UNDERSTANDING HEALTHY PROCUREMENT:

USING **GOVERNMENT'S PURCHASING POWER** TO **INCREASE ACCESS** TO HEALTHY FOOD

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NATIONAL POLICY & LEGAL ANALYSIS NETWORK
TO PREVENT CHILDHOOD OBESITY

State and local governments have a strong interest in improving the health of their residents. Not only does better health benefit community members, it also saves governments money. One way to lower health care costs is to improve residents' diets: healthier diets alone could prevent an estimated $71 billion per year in medical expenses, lost productivity, and lost lives nationwide.[1]

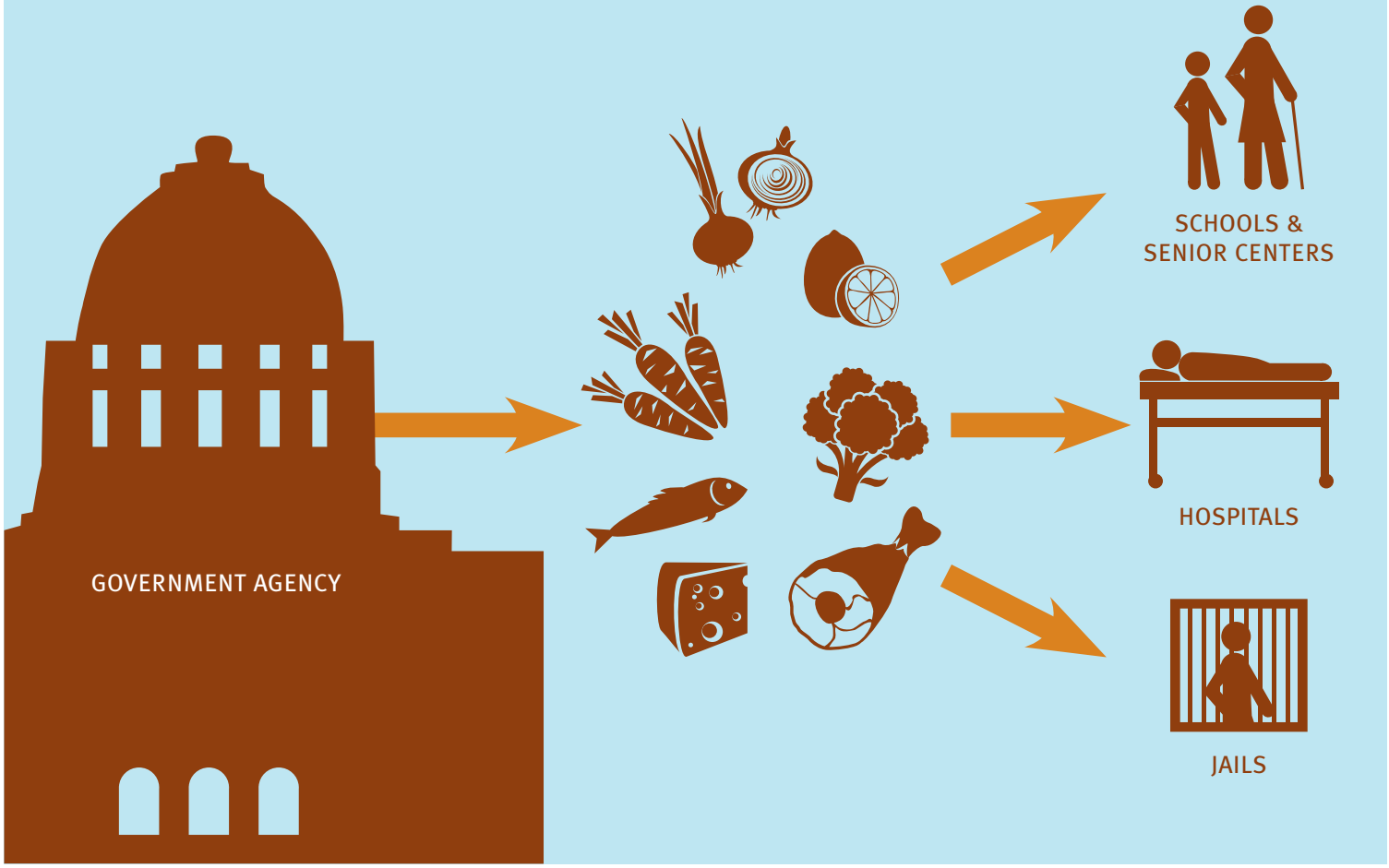
Governments can help improve residents' diets in a number of different ways. They can increase access to healthy food and decrease access to unhealthy food through their "regulatory" power – that is, by enacting laws or regulations. Using zoning laws, for example, cities can make it easier to establish farmers' markets and community gardens throughout a community. Cities can also pass zoning laws to limit or even ban fast food outlets.

