

Co-signing Danger: Why the FDA should tighten regulations on the use of trans fat in foods in order to limit its adverse effects on the health of low-income African-Americans.

By: Christopher L. Burrell

Christopher L. Burrell is a third-year student at Birmingham School of Law. In addition to serving as a Senior Editor for the SRBLSA Law Journal, he served as the President of the school's BLSA chapter, Vice-Chancellor (President) of Sigma Delta Kappa law fraternity, and captain of one of BSOL's American Association for Justice trial advocacy teams. He also assisted as advisor and assistant coach for the 2008-2009 Miles College mock trial team. In the summer of 2009, he clerked in Montgomery, AL with the Federal Defenders Office for the Middle District of Alabama. Chris is a proud graduate of the University of North Alabama, where he received dual degrees in Political Science and Sociology.

Introduction

Food today is produced faster, grown larger, and is often produced and grown more cheaply. However, improved food products have come with a cost. While farmers and scientists have collaborated to develop chemicals and methods to produce crops faster and larger, while continuing to provide a price break to consumers, not all of these advances are advantageous to the consumer's health. The very advances that have yielded faster-produced, larger-sized, cheaply-processed foods have also caused a decline in the food's nutritional value. This decline has affected poor African-Americans more than other racial groups because African-Americans are more likely than other populations to rely on cheaper food produced through unhealthy processing methods.

In the past decade, the increasing trend amongst food manufacturers has been to use trans fat in making and preparing

foods.¹ Trans fat has proven to be cost effective, as it increases the shelf life of products and decreases the need for refrigeration.² As manufacturers have been able to lower production and storage costs with minimal sacrifices to flavor in the foods, they have also been able to provide foods at lower costs. The government has allowed manufacturers to continue using trans fat because less expensive food options allow consumers on governmental assistance to get more “bang” for the assistance dollars they receive, while those who do not receive governmental aid will have additional funds to spend in other areas of the economy.³ Consumers still have a choice in the types of food they consume, but because foods containing trans fat cost less, they are more likely to be purchased and consumed by low-income Americans. Because African-American families are more likely to live in poverty, they disproportionately suffer from dire conditions that are compounded by trans fat. In the past few years, the federal government has increased its efforts to regulate the way products are used, but without closer regulation on the way foods are prepared, labeled, and marketed, the government is essentially “co-signing” on the danger posed by these foods.

Section I of this note will provide a background on how trans fats were derived and the numerous ways in which it is used to prepare and preserve food. Section II of the note will discuss the measures the federal government has taken to regulate the use and marketing of products that contain trans fat. Section III will highlight health conditions that disproportionately affect African-Americans and detail how trans fat exacerbates those conditions. Section IV will discuss how low-income African-Americans are particularly vulnerable because they often do not know how to read the nutrition labels, and even when they can, they simply cannot afford healthier food. The final part of this note, Section V, recommends that the government take measures to better educate citizens on reading nutrition labels and reform regulations manufacturers are allowed to package and market their foods. The section concludes by asserting

¹ INST. OF MED., THE NAT’L RESEARCH COUNCIL, ENSURING SAFE FOOD FROM PRODUCTION TO CONSUMPTION 17-18 (1998).

² *Revealing Trans Fats*, FDA CONSUMER MAG., Sept.-Oct. 2003, at 20.

³ *Id.*

that the government's failure to take adequate measures, through legislation or more stringent regulations on food, amounts to a failure to protect low-income African-American citizens.

I. Background on Trans Fat and its use in food

Trans fat is a product used in the mixing and preparation of many foods. It is derived from partially hydrogenated oils.⁴ Hydrogenation is a process in which hydrogen is added to vegetable oil.⁵ When oil is partially hydrogenated, its shelf life increases and its flavor is enhanced. This means that the oil can be stored for a longer period of time before it must be used, and even after having been stored for long periods of time, it retains more of its original flavor.⁶ Another benefit is that the oil, and the products made from it, do not have to be refrigerated as long, if at all. This is a welcomed benefit for food producers because they can minimize expenses related to refrigerating the products, including maintaining refrigeration devices, or paying third-party companies to refrigerate their products.⁷ Because baking often requires semi-solid fats to suspend solids at room temperature, partially hydrogenated vegetable oils can replace the animal fats such as butter and lard, which have long been used by bakers.⁸ Compared to other semi-solid oils like palm oil, trans fat is a very inexpensive alternative because vegetables can be raised cheaper than livestock. As a result, the oil derived from plants is less expensive than oil derived from animals.

Foods can either be made with trans fat or cooked in oils that contain trans fat. For years, McDonald's, Burger King, and other fast

⁴ NEW YORK CITY, N.Y. HEALTH CODE § 81.08 (2006); *See also* Notice of Adoption of an Amendment to Article 81 of the New York City Health Code (2006) [hereinafter Notice of Adoption], *available at* <http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art81-08.pdf> (last visited June 14, 2009).

⁵ RAYMOND CHANG, *ESSENTIAL CHEMISTRY* 375 (1996).

⁶ *Revealing Trans Fats*, *supra* note 2.

