

**FOR THE ATTENTION OF THE BOARD OF HEALTH**

**TO:** Thomas R. Frieden, M.D., M.P.H.  
Commissioner

**THROUGH:** Mary T. Bassett, M.D., M.P.H.  
Deputy Commissioner, Division of Health Promotion and Disease  
Prevention

**FROM:** Lynn D. Silver, M.D. M.P.H.  
Assistant Commissioner, Bureau of Chronic Disease Prevention and  
Control

Sonia Y. Angell, M.D., M.P.H.  
Director, Cardiovascular Disease Prevention and Control Program

**SUBJECT:** Results of Public Hearing and Comments Received Regarding  
Amendment of Article 81 of the New York City Health Code adding a  
new Section 81.08 to limit the use of artificial trans fat in NYC food  
service establishments (FSEs).

**DATE:** December 4, 2006

The New York City Department of Health and Mental Hygiene (DOHMH) proposed at the September 26, 2006 meeting of the Board of Health (“Board”) that Article 81 of the New York City Health Code be amended to limit the use of artificial trans fat in NYC food service establishments (FSEs). Notice of a public hearing was published in the City Record on September 29, 2006. On October 30, 2006, a public hearing was held on the proposed amendment. This document summarizes major points raised in written comments received and in public testimony presented at the public hearing.

**Summary of Comments and Testimony**

A total of 2,287 written comments about the trans fats proposal were received and 53 people spoke at the October 30<sup>th</sup> public hearing. Overall 2,266 written and oral were in support and 74 in opposition (31: 1 ratio).

The testimony and submitted comments were thoughtful, carefully prepared and overwhelmingly favorable. Unqualified support for the proposed changes came from numerous leading national and local professional societies, academic institutions, and local hospitals and advocacy groups, including the 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; see Appendix 1 for a more comprehensive listing of those who testified in support. Many of these comments reiterated and reinforced information presented to the Board on September 26, 2006. Some comments augment the discussion of benefits of the amendment or suggest language changes to the proposal; some of these are summarized in this memorandum.

In view of the volume of comments, we have provided a summary organized thematically, synthesizing the major objections to the proposal and their sources. Among those in opposition were the National Restaurant Association, New York State Restaurant Association, National Council of Chain Restaurants, Grocery Manufacturers Association, Wendy's, and Domino's; see Appendix 2 for a more comprehensive listing of those opposed.

Concerns raised in public comments and testimony were grouped in the following themes:

## **1 Health Impact**

- 1.1 Health benefit
- 1.2 Importance of other cardiovascular risk factors
- 1.3 Trans fat health risk at low levels
- 1.4 Possible substitution of trans fat with saturated fat
- 1.5 Safety of canola oil
- 1.6 Evolving science related to fat intake
- 1.7 Nut and seed allergies
- 1.8 Environmental impact

## **2 Feasibility**

- 2.1 Adequacy of trans fat-free oil supply
- 2.2 Reformulation of menu items
- 2.3 Cost of replacement oils
- 2.4 Ability to enforce
- 2.5 Impact on emergency feeding programs
- 2.6 Impact on foods with high content of natural trans fat
- 2.7 Addition of the word 'margarine'

## **3 Regulatory Strategy**

- 3.1 Appropriateness of government intervention
- 3.2 Possible alternatives to a restriction on artificial trans fat
- 3.3 Preemption/Interstate Commerce
- 3.4 Formal cost assessment

## **1 Health Impact**

### ***1.1 Health benefit***

Some who commented doubted the existence or extent of a health impact from the proposed regulation. Overall, testimony and written comments noted the public health benefit of reduced cardiovascular risk that would result from the proposed amendment. Professional organizations recognized the proposal to be scientifically sound and of public health benefit.

Testimony from Dr. Elena Rios, President of the National Hispanic Medical Association, and written comments from the Empire State Medical Society highlighted the health benefits to be gained by disadvantaged African-Americans and Hispanics, whose cardiovascular risk is high.

Several argued that trans fat reduction would have limited or no proven health benefit. Ruth Kava, Director of Nutrition at the American Council on Science and Health (ACSH), testified that the health impact was similar to that of saturated fat, which is consumed in higher amounts. The Grocery Manufacturers of America (GMA), which represents approximately 100 packaged food companies that account for over \$680 billion in annual sales, submitted written comments stating that there is “*no evidence of a public health benefit*” as a result of the restriction.

**DOHMH Response:** There is unequivocal scientific evidence for decreased coronary heart disease risk due to reduction of trans fat intake. Trans fat poses a health risk, and reduced intake will have a public health benefit. The American Heart Association (AHA), while not fully in support of the amendment, noted in submitted comments, “*Many well-designed and reputable scientific studies have unequivocally identified trans fat (primarily partially hydrogenated vegetable oil) intake as an important risk factor for the development of CVD.*” In his submitted testimony, Harvard professor Dariush Mozaffarian stated, “*By the most conservative estimates, based only on the effects of trans fats on blood total cholesterol and HDL cholesterol levels, 6% of heart attacks in the US are due to consumption of artificial trans fats. In NYC, this corresponds to ~[approximately] 1400 deaths from heart attacks each year*”. The Institute of Medicine report and peer-reviewed scientific publications clearly document the scientific basis for limiting trans fat intake.<sup>1,2,3,4,5,6</sup> This risk assessment underlies the Food and Drug Administration (FDA) decision to require trans fat content labeling on packaged foods. Further, data clearly show improved cholesterol profiles with replacement oils, an effect that is proven to reduce heart disease and stroke risk and thus produce a public health benefit. (See attached Institute of Medicine’s Letter Report on Dietary Reference Intakes for Trans Fatty Acids.)

### ***1.2 Importance of other cardiovascular risk factors***

The National Restaurant Association (NRA) criticized the proposal for failing to account for “*other nutrients and risk factors associated with coronary heart disease, tobacco smoking, hypertension, diabetes, physical inactivity, gender, age, family history and excessive stress*” The NRA, American Council on Science and Health (ACSH), and National Council of Chain Restaurants (NCCR) questioned the advisability of singling out trans fat, stating that saturated fat intake is more important than trans fat intake, given that saturated fat is a more sizable component of the U.S. diet.

**DOHMH Response:** We agree that trans fat consumption is only one of several risk factors that contribute to cardiovascular disease. Reducing saturated fat and sodium intake, along with increasing fruit and vegetable intake, are all part of a comprehensive effort to decrease cardiovascular disease risk through nutritional interventions. While the evidence shows that gram for gram, trans fat is worse than saturated fat,<sup>7</sup> high consumption of saturated fat in the U.S. diet is another important target to reduce cardiovascular disease risk.

However, invoking the multi-factorial basis of cardiovascular risk is not an argument for inaction on a single risk factor. Artificial trans fat, unlike other nutritional contributors to heart disease, is not part of a healthy diet. There are readily available alternatives; it can be replaced.

