of trans fatty acids in the oils and fats covered by this Executive Order shall not exceed 2 grams per 100 grams of oil or fat” *Id.*

¹¹⁴ MSNBC.com, *supra* note 113. While various factors undoubtedly may have contributed to this statistic, it should be noted that “[i]n countries that are making no effort to regulate the amount of trans fat in food, such as Hungary and Bulgaria, heart disease rates have continued to climb.” *Id.*

¹¹⁵ Notice § 81.08 NYC, *supra* note 1, at 3 (citing Mozaffarian et. al., *supra* note 72).

¹¹⁶ *Id.*

¹¹⁷ *Id.* (citing REPORT OF THE TRANS FAT TASK FORCE submitted to the Minister of Health, TRANSforming the Food Supply, June 2006, *available at* http://www.hc-sc.gc.ca/fn-an/nutrition/gras-trans-fats/tf-ge/tf-gt_rep-rap-eng.php. In June 2007, Canadian Health Minister Tony Clement announced that Canada will be adopting the Task Force’s recommendations. *See* News Release, Health Canada, Canada’s New Gov’t Calls on Indus. to Adopt Limits To Trans Fat (June 20, 2007), *available at* http://www.hc-sc.gc.ca/ahc-asc/media/nr-cp/_2007/2007_74-eng.php.

Board of Health did not enact the Ban until a voluntary program to restrict trans fat failed.¹¹⁸ In June 2005, New York City instituted the Trans Fat Education Campaign, which called for New York City restaurants to voluntarily remove trans fat from their menus.¹¹⁹ The campaign included outreach programs to educate “food suppliers, consumers and . . . every licensed restaurant in New York City.”¹²⁰ Unfortunately, the comparison of surveys conducted before and after the campaign indicated that the use of trans fat did not decline substantially.¹²¹ After the voluntary movement failed, New York City decided to move forward with the Ban.

In September 2006, the Board of Health published a “notice of intention” to create the Ban in the City Record, and in October 2006 held a public hearing.¹²² Response to the Ban was overwhelmingly positive, with 2,200 comments received in support of the Ban and only 70 comments against it.¹²³ Support for the Ban came from numerous sources, including “leading national and local professional societies, academic institutions, and local hospitals and advocacy groups.”¹²⁴ With this overwhelming

¹¹⁸ Notice § 81.08 NYC, *supra* note 1, at 3.

¹¹⁹ *Id.* (calling for “all NYC FSEs to voluntarily remove [trans fats] from the foods they were serving”). Perhaps this choice to allow restaurants to voluntarily remove trans fat was an effort to avoid complaints that restaurants could eliminate trans fat without government interference.

¹²⁰ *Id.*

¹²¹ *Id.* In a presentation at a Trans Atlantic Consumer Dialogue convention, Sonia Angell, the Director of the Board of Health CVD Prevention and Control Program, demonstrated that the level of New York City restaurants known to use trans fats did not decline from before and after the voluntary program was instituted by the Board of Health. See Sonia Angell, *The New York City Trans Fat Regulation: Preventing Heart Disease by Changing the Food Environment*, Apr. 8, 2008, at 12, available at www.tacd.org/events/meeting9/sonia_angell_transfat.pdf.

¹²² Notice § 81.08 NYC, *supra* note 1, at 1.

¹²³ *Id.* The Board of Health received “2,200 written and oral comments were received in support of the proposal and 70 comments in opposition.” *Id.*

¹²⁴ Press Release, The New York City Department of Health and Mental Hygiene, Board of Health Votes To Phase Out Artificial Trans Fat From New York City’s Restaurants (Dec. 5, 2006), available at <http://www.nyc.gov/html/doh/html/pr2006/pr114-06.shtml>. These sources of support included “the

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support, the Board of Health adopted the resolution.¹²⁵

The Ban was implemented in two stages: The first stage, which began in July 2007, bans the “use of oils, margarines and vegetable shortenings containing artificial trans fats that are used for frying and as spreads.”¹²⁶ The second, which began in July 2008, prohibits the use of “oils and shortenings used for deep frying yeast dough and cake batter and for all other foods containing artificial trans fats.”¹²⁷ This stage was implemented one year later, in July 2008, in order to give restaurants time to reformulate recipes where needed.¹²⁸

The Ban restricts the storage, distribution, and holding for service or use in preparation of any foods containing artificial trans fat.¹²⁹ The Ban allows a “food whose nutrition label . . . lists the trans fat content of the food as less than 0.5 grams per serving . . . [to] not be deemed to contain artificial trans fat.”¹³⁰ The Ban intentionally allows for products that are below this 0.5 threshold,

American Medical Association (AMA), National Hispanic Medical Association (NHMA), American College of Cardiology (ACC), American Cancer Society (ACS), American Diabetes Association (ADA), American Academy of Pediatrics (AAP), New York Academy of Medicine, Columbia University Medical Center, Harvard University, New York University, Institute for Urban Family Health, and Northern Manhattan Perinatal Partnership.” *Id.* The Ban also had major political support from New York City Mayor Michael Bloomberg. *See* Lueck & Severson, *supra* note 9 (stating that the New York ban was a victory for Mayor Bloomberg, an “outspoken health advocate”).

¹²⁵ Notice § 81.08 NYC, *supra* note 1, at 1.

¹²⁶ *Id.* at 4. The actual language of the Ban states: “No foods containing artificial trans fat, as defined in this section, shall be stored, distributed, held for service, used in preparation of any menu item or served in any food service establishment or by any mobile food unit commissary . . . except food that is being served directly to patrons in a manufacturer’s original sealed package.” *Id.* at 5.

¹²⁷ *Id.* at 6.

¹²⁸ While both stages of the Ban were originally slated to start at the same time, the second stage was delayed because the Board of Health received comments noting that “it could take longer to reformulate recipes to accommodate the restriction on artificial trans fat” for goods restricted during the second stage of the Ban. *Id.* at 4.

¹²⁹ *Id.* at 5.

