

85 (1995) (finding that the protection of the health, safety, and welfare of citizens is a substantial government interest)). In fact, FDA's interest in this rule includes an interest in ensuring consumers have information they need to help them maintain healthy dietary practices by providing factual information to consumers on food labels so that they can reduce CHD risk.

Under the third prong of *Central Hudson*, the regulation must directly advance the government's interest asserted (*Central Hudson* 447 U.S. 557 at 566). Requiring mandatory *trans* fat labeling on food products directly advances the government interest. As stated in section V.A of this document, analyses of survey data show that consumers rely on the Nutrition Facts label as a guide to choosing foods that meet their dietary objectives. The most frequently reported label use and the one that increased the most following the implementation of the 1990 amendments was to see how high the food was in nutrients such as fat. Mandatory *trans* fat labeling would help consumers maintain healthy dietary practices because it would provide needed information about the amount of *trans* fat in a given product so that consumers could plan a daily diet in a way that would reduce their intake of *trans* fat. Further, as stated in section V.A of this document, consumers need to be able to see the *trans* fat content of all foods subject to mandatory labeling so that they can compare the relative contribution of *trans* fat from each and make purchasing decisions accordingly.

Finally, under the fourth prong of *Central Hudson*, the regulation must be no more extensive than necessary to serve the government interest (*Central Hudson* 447 U.S. 557 at 566). That is the case here. Given, as stated in section V.A, that consumers need to understand the relative contribution of *trans* fat from all foods subject to mandatory labeling to make choices among products that will reduce their intake of *trans* fat, there are not "numerous and obvious less-burdensome alternatives" (*Cincinnati v. Discovery Network*, 507 U.S. 410, 418 n.13 (1993)) than the requirement imposed here. Imparting truthful, factual, noncontroversial information about the presence or absence and amount of *trans* fat in food products on the label will provide consumers with information to help them to reduce their risk of CHD. Thus, the agency's action to require factual information be imparted to consumers about *trans* fat content of foods by requiring such information in labeling is sufficiently narrowly tailored to meet the fourth prong of *Central Hudson*. The

"government is not required to employ the least restrictive means conceivable" rather it is required to have "'a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served'" (*Greater New Orleans Broadcasting Ass'n, Inc. v. U.S.*, 527 U.S. 173 at 177 (citing *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989))). Requiring disclosure of *trans* fat content would assist consumers to maintain healthy dietary practices, provide complete, factual information on a food label to help them to reduce *trans* fat intake and thereby reduce their risk of CHD. Further, it would prevent them from being misled by providing information on *trans* fat that can help them make product comparisons and choose products that are heart healthy.

The agency disagrees with the suggestion that narrow tailoring under the fourth prong of *Central Hudson* requires that *trans* fat content be included in the figure for total fat content. Such an approach would not provide consumers with labeling information on the amount of *trans* fat in a product. To provide consumers with a way to calculate the amount of *trans* fat in a product, all other fats (including monounsaturated and polyunsaturated fats) would be required to be on the label. The comment provided no basis for why monounsaturated fat and polyunsaturated fat should be made mandatory, why it would make sense for consumers to have to calculate the value for *trans* fat content from each label under the statutory scheme in section 403(q)(2)(A) of the act, and why such an approach would be less burdensome under the fourth prong of *Central Hudson* to support its assertion.

Moreover, there is a substantial argument that the agency need not satisfy the *Central Hudson* test because that test applies to prohibitions on speech, and not compelled commercial speech, which is at issue here. Although consumer curiosity alone is an insufficient interest to compel factual speech (*International Dairy Foods Ass'n v. Amestoy*, 92 F. 3d 67, 74 (2nd Cir. 1996)), the government can compel manufacturers to disclose information that "bears on a reasonable concern for human health or safety or some other sufficiently substantial government concern." *Id.* FDA's rule to require mandatory *trans* fat labeling is one that would require manufacturers to disclose such information.

Further, the U.S. Court of Appeals for the second circuit upheld a regulation

compelling speech where the goal of the statute was to reduce the amount of mercury released into the environment; a goal that was "inextricably intertwined with the goal of increasing consumer awareness of the presence of mercury in a variety of products" (*National Electrical Manufacturer's Ass'n v. Sorrell*, 272 F. 3d 104, 115 (2d Cir. 2001)). FDA is providing information that will assist consumers to maintain healthy dietary practices and prevent consumers from being misled if incomplete nutrition information on *trans* fat were provided on the food label, i.e., information that did not include the presence or amount of *trans* fat in foods. Similar to the goal the State of Vermont has in increasing awareness of consumers to prevent the harmful consequences of mercury containing products entering the environment, FDA wants to prevent the harmful consequences (increased risk of CHD) to consumers from *trans* fats. Thus, the agency's action to require *trans* fat labeling in this rule comports with similar actions in other compelled commercial speech cases which have been upheld under the first amendment.

For all of the foregoing reasons, the agency believes it has complied with its burdens under the first amendment to support mandatory disclosure of the amount of *trans* fat in food labeling. The information that FDA is requiring in food labeling for *trans* fat, i.e., the amount of *trans* fat listed in grams or an optional footnote stating "Not a significant source of *trans* fat" if zero grams are present, is purely factual information. FDA's action to compel *trans* fat labeling does not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." Rather, it simply provides for factual and uncontroversial information that can be supported if such labeling is reasonably related to FDA's government interests (*Zauderer*, 471 U.S. at 650–51 (distinguishing between the level of review necessary under the first amendment where factual and uncontroversial information is required and recognizing that the constitutionally protected interest in not providing such information is minimal); see also *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 472 (1997) (distinguishing compelled financial contributions that promote speech to encourage consumer purchases from speech in which the content of the message focuses on political or ideological differences). FDA's interests in requiring mandatory *trans* fat labeling