⁷ *Id.*

⁸ TRANS FAT TASK FORCE, HEALTH CANADA, *TRANSFORMING THE FOOD SUPPLY* 4 (2006) [hereinafter TASK FORCE], *available at* http://www.hc-sc.gc.ca/fn-an/nutrition/gras-trans-fats/tf-ge/tf-gt_rep-rap_e.html.

food restaurants have fried their foods in oils that were high in trans fat.⁹ Popular items such as French fries, apple pies, and chicken nuggets were often prepared in partially hydrogenated oils and consumed in large quantities by customers.¹⁰ Trans fat is an actual ingredient in other foods like hamburgers and milkshakes. Even everyday condiments, such as dipping sauces, contain the harmful ingredient.

When converted to a solid, the oils containing trans fat replaced items such as butter and shortening in cakes, pastries, and other baked goods.¹¹ The trans fat is beneficial to food manufacturers because, unlike butter, which melts at room temperature, trans fat oil requires less refrigeration prior to use.¹² By not having to refrigerate the solids before they are used in products, manufacturers lower their production costs. Once the goods are baked, they often do not require refrigeration. Not having to refrigerate the finished product, along with the enhanced flavor of the oil, makes products not only better tasting, but lengthens freshness time.

While trans fat serves a useful purpose in lowering food costs, its consumption can also have numerous deleterious effects.¹³ Trans fat consumption increases the risk of coronary heart disease. In addition, trans fat consumption has been shown to increase low-density lipoprotein, commonly referred to as LDL, or “bad” cholesterol. The food is also being linked to increases in diabetes, obesity, and inflammation, the body’s response to injury.¹⁴ This finding is particularly troublesome because, as will be shown in Section III, diabetes and obesity are known to affect African-Americans at higher rates than people of other ethnicities.

⁹ Marc Kaufman, *McDonald's to Give Fat a Break: Fast-Food Chain to Use Healthier Oil for Cooking*, WASH. POST, Sept. 4, 2002, at A7 (noting that because of health concerns, McDonald's had previously changed its cooking oil from beef tallow to a blend of corn and oil shortening).

¹⁰ *Id.*

¹¹ TASK FORCE, *supra* note 8.

¹² *Id.*

¹³ Notice of Adoption, *supra* note 4.

¹⁴ *Id.*

II. Federal government regulations on trans fat uses and product marketing

When it became apparent that trans fat had an adverse effect on consumers' health, the government on almost every level took measures to regulate the way trans fat was used and marketed. A number of cities instituted bans on the use of trans fat in restaurants. In 2005, New York City, one of the largest restaurant markets in the United States, instituted a ban on trans fat usage in all city restaurants.¹⁵ The state of North Carolina does not allow food containing trans fat to be served in its school cafeterias.¹⁶ These bans did more than limit the amount of trans fat served to the public. Bans stopped the use of trans fat all together. Still, there are a number of issues inherent in such bans, such as free commerce and regulatory takings.¹⁷

An example of the free commerce issue was the fallout from the New York City trans fat ban. When New York City, a city with over 20,000 restaurants, issued a trans fat ban in 2006, a number of restaurants instantly rejected the idea.¹⁸ Among other protests, the restaurants claimed that they froze and shipped foods from other states, and because they prepared some of their menu items in other states, in processes that required the use of trans fat, trans fat bans in New York violated federal rules on commerce.¹⁹ Nonetheless, the bans were not repealed.

Concerns about regulatory takings emerged as well. Because the first federal regulation on trans fat was simply requiring manufacturers to disclose its presence in their foods, many restaurants felt their obligation should be the same. When they were required to do more than simply disclose its presence – they had to actually

¹⁵ NEW YORK CITY, N.Y. HEALTH CODE § 81.08 (2006).

¹⁶ N.C. GEN. STAT. § 115C-264 (West 2007).

¹⁷ Carmen Filosa, *Trans Fat Bans: The Next Regulatory Taking?*, 29 J. LEGAL MED. 99 (2008).

¹⁸ Thomas J. Lueck & Kim Severson, *Big Brother in the Kitchen? New Yorkers Balk*, N. Y. TIMES, Sept. 28, 2006, available at <http://www.nytimes.com/2006/09/28/nyregion/28fat.html>.

¹⁹ *Id.*

remove it altogether – they argued that this regulation put such a strain on their businesses that it amounted to a regulatory taking by the local government.²⁰ A free-commerce challenge, and especially a takings claim, would substantially impede the government’s ability to institute such bans. If a court held that a regulatory taking had occurred as the result of a governmental ban on trans fat, then the government would be required to compensate the restaurant owners.²¹ Enforcing the bans, and compensating restaurants whose businesses suffered from it, would become extremely expensive for governments. As a result, governments needed to impose regulations that would be less susceptible to takings and free commerce challenges. This section details many of the measures federal and state governments instituted to regulate trans fat usage, while also pointing out a number of its shortcomings that result from a failure to regulate other avenues by which the product affects consumers.