### ***1.3 Trans fat health risk at low levels***

Several comments referred to the current levels of trans fat consumption in the U.S. diet, and one argued that such levels are safe. The NRA states that the “*IOM never concludes there is ‘no safe level,’ and its recommendation that ‘consumption be as low as possible’ is a far different proposition than the hyperbolic ‘no safe level’ statement favored by the Department...*” The National Council of Chain Restaurants (NCCR) made a similar statement regarding the IOM report.

**DOHMH Response:** The final summary statement in the IOM report reads: “*There is a positive linear trend between trans fatty acid intake and total and LDL cholesterol concentration, and therefore increased risk of CHD [coronary heart disease], thus suggesting a Tolerable Upper Intake Level (UL) of zero*”.<sup>8</sup> A UL is defined by the IOM as the “*highest level of daily nutrient intake that is likely to pose no risk of adverse health effects for almost all apparently healthy individuals in the specified life stage group*”.<sup>9</sup> In other words, any intake of trans fat is likely to pose health risks.

The IOM concludes its report with the recommendation that dietary intake “*be kept as low as possible.*” Restricting artificial trans fat in food service establishments will help achieve this goal. When purchasing packaged food, the public is now guided by nutrition labels, and sales of zero gram trans fat products are increasing rapidly.

There are good data to show that even at very low levels, trans fat in the diet is dangerous. Indeed the IOM included in its review evidence of the negative effects of trans fat on blood lipids, which start as low as 0.5% of daily energy intake.<sup>10,11,12</sup> This is close to the level expected when naturally occurring trans fat is the only major dietary source of trans fat and all artificial trans fat is eliminated from the diet.<sup>13</sup>

Artificial trans fat use is widespread, and current trans fat intake is not low. The average intake is estimated at 2.6% of daily energy intake. A single medium serving of fries or a doughnut alone can contain 5g of artificial trans fat, equal to about 2.2% of daily energy intake. The Department’s proposal restricts the use of trans fat from the major current source of trans fat, industrially produced artificial trans fat. Further, it restricts use only

in the restaurant environment at a time when the amount of artificial trans fat consumed in other settings is declining as a result of FDA-mandated labeling.

#### ***1.4 Possible substitution of trans fat with saturated fat***

The American Heart Association (AHA) submitted a written comment that acknowledged the scientific grounds for restricting trans fat but raised concerns that restaurants might switch to saturated fats if healthier oils were not readily available. The Grocery Manufacturers Association, Food Products Association, and NRA also indicated in written statements that they were similarly concerned about the unintentional adverse health consequences of a switch to saturated fats. The NRA emphasized that lack of technical know-how might prompt restaurants to rely on “*proven oils and shortenings, typically containing elevated saturated fat levels.*”

The need for education about healthier replacement oils was echoed by others, including eight New York University faculty members in the Nutrition and Dietetics Program who submitted a joint letter in support of the proposal.

**DOHMH Response:** DOHMH recognizes the concern that a decrease in trans fat use may increase restaurant use of saturated fat. Gram for gram, trans fat is worse than saturated fat. If more than one gram of saturated fat is used to replace a gram of trans fat, then the benefits realized from trans fat replacement could be potentially offset. However, presently available replacement oils can *eliminate* trans fat while, at the same time, *reduce* saturated fat.

For example, replacement of partially hydrogenated soybean oil (the most commonly used oil that contains trans fat) with a heart-healthy trans fat-free oil such as equally stable high-oleic sunflower oil, high-oleic canola or low-linolenic canola oil, would eliminate artificial trans fat *and* reduce by half the saturated fat content in the oil (from 15% to 7%).<sup>14</sup>

Practical experience bears out the prediction that saturated fats will decline when trans fat is replaced. Wendy’s and KFC, two high-volume quick service chains, are presently replacing trans fat-containing fry oils and reported no increase in the saturated fat content of their products. In fact, Wendy’s use of the non-hydrogenated oil averaged a 20% reduction in saturated fats in the breaded chicken items and French fries, **in addition to reducing trans fat.**<sup>15</sup> In addition, the non-hydrogenated low-linolenic oil chosen by KFC has roughly 20% less saturated fat than the partially hydrogenated soybean oil the company has been using.<sup>16</sup>

In contrast to most frying, sautéing, or grilling, many baking and certain frying applications may require a combination of healthy oils and some saturated fats. But there are healthier alternatives for baking and for fried products, and the range of alternatives is increasing. Fern Gale Estrow, who testified at the hearing, submitted for consideration an article by Tarrago-Trani et al entitled “New and Existing Oils and Fats Used in Products with Reduced Trans-Fatty Acid Content”. The authors list 33 different low trans fat products, 28 of which can be used for baking, with a wide range of saturated fat

content.<sup>17</sup> By continuing to work with the restaurant and baking industry to educate and support the transition to healthier oils, DOHMH expects that the net intake of both trans fat and saturated fat will decrease significantly.

In response to these concerns, and to optimize the transition to healthier oils and shortenings, the DOHMH proposes modifications to the proposal to support a shift to heart-healthy replacements and to assure that restaurants will have time to come into compliance using these replacements. **Specifically, we propose extending the phase-out period from six months to eighteen months for oils, shortenings, and margarines containing artificial trans fat for applications other than frying and spreading, and also for oils and shortenings used for deep-frying of yeast doughs and cake batters. This will give establishments more time to learn about, test, and switch to healthier alternatives. Because the transition for most frying and spreading is easier, and low-saturated-fat alternatives are readily available at similar cost, the deadline for removing artificial trans fat from oil, shortening and margarine for these processes would remain unchanged.**

Further, to address concerns about both the difficulty of transition and the potential for substitution with saturated fats, DOHMH will also provide increased technical assistance to eliminate artificial trans fat while minimizing use of saturated fat by:

- 1) Expanding the trans fat module in the food handlers' training course.
- 2) Developing, in conjunction with recognized culinary science experts, additional materials informing FSEs on how to transition to healthier alternatives.
- 3) Implementing training courses for food safety inspectors and for restaurant personnel.
- 4) Offering a technical assistance helpline staffed by recognized culinary science experts knowledgeable on this issue.
- 5) Developing and distributing additional restaurant support materials including a) a zero gram trans fat product source list, b) a brochure on replacing trans fat in baking and frying.

### ***1.5 Safety of replacement oils***

Several written comments questioned the safety of canola oil and other replacement oils. Specific issues raised include the effects of heating to high temperatures, and the impact of the odor removal process on trans fat content.