State and local governments can also improve residents' diets by exercising their "market participant" power – the power to buy and sell goods and services. By adopting healthy *procurement*, or purchasing, policies, governments can provide healthier food to community members and make a positive impact on community health. If their purchasing volume is large enough, they also may be able to influence the types of foods available more broadly to the community by creating greater demand for healthier products.

WHAT IS PROCUREMENT?

Government agencies often procure goods and services for use by employees, students, and community members. Among other things, these agencies (and the community-based organizations with whom they contract to operate social services) buy food to provide meals to people in jails, juvenile facilities, public hospitals, child-care centers, schools, and senior programs. Government departments also purchase food to sell to employees and the public in retail outlets, such as vending machines, cafeterias, and concession stands on government property.

Depending on the source of the funds they use to purchase the food, governments generally have discretion over the type of foods they procure. In fact, government entities exercising market participant power may face fewer legal restrictions than they do when exercising their regulatory power. By establishing policies to improve the nutrition of the food they (or their contractors) buy and serve or sell, government agencies can improve public health, lower overall costs, and provide leadership for the private sector to do the same.



WHO SETS
PROCUREMENT POLICY?

Healthy procurement policies can be established in various ways, depending on state and local law and practice. While policymakers may set policy requiring healthy food purchasing, the actual procurement standards are generally determined by those with procurement and health expertise, such as food policy task forces or health departments (often in consultation with purchasing departments). As described more fully in this publication, standards can include requirements setting the number of calories, fat, or sodium per beverage, snack, or meal; set the number of fruit and vegetable servings per day; and prohibit the purchase of certain foods or beverages.

At the state level, the legislature can pass a law requiring state agencies to purchase healthier foods. Or, if state law gives the governor authority over executive branch agencies that purchase food, the governor can issue an executive order requiring those agencies to follow healthier nutrition standards, as Governor Deval Patrick recently did for Massachusetts.[2] In Tennessee, Governor Phil Bredesen issued an executive order requiring state agencies to (1) set minimum nutritional standards for food and beverages sold on certain state properties and (2) make recommendations for the food provided to state employees at breaks, meetings, conferences, and other work-related events on state property.[3]

The decision-makers with the authority to set healthier food standards at the local level will vary. At the school district level, school boards generally set the policy. At the city or county level, the governing body (such as a city or county council) could enact a binding policy (by ordinance, resolution, or motion) requiring city or county departments to purchase and provide healthy foods, or directing their employees or the health department to develop healthy procurement standards that city departments must follow. For example, the city council of Baldwin Park, Calif., passed a resolution requiring all city vending machines to carry only products that meet certain nutritional standards.[4]

In a city where the mayor has authority over the executive branch departments that buy food, the mayor can issue an executive order requiring those departments to make healthier purchases. Mayor Michael Bloomberg issued such an order in New York City; the nutrition standards were developed by the city's Food Policy Task Force with active participation from city agency staff.[5] In some cities, an executive order may not be binding or may be subject to override by the city council. Generally, unless a particular department or sub-agency has explicitly been given the authority, government departments cannot create binding procurement policies that extend to other departments.

HOW IS
A PROCUREMENT POLICY IMPLEMENTED?

A healthy procurement policy (or existing law) generally specifies who is responsible for developing the standards (if the policy does not detail the standards itself), procuring and providing the food (whether directly through employees or through a contracting process), and enforcing the policy.

Sometimes, government employees – for example, kitchen staff in schools, jails, and juvenile facilities – are responsible for purchasing, preparing, and serving food. In this situation, the employees are responsible for following the healthy procurement policy.

Government entities also contract with nonprofit entities to provide food to dependent community members: for example, states or local government entities may give grants to nonprofit organizations, such as childcare centers or senior-serving organizations, to administer the federal Child and Adult Care Food Program.