¹³⁰ *Id.*

but still contain some trace levels of trans fat, because the FDA labeling regulations set the 0.5 allowable threshold.¹³¹ The Ban is enforced by Health Department inspectors in conjunction with their routine restaurant inspections.¹³² The inspectors first examine ingredient statements, and if they see a listing for trans fat, they then look at the Nutrition Facts panel.¹³³ In addition, the Board of Health reserved the right to perform nutritional testing to ensure compliance.¹³⁴ With both phases of the Ban now in effect, and health inspectors having begun their regular trans fat inspections of restaurants, it is now possible to begin evaluating the success of this legislation.

III. THE BAN SUCCESSFULLY REDUCES TRANS FAT IN OUR DIET

The Ban has met with much success in its goal to reduce trans fat in New York City restaurants.¹³⁵ It has become apparent, so far,

¹³¹ The Ban notes that FDA regulations “allow manufacturers of foods packaged for direct sale to consumers in retail markets to list trans fat content ‘0 grams’ if the product contains less than 0.5 grams per serving. *Id.* at 4. If the FDA does decide to tighten this threshold and not allow any acceptable percentage, it stands to reason that New York City might revise the Ban to reflect that level.

¹³² See Notice to Members, National Restaurant Association, New York City Menu-Labeling And Trans Fat Regulations: Requirements for Foodservice Operators, http://www.restaurant.org/government/state/nutrition/resources/nyc_requirement_s_062807.pdf (last visited Nov. 1, 2008) [hereinafter NRA Notice].

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ While it is still too early to see direct improvement in the health of New Yorkers, the Ban has been successful in aiding in the removal of trans fat from usage in New York City restaurants. See Jordan Lite, *Oil's well! City trans fat ban working*, N.Y. DAILY NEWS, Sept. 18, 2007 (quoting the Department of Health and Mental Hygiene: “Some 94 percent of the Big Apple’s more than 3,300 restaurants have switched to trans fat-free spreads and oils since the city’s ban on them went into effect in July”). In addition, a recent poll noted over 70% of New Yorkers statewide support phasing out trans fats. See Press Release, Center For Science In The Public Interest, *New Yorkers Want Statewide Phase-out of Artificial Trans Fat* (Apr. 24, 2008), available at <http://www.cspinet.org/new/200804241.html>.

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that a Ban at the municipal level is a more effective means of regulating trans fat when compared to federal and state initiatives.¹³⁶ In addition, the Ban has transformed the food industry's view of trans fat, as well as the benefits that have been gained through media exposure related to trans fat.¹³⁷ Finally, while detractors argue that the Ban impinges on personal choice,¹³⁸ there are numerous arguments why this is not the case. For example, the Ban can be said to increase choice for consumers who are now more aware of trans fat in their diet.¹³⁹ For all of these reasons, the Ban is successfully able to remove trans fat from our diet, and should be considered a strong model for similar trans fat

¹³⁶ Legislation to ban trans fat has been successful in several municipalities, while states have lagged behind. For example, where New York City, Philadelphia, Stamford, Conn., and Montgomery County, Md. have all banned trans fat, California is the only state to fully embrace such a ban at this time. See Jennifer Steinhauer, *California Bars Restaurant Use of Trans fats*, N.Y. TIMES, July 26, 2008, at A1. It should be noted that Massachusetts is considering such a ban, but that it has not come into effect to date, and the state's own public health commissioner stated that "[i]f he were to wait for legislative action [to implement a trans fat ban] . . . it might take another year or two." See Goldberg, *supra* note 31.

¹³⁷ Numerous fast-food chains have begun removing trans fat in anticipation of future bans being put in place. See Nancy Luna, *Fast-food Chains on Track to Comply With Trans Fat Ban*, ORANGE COUNTY REGISTER, July 31, 2008 ("Seeing the writing on the wall, many fast-food chains began cooking with trans fat-free oils more than a year [before California's ban was put into place].").

¹³⁸ Detractors from California's ban such as California Restaurant Association spokesman Daniel Conway argued that ingredients used by restaurants should be chosen by consumers, and not by the government. See Patrick McGreevy, *State Bans Trans Fats*, L.A. TIMES, July 26, 2008, at 1. One California restaurant owner questioned whether California was "going to outlaw salt next because it causes hypertension?" *Id.*

¹³⁹ The California Restaurant Association argued that trans fat bans are not necessary because restaurants are already eliminating trans fats voluntarily, as per customer demands. See Steinhauer, *supra* note 136. However, one of the main thrusts of the Ban in New York City was to ensure that restaurant customers were aware of the health risks posed by trans fat. See *infra* Part III.C (arguing that without the Ban, customers lacked freedom of choice because they were neither aware of the risks posed by trans fat, nor which foods contained trans fat).

bans in the future.

A. The Ban Has Already Been Successfully Implemented

Both stages of the Ban went into effect smoothly, thus demonstrating that the Ban has been effectively laid out as a means to reduce trans fat usage in restaurants. To date, almost all New York City restaurants have managed to comply with the trans fat regulation.¹⁴⁰ In the first week after the first phase of the Ban went into effect, only twenty out of 504 restaurants that were inspected were fined by the Health Department for being in violation of the Ban's provisions—this translates to a 96% compliance rate.¹⁴¹ Of the restaurants that were fined for offenses, most claimed that the fines were not for actually using trans fat laden ingredients while cooking, but for incidental violations such as not having disposed of all trans fat spreads or oils that had yet to be “tossed out.”¹⁴² Only one restaurant was fined for using oil that lacked proper labeling of trans-fat content, and that restaurant intends to fight the fine as the offending ingredient was peanut oil, which lacks trans fat.¹⁴³

Despite restaurants being able to comply with the Ban, fear exists that the Ban forces restaurants to rely upon unhealthy alternatives in order to comply with the law.¹⁴⁴ Although the goal of the Ban is to improve people's health, ironically, the end results

¹⁴⁰ See Lite, *supra* note 135.

¹⁴¹ See Maggie Haberman, *Trans-Fat Ticketers Leave No Margarine for Error*, N.Y. POST, Oct. 11, 2007, available at http://www.nypost.com/seven/10112007/news/regionalnews/trans_fat_ticketers_leave_no_m.htm.