**DOHMH Response:** Canola oil is only one of many possible replacement oils for trans fat. It is at least as heart healthy as other traditional oils.<sup>18</sup> In fact, the FDA recently approved a qualified health claim for canola oil, allowing companies to advertise canola oil's ability to reduce the risk of coronary heart disease (CHD) due to its unsaturated fat content.<sup>19</sup>

For high cooking and frying temperatures, there are a selection of low-linolenic and high oleic oils that share the high fry temperature stability and "fry life" of partially hydrogenated trans fat-containing oils. "Fry life" is determined by the oxidative stability

of oils. Restaurants must continue to change whatever oil they use at appropriate intervals to avoid the accumulation of oxidative by-products.

Although miniscule amounts of trans fat may form at high cooking temperatures, the amounts are negligible and well below the threshold of 0.5g per serving.<sup>20</sup>

Deodorization, the process in which high steam temperatures are used to remove undesirable flavors and odors, is already widely used in edible oil production, both trans fat free and trans fat containing.<sup>21</sup> This process can result in the formation of small amounts of trans fat that are far below the 0.5g of trans fat per serving used as the threshold for this proposal.

### ***1.6 Evolving science related to fat intake***

Several comments focused on the evolving nature of scientific knowledge and raised the specter of a future when experts no longer consider trans fats to be unhealthy. The NRA and others pointed out that partially hydrogenated vegetable oils (artificial trans fat) once were promoted as a healthier alternative to saturated fat.

The Center for Science in the Public Interest (CSPI) described the shift in science, stating that, *“Twenty years ago, everyone thought they [trans fats] were perfectly safe. But that all changed around 1990, when research began demonstrating that trans fat, on a gram-for-gram basis, is the single most harmful type of fat...There is now virtual unanimity that people should consume as little trans fat as possible from partially hydrogenated oils.”*

**DOHMH Response:** Sound public policy is based on the best available scientific evidence. When clear and conclusive evidence of significant harm is well established, as is now the case for trans fat, it should spur action to protect the public. Had public policy been more rapidly introduced to eliminate lead in paint, require seatbelts, reduce drunk driving, warn of tobacco risks - to note but a few – thousands of lives would have been saved.

### ***1.7 Nut and seed allergies***

Karen Benstock, a private citizen, expressed support for the proposal but concern that increased nut and seed oil allergic reactions could result from switching from partially hydrogenated vegetable oil to nut- or seed-derived oils. She recommended that restaurants be further required to disclose oil content, naming as potentially allergenic rapeseed, cottonseed, safflower, sesame, sunflower, almond, walnut, and possibly peanut and soy oils, as well.

**DOHMH Response:** Highly refined edible oils are unlikely to cause allergic reactions because allergenic proteins are destroyed during the refining process.<sup>22,23</sup> For example peanuts are the most commonly cited cause of food allergy, but a well designed study found that refined peanut oil did not cause allergic reactions.<sup>24</sup> While cold-pressed oils

might retain allergens, these oils are not stable and are not expected to replace highly-refined partially hydrogenated vegetable oils that are used for frying and baking.

The Department does concur that allergic reactions to certain products can constitute a risk, and that individual response to any food product may vary. While not directly relevant to the present proposal, the comments will be taken under consideration.

### ***1.8 Environmental Impact***

The NRA expressed concern that “*Substitute oils can have shorter shelf lives. The oil will need to be replaced more frequently to prevent rancidity, also increasing costs.*” A footnote expands on this concern, stating that “*More frequent deliveries of oil to restaurants will also exacerbate the bane of all businesses, cab drivers, delivery truck drivers and residents - traffic and congestion.*”

**DOHMH Response:** While some partially hydrogenated vegetable oils may be replaced with traditional oils with relatively short fry lives, we expect that most will be replaced with high stability oils that have similar or longer fry lives. As a result, we do not expect that, on average, there would be an increased volume of replacement oils used.

In addition, DOHMH took a hard look at this and directly contacted a sample of operators to get feedback on whether a change in oil fry life would increase frequency of deliveries. Virtually all of the restaurants surveyed indicated that it would make no difference in their delivery schedule since food deliveries come frequently during the week and oil deliveries arrive with other products. The balance of those surveyed did not know if it would make a difference. Therefore, based upon the information received about how most restaurants conduct their business in the City, the adoption of the proposal will not result in increased truck traffic or congestion.

## **2 Feasibility**

### ***2.1 Adequacy of trans fat-free oil supply***

The NRA, New York State Restaurant Association (NYSRA), National Council of Chain Restaurants (NCCR) and the American Heart Association (AHA) have concerns about the adequacy of the zero grams trans fat oil supply for NYC.

Owners of local chain restaurants shared the concerns of an owner of twelve Burger King restaurants in New Jersey that “*While some restaurants have made the change and are in the process of changing, there is currently not an available supply of oil alternatives for some restaurants....this is not a process that can happen overnight.*”

In contrast, both Harvard professor Walter Willett and Michael Jacobson, Executive Director of the Center for Science in the Public Interest (CSPI), disputed the assertion that there isn't enough supply of zero grams trans fat oil for New York City.

**DOHMH Response:** Our review of supply data from national suppliers, local distributors, and consultants to the edible oil industry indicates that there is an adequate supply of oils without trans fat for all of NYC's 24,000 food service establishments.

In 2005, the entire country consumed between 6 to 7 billion pounds of partially hydrogenated oil.<sup>25</sup> Although a major metropolitan area, New York City represents less than 3% of the US population and contains only 2% of the estimated 925,000 restaurants in the United States. While supply issues might exist for a national effort, there is no doubt that the supply of trans fat-free oils is adequate for New York City. This is further supported by industry projections of increasing output. Qualisoy, a consortium of more than a dozen companies to promote soybean competitiveness, estimates U.S. production of low-linolenic soybean oil, a suitable replacement oil, will increase to about 1 billion pounds in 2007.<sup>26</sup> This represents an increase of 600 millions pounds of zero trans fat oil supplies. By 2008, the NRA states that 2 billion pounds of low-linolenic soybean oil will be available.

In addition to low-linolenic soybean oil, there are many other trans fat-free substitutes, including, but not limited to: traditional vegetable oils, such as soybean, canola, corn, olive, etc.; new seed varieties with more stable chemical profiles of these same oils; and reformulated zero grams trans fat oils and shortenings that have specific technical properties for long fry life or types of baking. Food industry demand for non-hydrogenated oils has led to a market expansion for many of these oils and shortenings.

## ***2.2 Reformulation of menu items***

The American Heart Association (AHA) and NYSRA agree that trans fat should be reduced in the restaurant environment; however, they are concerned about the availability of trans fat-free replacements specific to the functional needs of individual menu items.

The National Council of Chain Restaurants (NCCR), a national trade association, noted, *"In response to consumer demand, many NCCR members have been working for years to reduce their use of trans fat-containing oils..."* They argued that the proposal timeline is impractical because suitable replacement oils are not readily identifiable, and acceptable reformulation requires time-consuming consumer acceptability trials.