The Canadian government banned trans fat, making itself the first in North America to initiate such a ban. While the United States sought only to change the way foods were packaged, by mandating that companies disclose the presence of trans fat in their products, the Canadian government called for a task force and followed the call with regulations that limited trans fat in all foods.²² Because of Canada’s close proximity to the United States and the large amount of food exports between the countries, the bans in Canada were crucial to the success of bans in the United States. Upon their realization that Canadians had banned trans fat, some American consumers came to expect similar bans in the United States. Another effect of the Canadian ban was that it forced American manufacturers who shipped products to Canada to stop selling their products in Canada and forfeit that market, to make two versions of the same product that could be sold in both markets, or to begin finding ways to make their products without trans fat.

²⁰ *Id.*

²¹ Filosa, *supra* note 17.

²² *See generally* Ban Trans Fats: The Campaign to Ban Partially Hydrogenated Oils, <http://www.bantransfats.com/transfatnews.html> (last visited Mar. 21, 2009).

In 2006, the Food and Drug Administration (FDA), in its attempt to better inform and protect consumers, promulgated less-restrictive means with the introduction of new regulations.²³ The FDA regulations did not seek to ban trans fats, but rather sought to educate the public on its presence in foods and the effects it could have on them.²⁴ The FDA required manufacturers to alter their labeling to alert consumers about the presence of trans fat in their products. Specifically, “trans fat” must be listed under the saturated fat category on the nutrition labels.²⁵ In order to advertise that their products were “free” of trans fat, companies were required to lower trans fat in their products to 0.5 grams per serving.²⁶

Trans fat became such a hot topic that the new regulations actually had another impact. Manufacturers sought to avoid labeling their foods as containing trans fat (in an effort to make their products appear healthier), so manufacturers removed trans fat altogether. Therefore, a number of manufacturers voluntarily stopped using trans fat.²⁷ McDonald’s, known for its French fries, announced that it would switch to a trans fat-free oil to fry their products.²⁸ Other top fast food companies, such as Burger King, also announced that they would discontinue the use of trans fat.²⁹ Snack-food makers undertook similar measures.³⁰

Though a number of companies discontinued using trans fat, others only decreased their use of the product or simply disclosed its presence in their foods. These products remain a danger to consumers.

²³ 21 C.F.R. § 101.1 (2006).

²⁵ *Id.* at § 101.9(c)(2)(i).

²⁶ *Id.* at § 101.9(c)(2)(ii).

²⁷ David B. Caruso, *KFC Phasing Out Trans Fats in Cooking for Popular Items*, N.Y. SUN, Oct. 30, 2006, available at <http://www.nysun.com/new-york/kfc-phasing-out-trans-fats-in-cooking-for-popular/42534/>.

²⁸ Kaufman, *supra* note 9.

²⁹ *Burger King Testing Oils Without Trans Fats in Restaurants for Possible Switch in 2008*, 1010 WINS, Jan. 31, 2007, available at <http://www.1010wins.com/pages/193864.php>.

³⁰ Harvard Sch. of Pub. Health, Trans Fats, http://www.hsph.harvard.edu/nutritionsource/nutrition-news/transfats/#big_changes (last visited Aug. 4, 2009).

Some foods are not completely “free” of trans fat; the foods simply fall below the 0.5 gram requirement that allows the manufacturers to advertise the products as being “trans fat free.” As a result, many consumers can still ingest a large amount of trans fat from having eaten large quantities or multiple servings of these products. Products still containing trans fat pose a danger in particular to consumers who are less educated and unable to effectively interpret the information on the nutritional labels, or whose income is too low to be able to afford higher-priced “healthy” food choices.

Though the federal government has been active in changing the way trans fat is used in making and preparing foods, it has been less active in regulating the way products are marketed, particularly to children. Changing the way products are marketed to children would substantially aid in establishing healthier eating choices and promoting better food education by providing individuals with this knowledge at a younger age. Companies should be aware that reaching tomorrow’s consumers today is important. In 2006, the Federal Trade Commission found that the nation’s largest food and beverage companies spent \$1.6 billion to market their products to children and adolescents.³¹ The companies used methods ranging from television and radio to billboards and the internet to generate interest in their products and increase sales.³² Television held the largest share of advertising budgets, with forty-six percent of all youth-marketing expenditures being used in this medium.³³ This statistic is particularly relevant to African-Americans because African-American youth (along with Hispanic youth) spend more time watching television than their white counterparts.³⁴

³¹ FED. TRADE COMM’N, *MARKETING FOOD TO CHILDREN AND ADOLESCENTS: A REVIEW OF INDUSTRY EXPENDITURES, ACTIVITIES, AND SELF-REGULATION* 12 (2008), available at http://www.ftc.gov/os/2008/07/P064504_foodmktngreport.pdf.

³² Margaret Gamble & Nancy Cotugna, *A Quarter Century of TV Food Advertising Targeted at Children*, 23 AM. J. OF HEALTH BEHAV. 261 (1999).

³³ FED. TRADE COMM’N, *supra* note 31.

³⁴ DONALD F. ROBERTS, ULA G. FOEHR, & VICTORIA RIDEOUT, KAISER FAMILY FOUND., *GENERATION M: MEDIA IN THE LIVES OF 8-18 YEAR-OLDS* 24 (2005), available at <http://www.kff.org/entmedia/upload/Generation-M-Media-in-the-Lives-of-8-18-Year-olds-Report.pdf>.