¹⁴² *Id.*

¹⁴³ *Id.* The restaurant in question received no violations during a subsequent Board of Health inspection on Feb. 14, 2008. See Restaurant Inspection Information, Ballato's Restaurant, <http://www.nyc.gov/html/doh/html/rii/index.shtml> (last visited Nov. 1, 2008) (click “Restaurant inspection results online”; search “Ballato's Restaurant”).

¹⁴⁴ See John Tierney, *One Cook Too Many*, N.Y. TIMES, Sept. 30, 2006, at A15 (“[T]he campaign to take trans fat out of French fries might not do any good, and it might even do harm. For all the rhetoric against trans fats, they're not worse for you than the old-fashioned saturated fats in lard and butter and various cooking oils.”).

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could be worse. The ban might also force restaurants to fall back on other unhealthy alternatives that are high in saturated fat.¹⁴⁵ This switch to saturated fat would undermine the gains made by the ousting of trans fat.

The reality is that removal of trans fat does not necessitate restaurants substituting equally unhealthy or even unhealthier alternatives. To illustrate, Kentucky Fried Chicken managed to eliminate trans fat, while simultaneously lowering saturated fats by 20%.¹⁴⁶ Other major fast food chains, such as Domino's Pizza and Subway, have been urged to choose trans fat free substitutes that are relatively low in saturated fat, such as canola or grape-seed oil.¹⁴⁷ McDonald's converted to a zero-gram trans fat canola blend oil in 14,000 restaurants, while Taco Bell went trans fat free in all of its restaurants in April 2007.¹⁴⁸ In addition, companies that produce trans fat free oil substitutes are constantly working to create healthier products, and they recently have seen numerous successes.¹⁴⁹ The Board of Health believes that the worst-case scenario of saturated fat replacing trans fat is "an unlikely outcome given the widespread trend to healthier fats by food producers."¹⁵⁰ Moreover, even if this were to occur, the Board of Health pointed

¹⁴⁵ See Danny Rose, *Fast Food Industry Trans Fat Replacement 'Just as Bad'*, THE MERCURY, Sept. 26, 2007 (reviewing a meeting of major fast food chain companies in Australia, where the successful shift away from trans fats included an increase in use of fats high in saturated oils such as palm oil).

¹⁴⁶ See Dan Halpern, *Dr. Do-Gooder*, N.Y. MAG., Dec. 17, 2006, available at <http://nymag.com/health/features/25642/index.html>. Kentucky Fried Chicken proclaims on its own website that all of its chicken products contain zero grams of trans fat per serving, as it has begun using a "new cooking oil" that maintains its signature "11 herbs and spices," but with no trans fat. See <http://www.kfc.com/nutrition/zerotransfat.asp> (last visited Nov. 1, 2008).

¹⁴⁷ Danny Rose, *supra* note 145.

¹⁴⁸ See Luna, *supra* note 137 (listing several fast-food chains and their success in preparing for or already meeting the California state ban on trans fats).

¹⁴⁹ Dorian Block, *Come Fry With Me, Oil Save Ya From Trans-fat Ban*, N.Y. DAILY NEWS, July 1, 2007, at 14 (discussing how the owner of MidAtlantic Vegetable Shortening Co. is reducing the level of saturated fats in palm oil, thus easing complaints from local New Jersey bakers regarding a ban on trans fat).

¹⁵⁰ Notice § 81.08 NYC, *supra* note 1, at 2.

out in its notice of adoption of the Ban that “[e]ven in the most conservative estimates, based on replacing trans fat primarily by saturated fat . . . a significant although smaller reduction in coronary heart disease events is still expected.”¹⁵¹ Thus, it does not seem likely that the ban will create increased health risks by forcing restaurants to rely on unhealthy trans-fat free alternatives.

Critics also argue that the Ban’s brisk timetable makes it questionable whether supplies of healthier oils will be available to satisfy the required transition away from trans fat oils.¹⁵² There is a legitimate concern that supplies of healthier alternatives are too low to keep up with a sudden spike in demand, in essence creating a domestic “oil shortage” of a different kind.¹⁵³ While there may be enough supplies of healthier trans fat free oils for now, “if every place would enact a ban, supply would be a big challenge.”¹⁵⁴ Even the American Heart Association has voiced fears that rapid growth in demand for trans fat free oil could lead to restaurants relying on oils loaded with saturated fat in order to meet the requirements of the Ban.¹⁵⁵

The American Heart Association recommended a more gradual approach to phasing out trans fat.¹⁵⁶ Despite the confidence of oil-production companies that they could keep up with the demand for

¹⁵¹ *Id.*

¹⁵² See Carolyn Walkup, *Trans Fat’s Domino Effect: Oil Supplies may Lag Behind*, NATION’S RESTAURANT NEWS, June 11, 2007, at 4.

¹⁵³ *Id.* (“[E]xperts say that oil suppliers could be increasingly hard-pressed to keep pace with the foodservice industry’s growing demand for alternatives, especially if legal mandates to ban trans fats escalate.”).

¹⁵⁴ *Id.* (quoting Shelia Cohn Weiss, the National Restaurant Association’s director of nutritional policy).

¹⁵⁵ See Thomas J. Lueck, *Acting on Restaurant Industry Complaints, City Will Revise a Plan to Limit Trans Fats*, N.Y. TIMES, Nov. 16, 2006, at B3. “The [American Heart Association] said a sudden spike in demand for oil and ingredients with little trace of trans fats could lead to shortages and prompt restaurants to revert to the use of products with saturated fats.” *Id.* However, new supplies of healthy cooking oil are being constantly researched, and quantities of trans fat free oils are increasing to meet the demand. See, e.g., *Future of Biotech Crops on Display at Iowa Farm Show*, *supra* note 23; *No Trans Fats? No Problem!*, *supra* note 23.

¹⁵⁶ Lueck, *supra* note 155.

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their products,¹⁵⁷ New York City agreed to push back the timetable of the Ban.¹⁵⁸ The New York City legislature has made it clear it is willing to negotiate the deadlines to accommodate restaurants by shifting back the deadlines for both stages of the Ban by three months.¹⁵⁹ In addition, there have been several initiatives to increase the supplies of trans-fat free oil,¹⁶⁰ and companies have noted that suppliers of trans-fat free oil have produced enough quantity to allow restaurants to go without trans fat earlier than expected.¹⁶¹

Because the Ban has been successful in reducing trans fat without “creating a fanfare,”¹⁶² it has created impetus for other

¹⁵⁷ David B. Caruso, *New Yorkers Prepared to Stomach Trans Fat Ban*, THE PRESS OF ATLANTIC CITY, June 27, 2007, at B2 (citing a cooking oils specialist at Dow AgroSciences who notes that his company began investing in healthy alternatives to trans fat a decade ago, and that the company is ready to supply over a billion pounds of healthier alternative oils).