The NYSRA mentions the impact on small and ethnic establishments. Chuck Hunt, Executive Vice President of the NYC Chapters of the NYSRA stated that *"the city's ethnic restaurateurs – who provide such an extraordinary range of dishes from around the world – would be particularly impacted."*

The Small Business Congress (SBC), a trade federation, wrote that while they admire the spirit of the proposal, they are concerned about the timeline because immigrant-operated businesses will not have enough information or enough time to adjust. *"While large chain restaurants whose integrated supply, delivery, and management systems can successfully adjust with reasonable costs, small businesses are dictated by the available products in the market and are without resources for alternatives. Furthermore, information of changes in the law is inaccessible for the many non-native speakers who*

*operate these establishments and must be proactively instructed and advised by the government and trade community.”*

Several written comments expressed concern that kosher bakeries that rely currently on margarine to produce baked goods without dairy would have difficulty meeting the requirement of less than 0.5g of trans fat per serving.

In written comments, local owners and managers of Applebee’s, Domino’s, and Burger King expressed concern about making the transition and stated that the long-term effect of the proposal would be customers not eating out, or instead, eating in another city.

The Grocery Manufacturers Association, Food Products Association, local restaurants, and private citizens expressed concern about changed taste and reduced variety of menu items. The owners of 16 Applebee’s locations in NYC, stated that the proposal “*will have a stifling effect on our industry by limiting the menu choices of New Yorkers, that people will likely seek restaurant experiences outside the City or will stop eating out.*” The GMA and FPA stated that the proposal would “*significantly reduce food options.*”

In contrast, Stephen Hanson, owner of BR Guest restaurant management company, stated that it is “*easy to find alternatives equal to or superior to those with trans fat...*” Russell Coco, owner of Jason’s Deli, a 130-location chain operating in 20 states, stated that his restaurants had trans fat in 47 ingredients and 80 menu items five years ago. He was able to take trans fat out of all products and asserted that other restaurants should be able to do so too, as long as restaurants work with their suppliers.

Stephen Joseph, founder of BanTransFats.com and FryTest.com, reported that in the town of Tiburon, California, all 18 restaurants had changed to zero grams trans fat oils when asked without customer complaint or incident. Monica Von Thun Calderon, owner of Grandaisy Bakery in NYC, stated “*...The elimination of artificial trans fat, however, is a simple and minimally intrusive change that a restaurant owner can make...*”

**DOHMH Response:** While some expressed concern that elimination of trans fat will change taste, packaged food reformulation has indicated that a wide variety of products can be successfully reformulated without changing the flavor of the food (e.g., Oreos, Goldfish crackers). In addition, announcements from major chains such as Wendy’s, Au Bon Pain, Taco Bell, and KFC indicate that restaurants can find the right combination of oils and shortening that produce the same taste without artificial trans fat. DOHMH does not expect New Yorkers to experience any change in taste or product availability as a result of the restriction.

In our survey of restaurant use of artificial trans fat-containing oils used for frying, baking and cooking, and in spreads, we found trans fat use did not correlate consistently with any single type of restaurant and the great diversity of NYC’s ethnic restaurants were well represented amongst those restaurants NOT using trans fat in food preparation. This proposal does not single out any type of restaurant, and all types of restaurants have demonstrated the feasibility of cooking without artificial trans fat.

Brochures for food service establishments on how to remove trans fat from foods are presently available in eleven languages in addition to English. Further, the Food Protection Courses at the Health Academy, which includes a trans fat module, are taught in Spanish, Chinese and Korean. To make certain that DOHMH educational materials are accessible, these will be translated into a variety of languages. In addition, DOHMH will provide, in conjunction with the technical assistance package outlined above, culinary experts to provide technical assistance in other languages.

DOHMH spoke with staff of kosher bakeries and kosher suppliers in the New York metro area and concludes that many bakeries already produce trans fat-free kosher baked goods, using zero grams trans fat margarine or reformulated zero grams trans fat vegetable shortening from their suppliers. Kosher bakeries will be able to continue to provide dairy-free baked goods that have less than 0.5g of trans fat per serving. The timeline modifications described below should facilitate this transition.

Nonetheless, change may not be easy for every restaurant. There is no simple replacement strategy for all trans fat-containing recipes. Many comments note that reformulation of cooked and baked products may require additional time and technical skill. **The DOHMH therefore proposes extending the phase-out period for oils, shortenings and margarines used for applications other than frying and spreading, and for oils and shortenings used for deep-frying of yeast doughs and cake batters, to eighteen months, from six months,** and creating the technical support package delineated in section 1.4.

### ***2.3 Cost of replacement oils***

The NRA and NYSRA were concerned that in replacing oils, restaurants would incur additional costs. The National Council of Chain Restaurants (NCCR) described the process of removing artificial trans fat as *“costly and time consuming...Once a new oil is found, restaurants must renegotiate contracts with suppliers or find new suppliers. Contract prices rise as the market for appropriate replacement oils tightens.”*

Not all restaurants thought cost was a concern. Ina Pinkney of Ina’s restaurant in Chicago testified in support of the proposal and noted that the healthy oils that her restaurant uses cost 30% more but last 75% longer, so that cost was not an issue. Ms. Pinkney stated that she uses her trans fat-free oil for *“pancake batters, for sauté and even my carrot cake.”*

Stephen Joseph, founder of BanTransFat.com and FryTest.com, reported that when local restaurants had changed to zero trans fat oils, cost was not an issue because many of the zero trans fat oils that cost more last longer in the fryer.

**DOHMH Response:** Based on discussions with suppliers and restaurants, we conclude that the price of oils without artificial trans fat will be comparable to oils with trans fat, especially when consideration is given to the extended fry-life of some replacement oils.

As Mr. Joseph and Ms. Pinkney testified, once restaurants make the switch, costs are equivalent. Large chains that have recently switched to trans fat-free oils, such as Wendy's and KFC, indicated that cost was not a significant barrier. Ian Rowden, Wendy's executive vice president and chief marketing officer stated that, "*the conversion to the new oil has been cost neutral to our system.*"<sup>27</sup> The issue of cost is discussed further in 3.3 below.

#### ***2.4 Ability to enforce***

Community Board 5, representing Midtown Manhattan, submitted a letter agreeing that restaurants should limit the amount of trans fats, while expressing concern that "*enforcement of the current proposal as is would be difficult and costly. Additionally, it would be problematic for health inspectors to ensure that trans fat oils were not present in restaurant foods.*"

*The NRA states that, "No level of punitive legal action nor fanfare created by a City transfat ban will yield a greater availability of substitute oils."*

**DOHMH Response:** The Department's Bureau of Food Safety and Community Sanitation is responsible for inspecting food service establishments and assuring that they are in compliance with all applicable regulations. The proposed amendment will not be costly to the agency or create enforcement problems. Food safety inspectors will check for artificial trans fat during regular yearly inspections. Inspectors will be trained to inspect ingredient labels and/or documentation from the manufacturer for all items in use that contain oils, shortening, or margarine. Because inspectors conducted the surveys done before and during the voluntary campaign, the DOHMH already has experience conducting such inspections.