Television stations that target African-American youth tend to air a higher proportion of food and beverage advertisements than stations that broadcast to a general-race audience. One study reviewed thirty-six hours of after-school programming and found that Black Entertainment Television (BET), whose target audience is African Americans, showed a higher percentage of food and beverage commercials than channels such as Warner Brothers or the Disney Channel, which both have a general target audience. On BET, food and beverage commercials constituted sixty-three percent of its advertising, compared with thirty-three percent for Warner Brothers and only four percent for the Disney Channel.³⁵ This data shows that, even from an early age, African-Americans are immersed in an environment where their perceptions and attitudes about food are frequently subject to external influences.

In terms of federal government regulation, little has been done about the way products are marketed to children. Although the purpose of the United States Federal Communications Commission (FCC) is to regulate broadcast television to ensure stations are operated in the public interest, sparse action has been taken to regulate advertising aimed at children. The extent of the FCC regulation has been to limit the amount of advertising shown on children's programming to no more than 10.5 minutes per hour on weekends and no more than twelve minutes per hour on weekdays.³⁶ These limits encompass all advertising and make no distinction between food advertisements and any other form of advertising. As a result of the failure to specifically address advertising related to foods and beverages, the current limits do not maximize the FCC's full regulatory power as a way to effectively neutralize advertising products that can have an adverse effect on children's health.

³⁵ Corliss Outley & Abdissa Taddese, *A Content Analysis of Health and Physical Activity Messages Marketed to African American Children During After-School Television Programming*, 160 ARCH. OF PEDIATR. ADOLESC. MED. 432, 434 (2006.).

³⁶ INST. OF MED., COMMITTEE ON FOOD MARKETING AND THE DIETS OF CHILDREN AND YOUTH, FOOD AND NUTRITION BOARD, ET AL, *FOOD MARKETING TO CHILDREN AND YOUTH: THREAT OR OPPORTUNITY* 181 (Nat'l Acad. Press 2005).

Advertising through other media, such as instant messaging and the Internet, has also gone largely unregulated as well, though the types of products marketed are foods of poor nutritional quality. A 2005 Kaiser Foundation survey found that eighty-five percent of foods and beverages advertised on television were also featured on websites that target children and adolescents.³⁷ A similar study focused on ten children's websites. It found that out of a total of 308 marketing instances, 248 were for candy and forty-two were for sweetened breakfast cereals.³⁸ Companies are also using social networking sites such as Facebook and MySpace to target adolescents. The advertising budget for social networking websites alone is expected to reach \$1.8 billion by 2010.³⁹ Again, children are faced with constant influence on their perceptions and attitudes toward food. Without some form of sufficient regulation, that influence will continue to grow unfettered, and there will be little to help children make better food choices, and specifically, to stay away from foods that contain trans fat.

III. Health conditions that primarily affect African-Americans and are made worse by trans fat

The African-American community faces health issues such as high cholesterol, hypertension, diabetes and obesity at alarmingly high rates. These are among the same conditions that are made worse by trans fat. Because African-Americans face these conditions more frequently than other races, African-Americans are more likely to suffer from the deleterious effect of trans fat in their foods. This is the primary reason that regulations on trans fat should be strengthened in a way that better educates these consumers and gives them healthier

³⁷ ELIZABETH S. MOORE, KAISER FAMILY FOUND., IT'S CHILD PLAY: ADVERTISING AND THE ONLINE MARKETING OF FOOD TO CHILDREN 27 (2006), available at <http://www.kff.org/entmedia/upload/7536.cfm>.

³⁸ Kristi Weber, Mary Story & Lisa Harnack, *Internet Food Marketing Strategies Aimed at Children and Adolescents: A Content Analysis of Food and Beverage Brand Web Sites*, 106 J. AM. DIET. ASSOC. 1463, 1465 (2006).

³⁹ JEFF CHESTER & KATHLYN MONTGOMERY, BERKELEY MEDIA STUD. GROUP, INTERACTIVE FOOD AND BEVERAGE MARKETING: TARGETING CHILDREN AND YOUTH IN THE DIGITAL AGE 40 (2007), available at <http://digitalads.org/documents/digiMarketingFull.pdf>.

food options. Since African- Americans disproportionately suffer from conditions worsened by the consumption of trans fat, it naturally follows that African-Americans are particularly in need of additional protection that would come from better education and healthier food choices.

Trans fat in foods has proven to be a contributing factor to high cholesterol. Consuming saturated fats and trans fat raises an individual's low density lipoprotein (LDL), or "bad cholesterol."⁴⁰ While saturated fat is the primary source of increased cholesterol levels, trans fat is a contributing factor.⁴¹ When the LDL level is too high, fatty deposits form along the artery walls and can lead to chest pain, coronary artery disease, and even heart attacks.⁴² The restriction caused by these deposits may also hinder the blood flow to the brain and result in stroke.⁴³

A National Health and Nutrition Examination Survey (NHANES), conducted by the Center for Disease Control, showed that from 2001-2004, African-Americans comprised a higher percentage than any other ethnic group of persons twenty years of age and over who had suffered from high blood pressure. African-American males made up 27.8 percent of all males suffering from hypertension. African-American females comprised 26.9 percent of the same category of all females suffering from the illness.⁴⁴ When the categories were adjusted to include all people over the age of eighteen who had high blood pressure, African-Americans constituted 31.6 percent of all patients.⁴⁵

⁴⁰ *Revealing Trans Fats*, *supra* note 2.