¹⁵⁸ Notice § 81.08 NYC, *supra* note 1, at 2. Because “it could take longer to reformulate recipes to accommodate the restriction on artificial trans fat in baked goods and deep fried yeast dough and cake batter,” the Ban was amended to push back the date for “oils and shortenings used for deep frying yeast dough and cake batter and for all other foods containing artificial trans fat” to July 1, 2008. *Id.*

¹⁵⁹ See Lueck & Severson, *supra* note 9 (“[T]he board granted concessions to the restaurant industry, which had complained vehemently that it was not being given enough time to experiment with new ingredients and recipes . . . some foods will fall under the later [July 1, 2008] deadline . . . that the board said were particularly hard to prepare with a trans fat substitute.”).

¹⁶⁰ See, e.g., Sarah Hills, *USDA Funds Soybean Oils Designed to Replace Trans Fats*, Sept. 11, 2008, <http://www.foodqualitynews.com/layout/set/print/content/view/print/219167> (noting that one company was “awarded a \$300,000 grant from the United States Department of Agriculture (USDA) to market its low linolenic soybean oils which offer an alternative to trans fats”).

¹⁶¹ See, e.g., Lauren Shepherd, *Burger King Switches to Trans Fat Free Oil*, Oct. 2, 2008, http://news.yahoo.com/s/ap/20081002/ap_on_bi_ge/burger_king_trans_fat; see also FryTest.com, Frequently Asked Questions, <http://frytest.com/faq.php> (Stephen Joseph’s company claims that it knows of “no restaurant operation that has had any difficulty obtaining zero trans fat oils. The supply is plentiful and more than sufficient.”).

¹⁶² Stephen Majors, *Roadblocks Take Bite Out Of Bills To Ban Trans Fats*, CAPITAL TIMES (Madison, Wis.), Nov. 28, 2007, at A5 (Proponents of state bills that create trans fat bans look for support by “pointing to New York City, where

cities¹⁶³ and states¹⁶⁴ to follow suit in implementing or planning similar trans fat bans of their own, thus paving the way for expanded restrictions on trans fat.¹⁶⁵ Media coverage of this success has aided in expanding the reach of the Ban's success. The media plays a crucial role in the realm of health promotion from "both a public education and social marketing standpoint."¹⁶⁶ It is

restaurants have complied with the ban's first phase - which applies to oils, shortening and margarine used for frying and spreading - without much fanfare."); see also Stephen Smith, *Trans Fat Ban Gains Eateries' Assent: Group Won't Oppose Bill Before Legislature*, BOSTON GLOBE, July 12, 2007, at 1A ("New York City approved a similar [trans fat] ban . . . a move that has inspired campaigns across the nation to consider similar regulations. The ban took effect . . . amid little complaint.").

¹⁶³ On February 8, 2007, the Philadelphia City Council passed a trans fat ban that was signed by the Philadelphia Mayor the following week. See Jonathan Last, *One Last Thing - Trans Fat Ban: Odd Use of City Funds*, PHILA. INQUIRER, Feb. 25, 2007, at D03. California became the first state to prohibit schools from "serving any foods fried in unhealthy oils or any foods containing artificial Trans Fats." Press Release, Office of the Governor of California, Governor Schwarzenegger and President Clinton Join Forces to Fight Childhood Obesity (Sept. 19, 2007), <http://www.gov.ca.gov/press-release/7468/>. In addition, Los Angeles has implemented a voluntary program where restaurants which are deemed to be trans fat free by health inspectors will get a special sticker to display in their establishment. See Susannah Rosenblatt, *L.A. County Rolls Out a Program -- and a Sticker -- to Entice Restaurants to Cook with More-Healthful Oils*, L.A. TIMES, Nov. 16, 2007, at 2.

¹⁶⁴ Majors, *supra* note 162 ("[O]ther states that have proposed a ban or restriction on trans fats in restaurants are Maryland, Michigan, Illinois, New Jersey, New Hampshire, Rhode Island, South Carolina, Tennessee, Vermont and Hawaii."); HARSANYI, *supra* note 2, at 30 ("Since New York instituted the ban there has been an explosion of interest in banning trans fats, from Chicago to Massachusetts.").

¹⁶⁵ Majors, *supra* note 162. While it might be argued that those following New York City's lead are just the blind leading the blind, it should be noted that it is the success of the Ban that has influenced others to follow New York City's example. For example: "States from Connecticut to California have looked this year to mimic the success of large cities like New York in banning artery-clogging trans fats from restaurants." *Id.*

¹⁶⁶ WING, *supra* note 14, at 563 (citing SURGEON GENERAL, A CALL TO ACTION TO PREVENT & DECREASE OVERWEIGHT & OBESITY 23 (2001)). "The media can provide a powerful forum for community members who are addressing the social and environmental influences on dietary and physical

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often difficult for people to discern what constitutes healthy eating behavior.¹⁶⁷ Now, citizens of both New York City and the rest of the nation have information at their disposal regarding the harmful impact of trans fat.¹⁶⁸ The more cities that follow New York's lead, the stronger the movement against trans fat will become.¹⁶⁹

B. A Ban At The Municipal Level Is The Most Effective Means Currently Available To Restrict Trans Fat

Some argue that rather than piece-meal regulations at the municipal level, the United States Congress should create trans fat regulation at a federal level by having the FDA take the lead on regulating trans fat.¹⁷⁰ If a federal law were in existence regarding use of trans fat in restaurants, it would most likely preempt the New York City law.¹⁷¹ However, it should also be noted that the FDA itself indicates that inspection of restaurants falls on the shoulders of state and local governments.¹⁷² In addition, a federal

activity patterns." *Id.*

¹⁶⁷ See *id.* at 570 ("[J]ust what is and what is not healthy behavior can be hard[] to discern.").