Again, the proposed amendments do not seek to ban trans fats. That aside, the NRA wrongly assumes that the only available enforcement mechanism available to the Department is one of a punitive nature. On the contrary, the Department has available to it various enforcement measures pursuant to existing law. Specifically, Health Code §3.13 provides that, "In lieu of enforcement of this Code by way of prosecution, recovery of civil penalties, revocation of permits, seizure, embargo and condemnation, and other compulsory means, the Department may seek to obtain the voluntary compliance with this Code by way of notice, warning or other education means." However, it is important to note that in no way is the Department required to use such non-compulsory methods prior to proceeding by way of compulsory enforcement. [Health Code §3.13].

#### ***2.5 Impact on emergency feeding programs***

The Food Bank for New York City, NYC Coalition Against Hunger (NYCCA), and FoodChange are nonprofit organizations that work closely with emergency feeding programs. All expressed concern that soup kitchens would have difficulty complying with the proposal because they receive free donated food that may contain trans fat from both the private sector and government. The Food Bank explained that soup kitchens, which are unable to meet demand, might distribute less food as a result of the proposal. In her testimony, Aine Duggan, Vice President for Government Relations at the Food

Bank, stated that “*the Food Bank only controls food purchasing for the NYSDOH HPNAP [state], FEMA-EFSP [emergency], and City Council food programs which amounts to just 8.5 percent of the total food distributed.*” The Food Bank also expressed concern that the emergency food system would receive more trans fat-containing foods because of food being ‘dumped’ at the end of the 18 month phase-out period.

To assure that the trans fat restriction would not reduce the food available in the emergency system, NYCCA noted that “*funding for the City’s Emergency Food Assistance Program (EFAP), managed by the City’s Human Resources Administration (HRA), should be significantly increased by the Mayor and the City Council to make up for the food lost due to this policy change and to meet the growing overall demand for emergency food.*” All three organizations emphasized that this amendment be part of a larger effort to expand access to nutritious food in poor neighborhoods.

Ellen Fried, who testified as a representative of the policy group of the NYC Nutrition Education Network (NYCNEN) and Hillary Baum, founder and Executive Director of the Baum Forum and a partner in Public Market Partners, both observed that it is important that food at emergency feeding programs be free of trans fat because the population served is already at high risk for cardiovascular disease.

**DOHMH Response:** DOHMH recognizes the importance of working with soup kitchens and emergency food distribution centers to promote an adequate, safe food supply.

We are encouraged by the Food Bank’s report that “*a recent onsite analysis of the Food Bank’s warehouse revealed very little inventory that contains trans fat, most of which was food supplied by donations.*” The long-term objective is to remove artificial trans fat from the food that emergency food providers serve, as for other food service establishments, particularly given the higher risk of heart disease in the clients served by these programs.<sup>28</sup>

As described by the Food Bank, there are five sources of the emergency food supply: USDA-TEFAP (Federal); FEMA-EFSP (Federal); NYS Department of Health – HPNAP (state); NYC-EFAP (city); and local donated and wholesale food. Aine Duggan of the Food Bank, the primary supplier to the network of emergency food programs in the city, reported that government emergency food programs – USDA, FEMA, NYS, and NYC – supply 63% of the total food distributed by the Food Bank. The remaining 37% is donated food from local and national sources and a small wholesale program. Only local donations might be affected by increased donations of trans fat-containing foods. Any such “dumping” would be unlikely to persist because suppliers and wholesalers would adjust their inventory to food service demand. In fact, the amendment would likely decrease the amount of trans fat in local food donations, as suppliers and distributors change their inventory mix, thereby improving the food donations that the Food Bank and other similar organizations receive.

The food procured through the city’s Emergency Food Assistance Program (EFAP) is already trans fat-free. In addition, other city agencies are working to reduce trans fat in the foods they purchase. We will forward requests to the USDA, FEMA, and New York State to remove artificial trans fat from the foods they procure and distribute to emergency food providers, consistent with current USDA Dietary Guidelines recommendations.

### ***2.6 Impact on foods with high content of natural trans fat***

The founder and Director of Research at Sweet Street Desserts, a food manufacturer that distributes its baked goods internationally, noted that the labels on their cheesecakes indicate 1.5g of trans fat, but that it is primarily from naturally-occurring trans fat found in dairy products. The company uses only small amounts of partially hydrogenated vegetable oils, under 0.5g per serving. The company is concerned that FSEs will only want to purchase food items that state that they have “0g” trans fat, and that the FDA labeling provisions and our proposal fail to distinguish between trans fat content from natural and artificial sources.

**DOHMH Response:** Products with 0.5g per serving or more of trans fat, but made without partially hydrogenated vegetable oil or shortening, are not restricted by the proposal. For these products the issue is one of marketing and communications between the producer and customers (FSEs). Specifically, the need would be to inform FSEs that the product is in compliance with NYC law. Products with 0.5 g per serving or more, from either natural or artificial sources, and with PHVO listed as an ingredient, will be restricted. DOHMH will train food safety inspectors to ensure that they are knowledgeable about the difference between artificial and natural trans fat and in order to enforce appropriately. Food serve establishments will be similarly informed.

### ***2.7 Addition of the word ‘margarine’***

In the process of reviewing comments, the Department learned that the word ‘margarine’ is also used in ingredient lists and product labels of some baked goods and that margarine may contain artificial trans fat.

**DOHMH Response:** Because margarine may contain artificial trans fat, we have amended the proposal to include the term ‘margarine’, excluding zero trans fat margarine, in (b) *Definition* and (3) *Documentation required when food products are not labeled*:

(b) *Definition.* For the purposes of this section, a food shall 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 oil. However, a food whose nutrition facts label or other documentation from the manufacturer lists the trans fat content of the food as less than 0.5 grams per serving shall not be deemed to contain artificial trans fat.

(3) *Documentation required when food products are not labeled.* If baked goods, or other food products restricted pursuant to subdivision (a) of this section, that are or that

contain fats, oils or shortenings, are not required to be labeled when purchased, food service establishments and mobile food commissaries shall obtain and maintain documentation acceptable to the Department, from the manufacturers of the food products, indicating whether the food products contain vegetable shortening, **margarine** or any kind of partially hydrogenated vegetable oil, or indicating trans fat content.

See full proposal with language changes in Appendix 3.