⁴¹ TASK FORCE, *supra* note 8, at 5.

⁴² *Trans Fat: Avoid This Cholesterol Double Whammy*, MAYOCLINIC.COM, May 7, 2009, <http://www.mayoclinic.com/health/trans-fat/CL00032>.

⁴³ *Id.*

⁴⁴ Margaret Lethbridge-Çejku, Deborah Rose, & Jackline Vickerie, *Summary Health Statistics for U.S. Adults: National Health Interview Survey, 2004*, 10 VITAL AND HEALTH STAT. ser. 228 (Ctrs. for Disease Control and Prevention/Nat'l Ctr. for Health Stat., Hyattsville, Md.), May 2006, *available at* http://www.cdc.gov/nchs/data/series/sr_10/sr10_228.pdf.

⁴⁵ *Id.* at 17.

Diabetes is another condition that afflicts African-Americans. Because a higher body weight makes diabetes harder to handle, and consuming trans fat leads to weight gain, consuming trans fat has a direct effect on one's ability to manage diabetes. As of 2002, approximately 2.7 million African-Americans over the age of twenty had diabetes.⁴⁶ Almost one-third of these cases were undetected. As the population ages, the number of African-Americans suffering from the disease increases. Among African-American women over the age of fifty-five, twenty-five percent of them have diabetes. Among all African-Americans between ages sixty-five and seventy-four, twenty-five percent suffer from the disease. When compared with other ethnic groups, African-Americans are 1.6 times more likely to be diagnosed with diabetes than non-Latino whites.⁴⁷

African-Americans with diabetes face increased risks of heart disease, stroke, and other macro-vascular complications. These complications can lead to higher instances of blindness, amputations, kidney disease, and kidney failure (end stage renal disease).⁴⁸ Blindness results from diabetic retinopathy, which is any abnormality or weakening of the small blood vessels of the retina caused by diabetes. Diabetes is also a cause of non-traumatic lower limb amputations, and African-Americans are up to 2.5 times more likely to suffer from this form of lower limb amputation.⁴⁹ Up to twenty-one percent of all people with diabetes develop kidney disease, and up to forty-three percent of all new cases of kidney failure are people suffering from diabetes.⁵⁰ Again, African-Americans are up to 5.6 times more likely to suffer from kidney disease. With all of the complications stemming from diabetes, it is important for African-Americans to lower their chances of developing the condition, and ultimately leading to any of these unfortunate consequences.

⁴⁶ Am. Diabetes Ass'n, Diabetes Statistics for African Americans, <http://www.diabetes.org/diabetes-statistics/african-americans.jsp> (last visited Dec. 27, 2008).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

Obesity is another ailment that afflicts African-Americans on a much larger scale than non-African-Americans. In a 2007 survey among adults over the age of eighteen years old, African-Americans constituted 35.3 percent of those who were obese.⁵¹ African-American women were especially obese. The CDC study found that 51.1 percent of African-American women suffered from obesity. Obese women are those women over the age of twenty who have a Body Mass Index (BMI) of thirty or greater.⁵² The issue of trans fat aside, it is apparent that African-Americans are already more likely to be obese or overweight. When the direct correlation between obesity and trans fat is introduced, the adverse effect of the trans fat on African-Americans becomes even more apparent.

Sleep apnea is one more health concern that arises for African-Americans, as it is caused to some degree by the other previously mentioned ailments, such as obesity. Sleep apnea is a disorder in which an individual pauses or stops breathing for periods of time while he/she is asleep.⁵³ When the pauses occur, the individual's blood oxygen levels can dip, which can eventually lead to high blood pressure, heart attack, stroke, or diabetes.⁵⁴ Although there is no indication that sleep apnea disproportionately affects African-Americans, it has been established that many of the conditions leading to sleep apnea are the same conditions that African-Americans suffer at higher rates than other ethnic groups; namely obesity and high blood pressure. Therefore, it is arguable that African-Americans may have an increased risk of developing sleep apnea, due in large part to suffering from higher incidences of the conditions like obesity and high blood pressure that cause sleep apnea and are directly linked to trans fat consumption.

III. Why Low-income African-Americans are particularly vulnerable.

⁵¹ CHESTER & MONTGOMERY, *supra* note 39, at Table 31.

⁵² *Id.* at Table 30.

⁵³ Nat'l Heart, Lung, & Blood Inst., Sleep Apnea, http://www.nhlbi.nih.gov/health/dci/Diseases/SleepApnea/Sleep_Apnea_WhatIs.html (last visited Dec. 20, 2008).

⁵⁴ *Id.*

People with lower incomes are particularly vulnerable to adverse effects of consuming trans fat because they cannot afford to buy healthier food to cook for their meals. A close correlation exists between a person's level of education and a person's level of poverty.⁵⁵ People who are poverty-stricken are less likely to accurately interpret nutritional facts in such a way that they can truly make an informed decision when deciding to consume these products. Even if they understood the nutritional facts, because products containing trans fat are generally so much cheaper, they may have no other options but to buy and consume them anyway.