¹⁶⁸ See Majors, *supra* note 162.

¹⁶⁹ The Ban has started a chain reaction among other cities, and provided valuable information resources for other cities to utilize in developing their own bans. Anemona Hartocollis, *New York Prepares For Life After Trans Fats*, INT. HERALD TRIB., June 23, 2008, at 7 ("Since New York announced its trans fat ban, officials from about a dozen other cities, including Boston, Philadelphia and Seattle, have called the [New York City] Trans Fat Help Center for advice in implementing their own bans.").

¹⁷⁰ See Kornblet, *supra* note 25.

¹⁷¹ Evidence of this can be seen from a recent ruling striking down the sister law of the Ban which required calorie labeling on New York City restaurant menus. The court held that the regulation was expressly preempted by Nutrition Labeling and Education Act (NLEA). *New York State Rest. Ass'n v. New York City Bd. of Health*, 509 F. Supp. 2d 351 (S.D.N.Y. 2007). For general information about the menu-labeling law, see Notice to members, National Restaurant Association, *New York City Menu-Labeling And Trans Fat Regulations: Requirements for Foodservice Operators*, http://www.restaurant.org/government/state/nutrition/resources/nyc_requirements_062807.pdf (last visited Nov. 1, 2008).

¹⁷² The FDA's website describes the interaction between the FDA and state

ban may be impractical given that there currently exists a “policy gap at the state and federal levels”¹⁷³ that creates a need for action at the municipal level.

While trans fat regulation could potentially fall within the purview of the FDA, to date the only regulation that the FDA has enacted is to require the addition of trans fat to nutrition labels.¹⁷⁴ And while the FDA was petitioned to disclose trans fat content on labels as early as 1994, the FDA did not require the food industry to comply until 2006. It has been suggested that the FDA’s twelve-year delay was “explained by objections from food manufacturers.”¹⁷⁵ Given the powerful lobbying of the National Restaurant Association (the “NRA”), the Ban has demonstrated that the municipal level might be more successful than the FDA for creating necessary trans fat regulations, as municipal officials are difficult to lobby.¹⁷⁶

In addition to federal inactivity, action at the state level to ban trans fat has also hit several roadblocks.¹⁷⁷ Similar to the FDA, state legislators have faced strong lobbying opposition against trans fat bans from the NRA and its state-level affiliates.¹⁷⁸ In New York State itself, legislators have had a great deal of difficulty getting trans fat restrictions into state law.¹⁷⁹ Given the difficulty

and local governments; the FDA notes the role of the state and local governments as overseeing “[a]ll foods within their jurisdictions,” and that it is the state and local governments’ responsibility to “[i]nspect restaurants, grocery stores, and other retail food establishments.” See U.S. Food and Drug Administration, Food Safety: A Team Approach, <http://www.cfsan.fda.gov/~lrd/foodteam.html#state> (last visited Nov. 1, 2008).

¹⁷³ NESTLE, *supra* note 71, at 386.

¹⁷⁴ See Press release, United States Department of Health & Human Services, *supra* note 88.

¹⁷⁵ NESTLE, *supra* note 71, at 386.

¹⁷⁶ The NRA concedes that the Board of Health “is very difficult to lobby.” *Id.*

¹⁷⁷ See Majors, *supra* note 162, at A5 (“[I]n the 14 states that have so far proposed a ban or restriction, not a single bill has been passed as the year draws to a close.”).

¹⁷⁸ See *id.*

¹⁷⁹ See *id.* (noting the struggle of New York Democratic legislator, Felix Ortiz, to get a trans fat restriction into state law since 2004).

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of passing trans fat legislation at both the federal and state levels, New York City's ability to create the Ban at the municipal level sets the tone for the rest of the nation's lawmakers to follow.

C. The Ban Does Not Curtail Personal Choice

One major question is whether trans fat bans cross the boundary between health legislation and curtailing people's right to choose their own diet. In the words of the NRA: "[the Ban] is a misguided attempt at social engineering."¹⁸⁰ The NRA is not alone in its fears regarding the Ban, and consumer groups such as Citizens Lobbying Against Smoker Harassment ("CLASH") registered their disdain for the ban during public hearings that were held while the legislation was being drafted.¹⁸¹ CLASH argued the Ban "shows contempt for the public . . . for the marketplace, [and] for the principles of autonomy and choice."¹⁸² In Chicago, a city with a "long love affair with big, tasty, greasy food,"¹⁸³ the Mayor questioned a similar trans fat ban, stating: "Is the City Council going to plan our menus?"¹⁸⁴ Fear abounds that New York City is continuing a push that it started with cigarette bans to become a "Nanny State" of sorts,¹⁸⁵ and that the Ban is just a "panic du

¹⁸⁰ Lueck & Severson, *supra* note 9, at A1.

¹⁸¹ See Halpern, *supra* note 146. CLASH is a consumer group that has a self-described mission to "rescue the constitutional rights of all -- to free assembly, equal protection, and equal access to public life." New York City C.L.A.S.H., NYC C.L.A.S.H. Mission Statement, <http://www.nyclash.com/main.html> (last visited Nov. 1, 2008).

¹⁸² Halpern, *supra* note 146; see also Wood & Hefler, *supra* note 20 (citing numerous individual complaints regarding a then-proposed ban on trans fats in New Jersey to support the argument that "while no one doubted trans fats posed a health problem, many questioned the need for government involvement").

¹⁸³ Davey, *supra* note 21.