### **3 Regulatory Strategy**

#### ***3.1 Appropriateness of government intervention***

Audrey Silk, founder of NYC C.L.A.S.H. (Citizens Lobbying Against Smoker Harassment), testified that, like the smoking ban, the restriction of trans fat is unnecessary government interference and that it sets a precedent for future inappropriate government intervention. Some private citizens expressed concern that the proposed amendment infringed on their right to make personal choices and that they believed that DOHMH was overstepping its bounds by influencing the type of food that can be consumed.

In contrast, Salvatore Fichera, an exercise physiologist, noted in a letter in support of the proposal that, *“Freedom of choice is what all Americans are entitled to. And as such, Americans should have the freedom to eat foods that are not poisoned with dangerous substances that compromise our health.”*

**DOHMH Response:** DOHMH is committed to protecting the health of New Yorkers. The NYC Health Code is an important tool to support these efforts. Like lead in paint, artificial trans fat is a dangerous and unnecessary substance in restaurant foods. The partial phase-out of trans fat is an appropriate governmental action to ensure that all New Yorkers experience the benefit of its removal.

Many past examples of government involvement demonstrate that regulations are essential to improve health and save lives:

- Motor vehicle safety (mandatory seat belt/motorcycle helmet laws and speed limits to prevent injury and death in crashes)
- Product safety (child-resistant packaging for medications and household products to prevent poisonings)
- Fire code/building regulations (required installation of smoke detectors to prevent fire-related injury and death)
- Smoking (smoking restrictions in public places to protect from toxic second-hand smoke)
- Fluoride (drinking water additive to prevent tooth decay)
- Folate (fortification of breads and flours to prevent birth defects)
- Asbestos (safe removal requirements to prevent lung disease)
- Lead paint (safe removal requirements to protect health of children)
- Iodine (fortification of salt to prevent thyroid disorders and mental retardation)

This proposal – grounded in the scientific evidence – follows in the footsteps of these past regulations, improving health for all through changes in our shared environment.

New Yorkers have expressed concern that this will limit consumer choice. In fact, consumers do not choose trans fat in restaurant food. When ordering fries, for example, one is not given the choice of fries with or without trans fat. When they eat out, most consumers have no way of knowing whether or not a product contains trans fat.

In practice, restaurants have made the switch without reducing consumers' choice of food. Major chains, such as Wendy's, Subway, Au Bon Pain, and KFC, have shown that restaurants can find the right combination to successfully reformulate their products without limiting food choice.

### ***3.2 Possible alternatives to a restriction on artificial trans fat***

The NRA stated that food manufacturers have a history of being voluntarily responsive to U.S. public health official requests for changes in the food supply. The statement refers to increasing PHVO use in order to decrease saturated fat use and the food industry's efforts to develop salt substitutes to decrease sodium.

Mohammad Javed, from Fast Food Inc., submitted written comments in support of the restriction, but stated that it would be more direct to ask the manufacturers to produce zero grams trans fat oil only, such as corn and canola, so that trans fat is taken out at the national level.

Mary Beth Kooper, from the Exercise Network, agrees with the goal to restrict trans fat but suggests that DOHMH issue "*seals of approval*" to restaurants in compliance with proposed guidelines and to educate people. Community Board 5 also recommended labeling in their letter.

Amy Forgacs, a private citizen, supports reducing the amount of trans fat in New York City restaurants but advocates using a tax break to "*give restaurants an incentive to serve healthier food with less artificial trans fat.*" She cites tax incentives that the city has offered to purchase hybrid vehicles. Alternatively, she mentions the possibility of adding a tax to restaurants that use trans fat, citing the cigarette tax as a successful example of this approach.

**DOHMH Response:** Our aim is to reduce the consumption of artificial trans fat, the largest source of trans fat in the U.S. diet, to the lowest practical level in all restaurants. This is our goal regardless of type or neighborhood location, or whether owners or their clientele are wealthy or poor.

We recognize and commend the many food service establishments that have voluntarily restricted use of trans fats. This, along with successful voluntary removal of trans fat

from many packaged goods, demonstrate the feasibility of our proposal. But far too many establishments continue to serve foods with artificial trans fat.

In mid-2004 the DOHMH began discussion about restricting artificial trans fats in food service establishments with our Food Safety Advisory Committee, which includes the NYSRA and other restaurant groups. DOHMH publicly requested that New York City restaurants and suppliers voluntarily remove artificial trans fat from the foods they sell or serve in mid-2005. This request was followed by a year-long education campaign. Information was mailed to every permitted food service establishment in the city, and written resources were provided to restaurants and food suppliers to help them make this change. More than 7,000 food handlers completed a training module on trans fat. Comparisons of the pre- and post-education campaign evaluations showed that in restaurants where it could be determined if trans fat was used, half used trans fat-containing oils for cooking or spreads both before and after this educational initiative. Despite this one-year voluntary campaign, New Yorkers continue to be exposed to dangerous, invisible, and replaceable trans fat in restaurant foods.

With a partial phase-out to the lowest feasible levels, all New Yorkers will have their exposure to artificial trans fat in restaurants minimized.

Tax incentives would not meet the public health goal of minimizing trans fat in foods consumed in food service establishments. A tax, likewise, would have the unwanted consequence that restaurants could buy their way out of a trans fat restriction. The adverse health effects of trans fat are universal, and there are healthy substitutes available.

DOHMH does not issue permits to or inspects food manufacturers, whereas we have long exercised regulatory authority over food service establishments.

### ***3.3 Preemption/Interstate Commerce***

The National Restaurant Association takes the position that the proposed amendments are violative of the preemption doctrine rooted in the Supremacy Clause and the Commerce Clause.

**DOHMH Response:** The proposed amendments do not violate either the Supremacy Clause or the Commerce Clause.

When a state or locality legislates pursuant to its regulatory authority, it should not be presumed that there is “federal displacement unless that was the clear and manifest purpose of Congress.” [*Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963) *citing* *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)]. As the Second Circuit noted in *Grocery Manufacturers of America v. Gerace*, “[s]tates have traditionally acted to protect consumers by regulating foods produced and/or marketed within their borders.” 755 F.2d 993, 1003 (2d Cir), cert denied, 106 S.Ct. 69 (1985). A local government exercises its most basic, traditional powers when it acts to protect

consumers from unknown or unhealthy choices at the point of consuming food products. “The supervision of the readying of food stuffs for market has always been deemed a matter of peculiarly local concern.” [Florida Lime, at 144]. When a local government seeks to regulate foods at the point of consumption – as is the case with the Board of Health proposal – it acts within its traditional regulatory authority.