According to a Vanderbilt University Medical Center survey, generally, many people find it difficult to understand nutrition labels. Being able to clearly process the information on the labels and effectively gain the information they need requires reading and math skills that a number of individuals may not possess. The Vanderbilt research team surveyed 200 patients drawn from a wide range of socioeconomic backgrounds. The majority of the participants had at least a ninth grade education, and several others had at least some college education. They designed a nutrition-label survey with input from dietitians, health literacy/numeracy experts, and doctors. Forty percent of the participants had a chronic illness requiring specific dietary intervention, and twenty-three percent were on a specific diet plan.⁵⁶

The survey results demonstrated that when using the nutrition labels to make everyday decisions, most of the participants struggled to calculate dietary information. Those with less education faced even greater difficulty in obtaining the information they needed.⁵⁷ When required to calculate the amount of carbohydrates in a twenty-ounce soda with 2.5 servings per bottle, only thirty-two percent of the

⁵⁵ Elsevier Health Sciences, *Understanding Food Nutrition Labels Challenging For Many People*, SCIENCE DAILY, Sept. 26, 2006, <http://www.sciencedaily.com/releases/2006/09/060926072110.htm>.

⁵⁶ Russell L. Rothman et al., *Patient Understanding of Food Labels: The Role of Literacy and Numeracy*, 31 AM. J. PREVENTIVE MED. 391 (Nov. 2006).

⁵⁷ *Id.* at 393.

respondents could do so. Only twenty-two percent could determine the amount of carbohydrates in two slices of low-carb bread.⁵⁸ When specifying the common reasons for failing to get the correct information, the participants indicated that they had incorrectly calculated the numbers or were simply confused by the extra information on the food label.⁵⁹

Even if consumers could understand nutrition information, most still could not afford healthier food choices. Lower-income households tend not to meet federal recommendations for consumption of fruits, vegetables, and whole grains and consume fewer servings of nutritious foods than other households.⁶⁰ This phenomenon occurs because lower-income households cannot afford the higher-priced foods. Lower-income households are commonly faced with the dilemma of having to choose between healthy foods or other expenditures that may take higher priority. Even by standards put forth by the government, it appears that healthy foods are not affordable for lower-income families.

The USDA has struggled to define and calculate the cost of a healthy diet since its first published food plan in 1984. The USDA's current plan, calculated by the Center for Nutrition Policy and Promotion (CNPP), details four cost models of foods that people can purchase and prepare at home: Thrifty, Low-Cost, Moderate-Cost, and Liberal Food Plan.⁶¹ Each plan is calculated using national-average price estimates. As of June 2008, the food plans ranged from

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Elise Golan et al., *Can Low-Income Americans Afford a Healthy Diet?*, AMBER WAVES (U.S. Dep't of Agric./Econ. Res. Serv., Springfield, Va.), Nov. 2008, available at <http://www.ers.usda.gov/AmberWaves/November08/Features/AffordHealthyDiet.htm>.

⁶¹ HAYDEN STEWART & NOEL BLISARD, ECON. RES. SERV., U.S. DEP'T OF AGRIC., ARE LOWER-INCOME HOUSEHOLDS WILLING AND ABLE TO BUDGET FOR FRUITS AND VEGETABLES? (2008), available at <http://www.ers.usda.gov/publications/err54/err54.pdf>; See also JOANIE F. GUTHRIE ET AL., ECON. RES. SERV., U.S. DEP'T OF AGRIC., CAN FOOD STAMPS DO MORE TO IMPROVE FOOD CHOICES?: AN ECONOMIC PERSPECTIVE (2007), available at <http://www.ers.usda.gov/publications/eib29>.

\$588.30 per month for a family of two adults and two school-age children on the Thrifty Food Plan, to \$1,151.40 per month for the same-sized family on the Liberal Food Plan.⁶² This study concluded that foods would be affordable because the plans ranged from eight percent to eleven percent of the households' income, while most households typically spent ten percent of their gross income on food.⁶³ The study also found that lower-income households receiving maximum food stamp benefits were also able to adequately provide nutritious meals. However, the study did not address variations between the estimates used to calculate the costs of each food plan versus what the consumers could actually find themselves paying at the store. The study also did not take into account surges in food prices attributable to external factors, such as natural disasters and food shortages or rising fuel costs.