¹⁸⁴ *Id.*

¹⁸⁵ See Tierney, *supra* note 144 ("This [trans fat ban] is the biggest step yet in turning the Big Apple into the Big Nanny. . . . [P]revious bans were justified . . . to protect innocent victims from hazards created by others: the smoke coming from other people's cigarettes, the lead chips falling from walls that had been painted . . . by someone else.").

jour.”¹⁸⁶ Despite the arguments that the Ban is too restrictive, however, there are several reasons why concerns that the ban will lead to future restrictions on choice¹⁸⁷ are ungrounded.¹⁸⁸

Removing one dangerous substance from the ingredient pool does not mean that the Board of Health will be looking to remove all questionable ingredients in the future.¹⁸⁹ The Ban on trans fat was specifically created because trans fat is an artificial ingredient that has increased cardiac-health risks.¹⁹⁰ In addition, the Ban was created because, unlike numerous other potentially harmful threats,¹⁹¹ trans fat is not always detectable or easily avoided by consumers.¹⁹²

Arguably, the Ban actually increases freedom of choice by removing trans fat from restaurants where patrons would normally have no choice but to ingest it.¹⁹³ One of the main rationales of the Ban was to address this problem, noting that people have “no practical way to avoid [trans fat]”¹⁹⁴ served in restaurants. When people dine at a restaurant, they have already relinquished a part of their control over their diet by letting the restaurant choose the

¹⁸⁶ Gina Kolata, *The Panic Du Jour: Trans Fats in Foods*, N.Y. TIMES, Aug. 14, 2005, at 4 (quoting Dr. David Kritchevsky, dietary fat and cholesterol researcher at the Wistar Institute).

¹⁸⁷ HARSANYI, *supra* note 2, at 30 (questioning that “[i]f we can ban one unhealthy ingredient, what stops government from banning many or all of them?”).

¹⁸⁸ See Michael Sanson, Editor’s Letter, *The Trials and Tribulations of Running a Restaurant*, RESTAURANT HOSPITALITY, July 1, 2007, at 6 (“The restaurant industry is swamped with regulations, but at least this zero-trans fat legislation has turned out to be one that was relatively painless for you and good for your customers.”).

¹⁸⁹ See Halpern, *supra* note 146.

¹⁹⁰ See *supra* Part II.C.

¹⁹¹ See HARSANYI, *supra* note 2, at 30 (arguing that if trans fats are a “wrong,” this definition of wrong, and the resultant restrictions, should be extended to alcohol, sugar, pornography and SUVs).

¹⁹² See Halpern, *supra* note 146 (quoting New York City Health Commissioner Dr. Thomas Frieden: “In a restaurant, it’s not labeled, and there’s no practical way to do it. Nobody goes into a restaurant and says, ‘I’ll have a plate of trans fats.’”).

¹⁹³ See *id.*

¹⁹⁴ Notice § 81.08 NYC, *supra* note 1, at 1.

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ingredients, as well as how they are cooked.¹⁹⁵ This makes it extremely difficult for restaurant patrons to avoid eating trans fat, as many restaurants are not at this time required to list their ingredients.¹⁹⁶ Without banning trans fat, consumers who want to be certain they are not eating trans fat while dining out are reduced to the onerous task of having to utilize sources such as the internet or books specifically published with information regarding restaurants' ingredient lists, if the information is available at all.¹⁹⁷ When trans fat is forced upon people, they have no choice in their own health. However, if trans fat is summarily removed from the potential ingredient pool, people retain the freedom to choose whatever meal they want without fear of having this harmful fat forced upon them.

Finally, while restaurant owners have expressed fear that switching from trans fat to healthier alternatives will create a noticeable change in taste that will essentially ruin their products, it is questionable whether removing trans fat will impinge on consumers' dining experience when consumers may not notice any taste differentials.¹⁹⁸ Moreover, the success of several major fast-food companies to make the trans fat free transition without affecting taste suggests that these fears are not warranted.¹⁹⁹ The

¹⁹⁵ MITCHELL, *supra* note 8, at 40.

¹⁹⁶ See generally *N.Y. State Rest. Ass'n*, 509 F. Supp. 2d at 352.

¹⁹⁷ MITCHELL, *supra* note 8, at 41 (noting that "none of these options is convenient"); see also Halpern, *supra* note 146 (noting that the NYC Commissioner of Health created the ban so that consumers could "have a healthy life without having to go the extra mile").

¹⁹⁸ See, e.g., Wood & Hefler, *supra* note 20 (quoting a baker who noted she "had to go back to [trans fat] oil, because [their] customers said the doughnuts didn't taste right"); Katy McLaughlin, *Trans Fat Ban: Good for Hearts, Bad for Wallets?*, VA. PILOT & LEDGER-STAR, July 8, 2007, at 1 (describing one restaurant owner's attempt to change to a trans fat-free soybean alternative, where he said "[t]he french fries look like they've been standing on a steam table for an hour when they have not").

¹⁹⁹ See Laura Norton, *Many Local Fast-Food Outlets Already Shun Hydrogenated Oil*, SANTA ROSA PRESS DEMOCRAT, July 26, 2008 ("Fast-food joints from McDonald's to Taco Bell as well as many local doughnut shops, fish-and-ship cafes and taquerias are already happily sizzling without trans fat.").

results from the phase-in of new trans fat free oils in thousands of restaurants, however, have been “absolutely seamless.”²⁰⁰ For example, McDonald’s has gone to great lengths to create trans fat free french fries without losing the fries’ signature taste, and has obtained success: “McDonald’s . . . [has] finally struck gold It found a suitable trans fat-free oil that won’t change the taste or texture of its top-selling menu item: french fries.”²⁰¹ Several other large food chains have announced that they will be making similar changes to healthier cooking oils as well.²⁰² Kraft has had advances and setbacks in making changes to one of its premiere brands, Oreo cookies, but in the end was successful in eliminating trans fat from its cookies.²⁰³ Further, Crisco has had success in reformulating its shortening products,²⁰⁴ and Dunkin’ Donuts has

²⁰⁰ Caruso, *supra* note 157 (quoting McDonald’s spokesman Walt Riker); *see also, e.g.*, Smith, *supra* note 162 (quoting a restaurant owner who removed trans fat from all of his dishes, including french fries and chicken fingers, noticing that many customers were “dazed and confused because they didn’t know [he] had changed . . . [t]hey noticed zero difference.”).

²⁰¹ *Fat Buster: McDonald’s Says It Has Found Trans Fat-Free Oil for Its Fries*, CHI. TRIB., Jan. 29 2007, at 8. It should be noted that this trans fat-free formula came “[a]fter testing 18 varieties of oil in more than 50 blends during the last seven years.” *Id.* This great effort should not be minimized. However, if such a major food-industry icon such as McDonald’s can make the change, it should give hope to others.