The NRA raises the issue of the federal government having established a system with regard to substances (such as partially hydrogenated vegetable oils) which may be generally recognized as safe (GRAS) by the FDA for the proposition that the Department cannot take action with regard to such substances. This is an incorrect conclusion. Firstly, there is no federal statute or regulation declaring that states and localities cannot act if the FDA has deemed a particular food product as generally safe. Secondly, the Department, even though it could, is not declaring artificial trans fats to be adulterated in that it is not ordering such products to be confiscated or embargoed from store shelves as per se unsafe public health nuisances. The Department is not preempted from taking the action it is proposing for the protection of public health. Although the Department has not taken the position that trans fat is adulterated and should therefore, be confiscated, federal law would not prohibit such action from being taken by a local government for the protection of its citizens. It is worth noting that while the FDA authorizes the use of saccharin under certain conditions set forth in 21 CFR Section 180.37, states such as Connecticut and Wisconsin have further restricted the use of saccharin. [*See*, C.G.S.A. Section 21a-143 and W.S.A. Section 97.46].

The NRA comments that the FDA would not dictate the proper labeling of an ingredient that is unsafe and should be banned. As we have stated herein, the proposed amendments do not seek a citywide ban on trans fats, but rather addresses the regulation of trans fats in limited circumstances. The fact that the FDA requires the labeling of trans fats on packaged foods does not bar states or localities from taking action restricting the use of the product under certain scenarios. By way of analogy, sulfites are a good example. There are various FDA labeling requirements for sulfites. [*See e.g.*, 21 CFR Section 130.9]. At the same time jurisdictions such as Michigan, Virginia, Texas and California have banned the use of sulfites under certain circumstances - such as in food service establishments. [*See e.g.*, M.C.L.A. Section 289.6139, Va. Code Ann. Section 35.1-14.1, 25 TAC Section 229.164 and Cal.Health & Safety Code Section 114070].

Of critical importance is the position of the Food and Drug Administration regarding the authority of localities in the area of food regulation. The FDA itself has on numerous occasions recognized the authority of local government in the area of food service establishments. The FDA has stated, “While the responsibility for regulating retail and foodservice establishments lies **primarily** with State, local, and tribal jurisdictions, FDA provides assistance to these jurisdictions through multiple means...” (emphasis added) [70 FR 42072, (2005), *see also*, 64 FR 49812 (1999)]. Dr. Lester Crawford, former Deputy Commissioner of the FDA made the following statement on April 30, 2002 to the Subcommittee on Oversight of Government Management regarding the issue of federal school lunches: “FDA recognizes State and local governmental jurisdictions as having

**primary** responsibility for the regulation of the retail segment of the food industry.” (emphasis added).

Even if these proposed amendments do in some manner burden commerce, it is not all burdens upon commerce but only **undue** or **discriminatory** ones which are prohibited. [See Nippert, v. City of Richmond, 327 U.S. 416, 425 (1946)]. As the Supreme Court explained in Huron Portland Cement Co. v. City of Detroit: “In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when conferring upon Congress the regulation of commerce...never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the country. Legislation...may affect commerce and the persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.” 362 U.S. 440, at 443-444. The proposed amendments are neither an undue burden nor are they discriminatory.

The NRA takes the position that the proposed amendments do not represent a merely incidental burden on interstate commerce. The Supreme Court in considering questions of interstate commerce has stated, ‘Such regulations by the state are to be sustained, not because they are ‘indirect’ rather than ‘direct,’...not because they control interstate activities in such a manner as only to affect the commerce rather than to command its operations. But they are to be upheld because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character and the practical difficulties involved, may never be adequately dealt with by Congress.’ [Parker v. Brown, 317 U.S. 341, 362-363 (1943)]. Obesity and diabetes are examples of two interrelated conditions which are of enormous local concern.

Even if the requirement were to increase the cost of oil, a claim which the evidence does not support, this would not constitute an undue burden on interstate commerce. It is important to note that the Commerce Clause is not meant to protect certain retail schemes. [Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978)]. The Court wrote: “[w]e cannot...accept appellants’ underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market...the Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulation.” [Exxon, at 127].

A Florida county ordinance imposing labeling restrictions on detergents and a ban on the sale of phosphate detergents was upheld in Soap and Detergent Association v. Clark despite being challenged constitutionally as an unreasonable burden on interstate commerce. [330 F.Supp. 1218 (1971)]. The court stated, “Balancing the uniform agreement of the County’s experts that a total ban on phosphates in detergents will substantially improve the quality of the County’s waters, against the financial harm to the detergent industry from complying with such a ban, the scales are strongly tipped in favor of the legislative pronouncement by Dade County’s Board of County Commissioners.” [at 1222]. Further, the court went on to state: “...[M]ere economic injury to an affected

industry will not counterbalance the avowed public intent of the local ordinance....The bold action taken by the Board of County Commissioners of Dade County in seeking to revitalize and rescue our troubled waters stands out as a major response to the citizens' overriding concern with environmental pollution.”(at 1222-1223); see also Proctor and Gamble v. City of Chicago, 509 F.2d 69 (1975), *cert. denied*, 421 U.S. 978 (1975), where the Court of Appeals for the Seventh Circuit reversed the District Court decision ( Soap Detergent Association v. City of Chicago, 357 F. Supp. 44, 51 (1973)) which had held that a Chicago ordinance making it a criminal offense to sell phosphate detergents in the city violated interstate commerce.

### **3.4 Formal cost assessment**

The NRA states that the Board should demand a formal cost assessment and further opportunity for public comments.

**DOHMH Response:** Rulemaking initiated by City agencies is subject to the City Administrative Procedure Act (NYC Charter §1041 et seq. of the NYC Charter). The Department and the Board have fully complied with CAPA with regard to the proposed amendments.

## **4 Summary:**

The DOHMH has carefully considered and weighed the oral testimony and written comments. DOHMH thanks the public for their thoughtful input, notes that comments in favor outweigh comments in opposition by more than 30:1, notes that virtually all health organizations strongly support the proposal and that opposition is primarily from the restaurant industry. The Department acknowledges the complex issues brought forth by the public health, clinical, food service, and research communities, as well as organizations of civil society, citizens, and individuals. We learned from the review of each comment and oral testimony and are preparing specific modifications to the proposal and its implementation. The response to the public period also affirms the public's commitment to participating in the regulatory process of the New York City Health Code.

The DOHMH recognizes the challenges of replacing trans fat, in particular those used in baking. For this reason, we propose extending the phase-out period to 18 months for trans fat-containing oils, shortenings and margarines for applications other than frying and spreading and for oils and shortenings used for deep-frying of yeast doughs and cake batters. The deadline for removing artificial trans fat from oil, shortening and margarines used for most frying and all spreading would remain unchanged, i.e., at six months. The DOHMH will also, in parallel, arrange for a technical assistance program with recognized culinary experts to support restaurants and bakeries in making the transition and using the healthiest feasible composition of fats to maintain or improve the quality of their food.

Food service establishments are important partners in improving and protecting the health of New York City residents. To provide FSEs with additional time to comply with the trans fat restriction, the Department will not pursue fines for the first three months of each phase-out period (at six months and 18 months respectively).