An added aspect the study failed to address was the affordability of food for low-income households that do not receive food stamp benefits, or that do not receive maximum benefits, instead receiving lower benefit amounts because they do generate some income. The government assumes that thirty percent of income is a reasonable amount of the household's income to spend on food. Therefore, maximum benefits are reduced by thirty percent of the household's income. The figure is then further adjusted for a number of deductions.⁶⁴ This thirty percent standard, however, is a figure that originated with the Social Security Administration's calculations in 1963, and relied on data from the 1955 Household Food Consumption Survey to estimate the share of income spent on food. This standard is outdated and therefore inaccurately measures today's standards. Changes in living standards and other factors now put the percentage of household income spent on food at around ten percent.⁶⁵

Importantly, poor African-Americans are more vulnerable to unhealthy food options because they are more likely to live in lower-income neighborhoods where fast food restaurants that do not offer

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

healthy, nutritious meals, proliferate. In 2005, Los Angeles, California exemplified the predatory relationship between the ubiquitous presence of fast food restaurants and poor residents. Seventy-two percent of South Los Angeles restaurants were fast food establishments. By comparison, just forty-one percent of restaurants in the more affluent West Los Angeles area offered fast food.⁶⁶ These numbers bore a direct correlation to the higher incidence of obesity among South Los Angeles residents compared with those in West Los Angeles. As of 2005, thirty percent of South Los Angeles adults were obese.⁶⁷ This was in stark contrast to the 19.1% of the adults in the metropolitan area who were obese, and more than double the 14.1% of adults in the affluent Westside.⁶⁸

A change had to be made. “Cheap, unhealthy food and lack of access to healthy food is a recipe for obesity,” said Kelly D. Brownell, director of Yale University’s Rudd Center for Food Policy and Obesity. “Diets improve when healthy food establishments enter these neighborhoods,”⁶⁹ Brownell added. The Los Angeles City Council, in response to the decline in the overall health of its citizens, unanimously passed a measure to institute a one-year moratorium on the building of new fast food restaurants in South Los Angeles.⁷⁰ The goal of the moratorium was to give the city time to attract restaurants that offer healthier food choices.⁷¹ The moratorium affected stand-alone fast food restaurants, defined as those that do not offer table service and have a limited menu of quick-service foods in disposable wrapping. Restaurants that did not have drive-through windows and

⁶⁶ ANNIE PARK, NANCY WATSON, & LARK GALLOWAY-GILLIAM, CMTY. HEALTH COUNCILS, SOUTH LOS ANGELES HEALTH EQUITY SCORECARD (2008), *available at* <http://www.chc-inc.org/userimages/South%20LA%20Scorecard.pdf>.

⁶⁷ *The Obesity Epidemic in Los Angeles County Adults*, L.A. HEALTH TRENDS (L.A. County Dep’t of Pub. Health/Off. of Health Assessment and Epidemiology, Los Angeles Ca.) Sept. 2006, at 1, *available at* <http://lapublichealth.org/wwwfiles/ph/hae/ha/Obesity05.pdf>.

⁶⁸ *Id.*

⁶⁹ *L.A. OKs Moratorium on Fast-Food Restaurants*, MSNBC.COM, July 29, 2008, <http://www.msnbc.msn.com/id/25896233>.

⁷⁰ *Id.*

⁷¹ *Id.*

prepared food fresh to order were exempted from the moratorium as “fast food casual.”⁷²

Conditions such as hypertension, diabetes, and high cholesterol are widespread in the African-American community and are made worse by trans fat.⁷³ When coupled with the fact that poor African-Americans may not understand nutrition labels, cannot afford higher priced products, and may live in fast food dominated neighborhoods, it becomes clear that they are particularly vulnerable to the effects of trans fat. Thus, greater measures are needed to better protect them as consumers.

African-Americans are also more likely to be classified among lower socioeconomic groups of people who cannot afford to buy higher priced foods that do not contain trans fat. As of 2007, the poverty rate for African-Americans was 24.4%.⁷⁴ This rate was higher than Hispanics, who were at 21.5%, and almost triple the rate of Non-Hispanic Whites, who were impoverished at a rate of 8.2%.⁷⁵ In addition to being the largest percentage of any ethnic group to live in poverty, this rate also indicated the largest increase of impoverished individuals from the survey’s results in 2001. Since African-Americans are more likely to be impoverished, they are likely to be unable to afford higher-cost foods that do not contain trans fat. As a result, even if poor African Americans could understand packaging and nutritional information, they would still be less likely than other groups to be able to afford the healthier alternative food.

IV. The government should take additional measures to better protect citizens

⁷² *Id.*

⁷³ *Revealing Trans Fats, supra* note 2.

⁷⁴ CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR & JESSICA SMITH, U.S. CENSUS BUREAU, U.S. DEP’T OF COM., INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2007 49 (2008), *available at* <http://www.census.gov/prod/2008pubs/p60-235.pdf>.

⁷⁵ *Id.*

Since a lack of understanding and a lack of healthier food choices are the two primary nutritional issues facing low-income African-Americans, the government should focus its reform efforts addressing these problems first. By providing a simplified nutrition guide, the government can overcome the lack of information that afflicts so many poor African-American consumers. By providing incentives to companies to find alternative replacements for trans fat, the government can also overcome the issues relating to lack of healthier food choices. This section discusses ways in which both objectives can be achieved by reorganizing priorities.