²⁰² Wendy’s, Taco Bell and KFC have also announced that they were switching to new cooking oils. *See id.*

²⁰³ *See* Delroy Alexander, Jeremy Manier & Patricial Callahan, *For Every Fad, Another Cookie*, CHI. TRIB., Aug. 23, 2005, available at <http://www.chicagotribune.com/news/specials/chi-oreo-3,0462266.full.story>. The article reviews the successes and failures that Kraft has gone through in trying to achieve a trans fat free Oreo, noting how “Kraft scientists watched one promising prototype after another fail.” *Id.* Kraft has found an Oreo that maintains the taste, but keeping the same exact texture that makes Oreos so famous has proven difficult, and the only solution so far has involved using palm oil, an ingredient that has been met with less than positive reviews in the past. *Id.* Kraft has subsequently reported that its Oreo cookies are trans fat-free. *See* Nabisco World.com, Oreo, Nutrition Info, <http://www.nabiscoworld.com/Brands/> (click “Oreo,” click “nutrition info” underneath “Oreo - Sandwich Cookies - Oreo”) (listing trans fat content for Oreo cookies at zero).

²⁰⁴ Now Crisco’s shortening products have “zero grams trans fat per serving while maintaining 50 percent less saturated fat than butter.” *See* Press

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“found a way to all but eliminate the much-criticized [trans] fat from its signature snack.”²⁰⁵ The ability for these staples of the fast-food industry to make changes to their signature items without consumers noticing a change in taste supports the Board of Health’s statement that “artificial trans fat can be replaced with heart-healthier oils and fats without changing the taste of foods.”²⁰⁶

For smaller restaurants that may not have the same time or money to invest in new recipes that the larger food chains have,²⁰⁷ there are several resources available in order to help them make the transition without sacrificing taste. In instituting the Ban, New York City organized several resources, including the “Trans Fat Help Center”²⁰⁸ which “assist[s] restaurants in switching from artificial trans fat to healthier oils while maintaining the same taste and texture of the food.”²⁰⁹ Other resources available to the general public include websites dedicated to helping chefs come up with trans fat free recipes.²¹⁰ And there have been entire events dedicated to trans fat free frying. One such example was the 2007

Release, Crisco, Crisco Shortening Products Reformulated to Contain Zero Grams Trans Fat Per Serving (Jan. 24, 2007), *available at* http://crisco.com/Promotions_News/Press_Releases/2007/zero_grams_trans_fat.aspx.

²⁰⁵ Karen Robinson-Jacobs, *Dunkin’ Donuts to Cut Trans Fat from Menu*, DALLAS MORNING NEWS, Aug. 28, 2007, at 4D. Compare this with reports in 2005 that Dunkin’ Donuts “cannot find a way to make [a doughnut] that tastes good without using partially hydrogenated oil [trans fats].” Kim Severson & Melanie Warner, *America’s Oil Change: Losing Trans Fats; Fat Substitute, Once Praised, Is Pushed Out of the Kitchen*, N.Y. TIMES, Feb. 13, 2005, at 11.

²⁰⁶ Notice § 81.08 NYC, *supra* note 1, at 3.

²⁰⁷ See Robinson-Jacobs, *supra* note 205 (noting that Dunkin’ Donuts effort to make the move away from trans fats took four years of trying).

²⁰⁸ See NRA Notice, *supra* note 132. The Help Center “offers a telephone help line, classes and Web resources . . . [There is also a] downloadable list of ‘0 grams trans fat’ products that can serve as alternatives to products containing artificial trans fat.” *Id.*

²⁰⁹ *Id.* The Trans Fat Help Center’s website is available at <http://www.citytech.cuny.edu/notransfatnyc/> (last visited Sept. 10, 2008).

²¹⁰ There are websites that claim to “exist solely to provide unbiased information about the different zero trans fat cooking oils and other zero trans fat products on the market today.” FryTest.com, Who is FryTest.com?, <http://frytest.com> (last visited Nov. 1, 2008).

Great Indiana State Fair, a fair that is the “realm of corn dogs and fried pickles,”²¹¹ which went trans fat free this year with positive results.²¹²

D. New York’s Ban Creates Impetus For Change At A Corporate Level, Thus Creating Changes To The Trans Fat Landscape At A National Level

The Ban has captured the attention of the food industry, and created changes in its usage of trans fat that might otherwise not have occurred or would have happened at a slower pace.²¹³ This is remarkable, given that the fast-food industry has not generally been given credit for acquiescing to regulation of its products.²¹⁴ To the extent that the fast-food industry directly profits from Americans’ poor eating habits, it makes sense that major fast-food corporations would resist changes to that social and economic environment without regard for the health justifications for making changes.²¹⁵ While regulations of the fast-food industry may not necessarily transform fast-food into a healthy dining choice, when the fast-food industry refuses to make changes itself, regulation may become necessary.²¹⁶

The “healthier” versions [of fast-food] may be *better*

²¹¹ Monica Davey, *Elephant Ears Are Healthier than ever: Indiana State Fair Bans Trans Fats from Goodies*, THE GRAND RAPIDS PRESS, Aug. 26, 2007, at A14.

²¹² *Id.* (“[F]airgoers seemed pleased with the switch. The food tasted the same, they said happily.”).

²¹³ See McLaughlin, *supra* note 198 (statement of a consultant for a food-service consulting firm) (“New York’s pioneering law is being watched closely by the food industry.”).

²¹⁴ See WING, *supra* note 14, at 580–81.

²¹⁵ See *id.* at 575 (citing KELLY BROWNWELL & KATHERINE HORGAN, FOOD FIGHT (2004)) (noting that the consolidation of power in the food industry has put power in a few large companies who wield enormous power over government regulation).

²¹⁶ See WING, *supra* note 14, at 580–81 (“[S]ince [corporations] profit from [the current toxic] environment, they will resist any changes in that environment, whatever the merits of the public health-based justifications for doing so.”).