Considering all of the comments, it is our conclusion that there are substantial benefits to this proposal, and its implementation is warranted from a health standpoint, feasible, and legal. We urge the adoption of the amended proposal presented to the Board.

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## APPENDIX 1

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### **Selected Comments in Support**

Supportive statements were received from the following national medical organizations:

- American Cancer Society (ACS)
- American College of Cardiology (ACC)
- American Diabetes Association (ADA)
- American Medical Association (AMA)
- American Society of Preventive (ASPC)
- National Hispanic Medical Association (NHMA).

State and regional health organizations submitting statements supporting the proposal included:

- American Academy of Pediatrics (AAP)
- American Society of Hypertension - Eastern Regional Chapter
- Empire State Medical Association (New York State Affiliate of the National Medical Association)
- Medical Society of the State of New York
- New York Academy of Medicine
- NYS Chapter American College of Cardiology
- NYS District of the American Academy of Pediatrics (AAP)

Supportive statements were received from the following health organizations, medical schools and local hospitals:

- Albert Einstein College of Medicine
- American Medical Students Association (AMSA) chapter at the City University of New York
- Campaign for Bronx Health
- Chapters 2 and 3 of the New York State Academy of Pediatrics
- Columbia University Medical Center
- Columbia University's Mailman School of Public Health
- Community Health Care Association of New York States (CHCANYS)
- Community Healthy Care Network
- East Harlem Partnership for Diabetes Health and Prevention
- GHI
- Harlem Hospital Center
- Harvard School of Public Health
- Institute for Urban Family Health
- Montefiore Medical Hospital
- Morris Heights Health Center
- Mount Sinai School of Medicine
- MSTP Student Council, Medical Student Council, and Graduate Student Committee, Albert Einstein College of Medicine

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- New York Downtown Hospital
  - New York University School of Medicine
  - North General Hospital
  - Primary Care Development Corporation (PDCD)
  - Public Health Association of New York City
  - Staten Island University Hospital

Local elected officials expressed support, including:

- Felix Ortiz, NYS Assembly Member
- Peter Vallone, Jr., NYC Council Member (Councilmember Vallone indicated that the proposals have the full support of the Council's Health Chair, Joel Rivera, and the former Health Chair, now Council Speaker, Christine Quinn)
- Richard Gottfried, NYS Assembly Member

Comments in support from National Organizations and Businesses include:

- BanTransFats.com and FryTest.com
- Center for Science in the Public Interest (CSPI)
- The Rudd Center for Food Policy and Obesity

Comments in support from regional and local organizations and businesses:

- Baum Forum
- BR Guest/Steven Hanson
- Citizen's Committee for Children
- Citizens for New York City
- Community Service Society
- FamilyCook Productions
- FoodChange
- Forza Fitness
- Fresh Direct
- Grandaisy Bakery
- Harlem Consumer Education Council
- Ina's Restaurant
- Jason's Deli
- Les Dames d'Escoffier International, NY Chapter
- New York Coalition for Healthy School Lunches
- NYC Coalition Against Hunger (NYCCAHA)
- NYC Department of Education
- NYC Nutrition Education Network
- Public Market Partners

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## APPENDIX 2

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### **Selected Comments in Opposition**

Comments in opposition were received from the following national organizations and businesses:

- American Council on Science and Health
- Domino's
- Food Products Association
- Grocery Manufacturers Association
- National Council of Chain Restaurants
- National Restaurant Association
- New York State Restaurant Association
- Wendy's

Comments in opposition were received from the following local organizations and businesses:

- Applebee's
- Burger King
- Community Board 5
- NYC C.L.A.S.H. (Citizens Lobbying Against Smoker Harassment)

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### Appendix 3 Proposed Language

The proposal is as follows:

Note-matter in brackets [ ] to be deleted

Matter underlined is new

RESOLVED, that Article 81 of the New York City Health Code, set forth in title 24 of the Rules of the City of New York, as amended by resolution adopted on the seventh of June, two thousand five, be and the same hereby is further amended by adding a new §81.08, to be printed together with explanatory notes, as follows:

#### **§81.08 Foods containing artificial trans fat.**

(a) Artificial trans fat restricted. 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, as defined in §89.01 of this Code or successor provision, except food that is being served directly to patrons in a manufacturer's original sealed package.

(b) Definition. For the purposes of this section, a food shall 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 oil. However, a food whose nutrition facts label or other documentation from the manufacturer lists the trans fat content of the food as less than 0.5 grams per serving, shall not be deemed to contain artificial trans fat.

(c) Labels required.

(1) Original labels. Food service establishments and mobile food unit commissaries shall maintain on site the original labels for all food products:

(i) that are, or that contain, fats, oils or shortenings, and

(ii) that are, when purchased by such food service establishments or mobile food unit commissaries, required by applicable federal and state law to have labels, and

(iii) that are currently being stored, distributed, held for service, used in preparation of any menu items, or served by the food service establishment, or by the mobile food unit commissary.

(2) Documentation instead of labels. Documentation acceptable to the Department, from the manufacturers of such food products, indicating whether the food products contain vegetable shortening, margarine or any kind of partially hydrogenated vegetable oil, or indicating trans fat content, may be maintained instead of original labels.

(3) Documentation required when food products are not labeled. If baked goods, or other food products restricted pursuant to subdivision (a) of this section, that are or that contain fats, oils or shortenings, are not required to be labeled when purchased, food service establishments and mobile food commissaries shall obtain and maintain

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*documentation acceptable to the Department, from the manufacturers of the food products, indicating whether the food products contain vegetable shortening, margarine or any kind of partially hydrogenated vegetable oil, or indicating trans fat content.*

*(d) Effective date. This section shall take effect on July 1, 2007 with respect to oils, shortenings and margarines containing artificial trans fat that are used for frying or in spreads; except that the effective date of this section with regard to oils or shortenings used for deep frying of yeast dough or cake batter, and for all other foods shall be July 1, 2008.*

*Notes: Section 81.08 was added by resolution adopted on xxx to restrict 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.*

RESOLVED, that the list of Section Headings in Article 81 of the New York City Health Code, set forth in title 24 of the Rules of the City of New York, as amended by resolution adopted on the seventh of June, two thousand five, be, and the same hereby is, further amended, to be printed together with explanatory notes, as follows:

**ARTICLE 81**

**FOOD PREPARATION AND FOOD ESTABLISHMENTS**

\* \* \*

**§81.07 Food; sanitary preparation, protection against contamination.**

**§81.08 Foods containing artificial trans fat.**

**§81.09 Food; temperature requirements**

\* \* \*

Notes: Section 81.08 was added by resolution adopted on XXXX to restrict service of unhealthful artificial trans fat by food service establishments.