The federal government's first significant step towards any type of labeling began in 1994. That year, the Nutrition Labeling and Education Act (NLEA) was passed to standardize information on the amount and percent of daily value per serving of calories, fat, and other information on nutrients, vitamins, and minerals.⁷⁶ The Food Safety and Inspection Service of the U.S. Department of Agriculture instituted a similar set of regulations for labeling meat and poultry products.⁷⁷ The goal of having standardized information readily available was to make it easier for consumers to compare products and make healthier food choices. However, most consumers did not do so, and the use of the standardized labels steadily declined.⁷⁸

One reason the nutrition labels are confusing is that they list food by serving size. For instance, a steak's nutrition label does not give the total number of calories or grams of fat in the steak. Instead, the label informs the consumer there are a certain number of calories and grams of fat per quantity (serving size). Therefore, if the serving size is two ounces, and the steak is a total of eight ounces, most consumers may not be aware that the actual number of calories and grams of fat should be quadrupled to determine the number of calories and grams of fat are actually in the steak they are eating.

⁷⁶ JESSICA E. TODD & JAYACHANDRAN N. VARIYAM, ECON. RES. SERV. U.S. DEP'T OF AGRIC., THE DECLINE IN CONSUMER USE OF FOOD NUTRITION LABELS, 1995-2006 (2008), available at <http://www.ers.usda.gov/Publications/ERR63/ERR63.pdf>.

⁷⁷ *Id.*

⁷⁸ *Id.*

To alleviate this issue, the government should set forth guidelines to simplify the nutrition labels. Because most foods are mass produced, individual pieces of food will likely have the same size and nutritional content. Therefore, the labels should be made to reflect the nutritional value of the item in its totality, instead of smaller units of measure that make up the item. A consumer can more easily identify the food as the actual serving size. This will eliminate the hassle of having to add and multiply fractions (which is how serving sizes are currently given) and lessen the likelihood that the consumer could make a mistake in calculating the nutritional content of his or her food.

For example, if a consumer prepares to eat a snack cake (i.e. “Twinkie” or oatmeal pie), manufacturers should list the actual snack cake as the serving size when providing the nutritional value. That way, once the consumer has eaten the snack cake, they understand that the nutritional value listed on the label is the nutritional value of the entire item they have just consumed. If the consumer eats half, then they understand that they have consumed only half the calories and fat listed. As it currently stands, the serving size may be listed as one ounce, and the cake may be 2.5 ounces. The consumer can read the nutrition label, consume the cake, and not realize that what they have just consumed is actually 250% more than they thought they had consumed. Furthermore, because of all the calculation and understanding necessary to adequately interpret the labels, if the consumer attempted to cut back, they may not be aware that even consuming half of the cake would be more calories and fat than they presume they have ingested, simply because the information is presented in such a misleading manner.

In addition to simplifying nutritional information, the federal government should provide incentives to companies to remove trans fats and find alternative products with which to make their food. This step avoids the necessity of an outright ban on the product, thus sidestepping constitutional laws involving takings and restricting commerce. In fact, this recommendation promotes a more harmonious and cooperative relationship between the government and the manufacturers because the manufacturers are not forced to alter their products, but rather given sound incentives to do so voluntarily. This

will allow both entities, government and food makers, to work collaboratively to achieve an important public policy of providing healthier food options for all citizens, and specifically lessening the deadly impact that trans fat has on poor African-Americans.

It is critical that the regulation come from the federal government and not be left in the hands of state or local governments. Doing so would lead to varying standards among states and would not yield a consistent level of protection for all citizens. The U.S. government should pass laws that preempt any state and local laws, which could be done by invoking the powers of the Supremacy Clause. The standard for pre-emptive laws in the area of foods was set forth in *Florida Lime & Avocado Growers, Inc. v. Paul*.⁷⁹ In that case, the U.S. Supreme Court determined that a state statute was preempted by a federal standard when the state regulation created an obstacle to achieving the goals and objectives of Congress. Therefore, if Congress sets forth a purpose of regulating the use of trans fat as a means of promoting the general health and well-being of American citizens, the Supremacy Clause provides a broad basis for preempting any state regulations that frustrate or counter those objectives.

In relation to food labeling and determining whether to preempt, the courts have focused on the scope and impact of a state's statute and tried to find a common ground of whether it is possible to comply with both statutes. As a result, state laws are pre-empted when they are found to allow labeling that is "different" from that required under an applicable federal statute.⁸⁰ This paradigm will likely ensure the uniformity of labeling by putting states on notice that they must fall within any strict labeling guidelines the federal government creates. To further ensure uniformity, the government could simply design the new labeling and have it adopted or incorporated into each state's current labeling requirements. This would alleviate any tedious considerations of whether it is possible to comply with both state and federal statutes.

⁷⁹ Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141 (1963).

⁸⁰ See generally Jones v. Rath Packing Co., 430 U.S. 519 (1977).

In order to justify new labeling requirements, the government would have to satisfy a very low threshold. A court sitting in review of the labeling requirements would only mandate that the requirements be reasonable and not arbitrary or capricious.⁸¹ With such a low threshold to overcome, and with the limited scope that a court would use to review the facts in determining violations of the threshold, it is likely that the government could establish new labeling requirements with minimal resistance or obstacles.

The federal government should take all reasonable measures to institute changes related to the marketing, use, and labeling of trans fat in foods to protect not only Americans, but particularly low-income African-Americans. The task of making these changes would not be overly burdensome or legally restrictive. Poor African-Americans rely on the government to protect them, and the government should act accordingly.

⁸¹ See *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 534 (1924).