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choices, but they are not necessarily *good* choices
Food companies cannot resolve the impossible dilemma on
their own. For business reasons, they cannot – and will not
– stop making nutritionally questionable food products
Regulations are needed and they will surely come.²¹⁷

Despite these obstacles, the Ban has been able to make an impact on the fast-food industry. Consumer groups have been keeping a close tab on the level of trans fat in french fries and have noted that in cities that have established trans fat bans like New York City (and now Philadelphia), large fast-food establishments are reducing their trans fat usage.²¹⁸ While large fast-food chains such as McDonald's have not eliminated trans fat in all of their establishments, in New York City they have completely eliminated trans fat,²¹⁹ thus demonstrating that when large corporations are forced by regulation to eliminate trans fat, they will find a way to comply.

The fast-food industry has seized the trans fat initiative of late. Several major corporations now market their products as “trans fat free.”²²⁰ Given that these corporations generally produce food that is decried for its lack of nutritional value,²²¹ it is easy to wonder if trans fat is being used as a marketing tool to sell food that people should not be eating anyway. In short, the answer is yes, the fast-

²¹⁷ NESTLE, *supra* note 71, at 393. While this quote refers specifically to the food industry's fight against regulations restricting their marketing to children, the concept directly translates to trans fat regulations, as many of the arguments are similar.

²¹⁸ See Consumer Reports, *Claim Check: Are fast-food fries trans fat free?*, 72 CONSUMER REP. 7 (2007), available at <http://www.consumerreports.org/cro/food/dining-out/fast-food/trans-fat-fries-12-07/overview/trans-fat-fries.htm> (providing an overview trans-fats in fast food).

²¹⁹ *Id.* (“McDonald's fries claim a high 8 g for most locations and 0 g for New York City, and they met those claims.”).

²²⁰ Leaflets posted on one McDonald's advertise “0 grams Trans Fat and Still Loving the Taste!” Karen Matthews, *Most Get Rid of Trans Fat, but Few Following Calorie-Posting Policy*, ALB. TIMES UNION, July 2, 2007 at A3; see also sources cited *supra* note 7 (discussing KFC's trans fat free advertising).

²²¹ One author describes the food we eat today as “a highly efficient delivery system for fats, carbohydrates, sugars and other bad things.” MORGAN SPURLOCK, DON'T EAT THIS BOOK 24 (G. P. Putnam's Sons 2005).

food industry is taking advantage of the movement against trans fat to sell more fast-food.²²² If the public believes that trans fat is unhealthy, then it makes sense that the fast-food industry would take advantage of the public's beliefs.²²³

While the fast-food industry may have jumped on the trans fat free bandwagon out of self-interest,²²⁴ this is not necessarily a bad thing. Fast-food restaurants are a major part of our country's economy, and this industry has grown immensely in the recent past.²²⁵ The Ban puts the responsibility of removing trans fat where it belongs: not on the consumer, but the restaurants themselves. Consumers are aware that fast food is unhealthy.²²⁶ Given that these restaurants are not going away anytime soon, turning restaurants' attention toward healthier ingredients is a good thing. People are going to continue to eat french fries and hamburgers. If they can eat these foods without ingesting trans fat at the same time, then at least some of the harm of the fast-food industry will be prevented.

²²² "The interest of McDonald's in healthy eating is not altruistic: it is partly a case of rebranding and partly a defensive manoeuvre [sic] against the future possibility of obesity lawsuits." Gary Younge, *McDonald's Grabs a Piece of the Apple Pie*, THE GUARDIAN (United Kingdom), Mar. 23, 2005 (also noting that McDonald's has tried to take advantage of the health-food movement by becoming a major buyer of apples in the United States, as it markets its "Apple Dippers" as a healthy choice).

²²³ "As more people are becoming aware when it comes to nutrition and taking an interest in finding healthier foods, fast food restaurants are scrambling to roll out appealing options." Regina Schaffer, *Healthier Meals to Make Moms Happy*, THE PRESS OF ATLANTIC CITY, Sept. 21, 2007 at B1.

²²⁴ See Younge, *supra* note 222.

²²⁵ American spending on fast food has increased from \$6 billion in the 1970s to \$110 billion annually. ERIC SCHLOSSER, *FAST FOOD NATION 3* (Harper Perennial 2002).

²²⁶ As one article succinctly states this issue of choice: "[C]onsumers can easily figure out for themselves that a triple cheeseburger is going to be loaded with sodium, fats, carbohydrates and calories." Andrea Otanez, *Fat Chance We'll Take Responsibility For Our Health*, SEATTLE TIMES, Aug. 1, 2007, at 2.

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IV. CONCLUSION

New York City's Trans Fat Ban is a positive measure in the fight to save lives and improve the health of New Yorkers. While federal and state regulations have been slow to remove trans fat,²²⁷ the Ban demonstrates the willingness and ability to create change at a municipal level. By effectively regulating the removal of the ingredient from all usage in food served within restaurants, the Ban has been able to force trans fat from almost all restaurants in New York City without major changes in taste or price of the foods served. In addition, ancillary benefits of the Ban can be seen in the cities and states following New York City's lead,²²⁸ as well as through the impact the Ban has had on the fast-food industry as a whole.²²⁹ Given the Ban's recent enactment, and that the second stage has just come into effect, its future is still uncertain. However, the response to the Ban since it went into effect has been positive,²³⁰ thus demonstrating a start in the right direction.

²²⁷ California is the only state to have banned trans fat at the present time. *See Morino, supra* note 33.

²²⁸ Even the United States Coast Guard has stopped using trans fat. *See* Kip Wadlow, *Coast Guard Gets Heart Healthy By Removing Artificial Trans Fats From Menus*, COAST GUARD NEWS, Aug. 28, 2008, <http://coastguardnews.com/coast-guard-gets-heart-healthy-by-removing-artificial-trans-fats-from-menus/2008/08/28/>.

²²⁹ *See* Luna, *supra* note 137.

²³⁰ *See* Press Release, Center For Science In The Public Interest, *supra* note 135 (noting that over 70% of New Yorkers statewide support removing trans fat from restaurants). In Philadelphia, the Zagat Survey for 2009 Philadelphia Restaurants noted that 60% of Philadelphians want "trans-fats banned from food preparation." *See* Tiffany Barbalato, *Philadelphians Are The Highest Tippers In The Nation*, ZAGAT, Aug. 27, 2008, <http://www.zagat.com/About/Index.aspx?menu=PR120>.