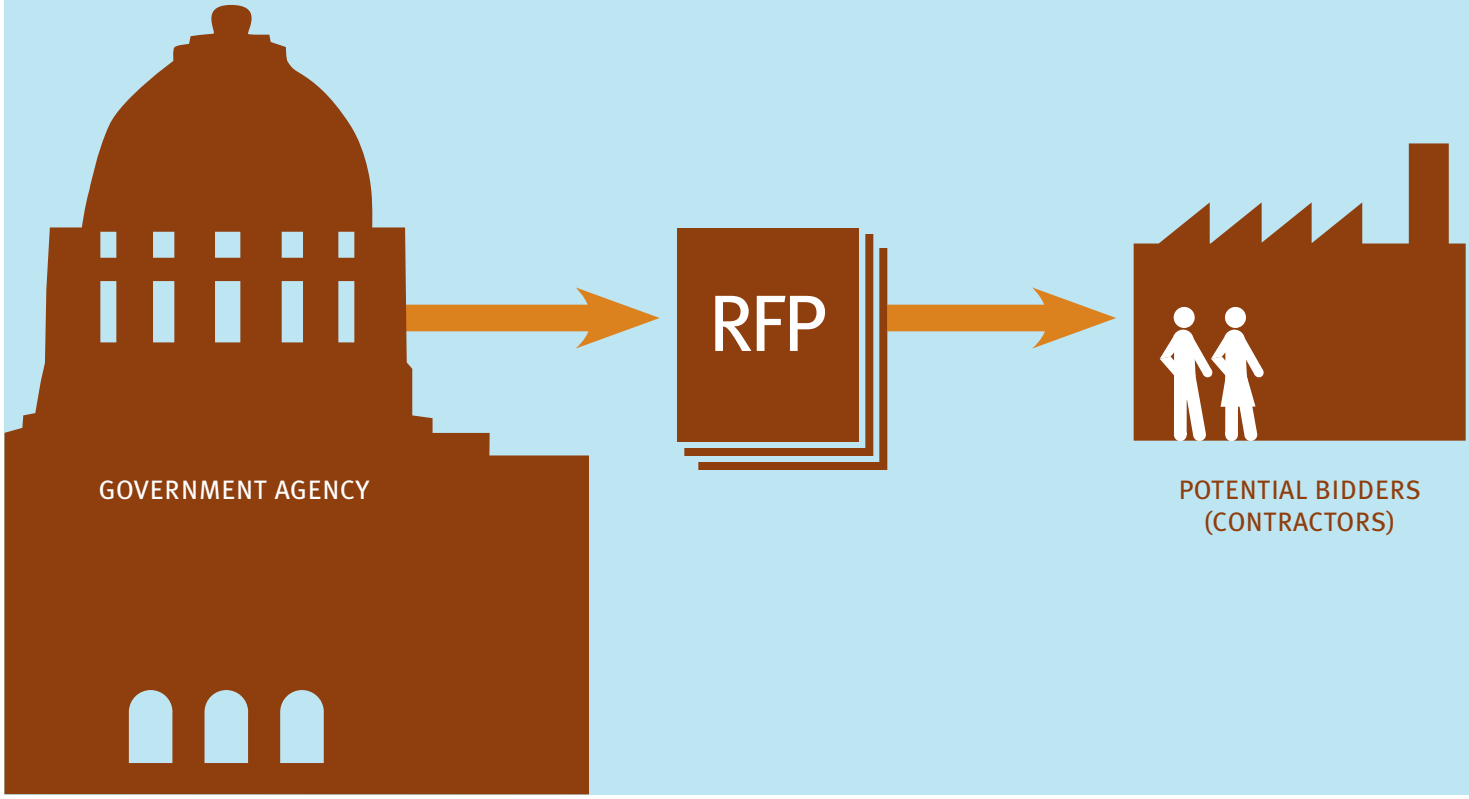
Finally, states, cities, and counties sometimes contract with or give a permit to an individual or business to operate government food services operations. For example, a city might contract with a vending distributor to provide and stock vending machines or with a company to operate a café at its city hall. Or it might issue permits to vendors who sell food and beverages in its parks.

Whether the government entity uses a contracting or permitting process generally depends on local law and practice. A brief description of each process follows.

The Contracting Process

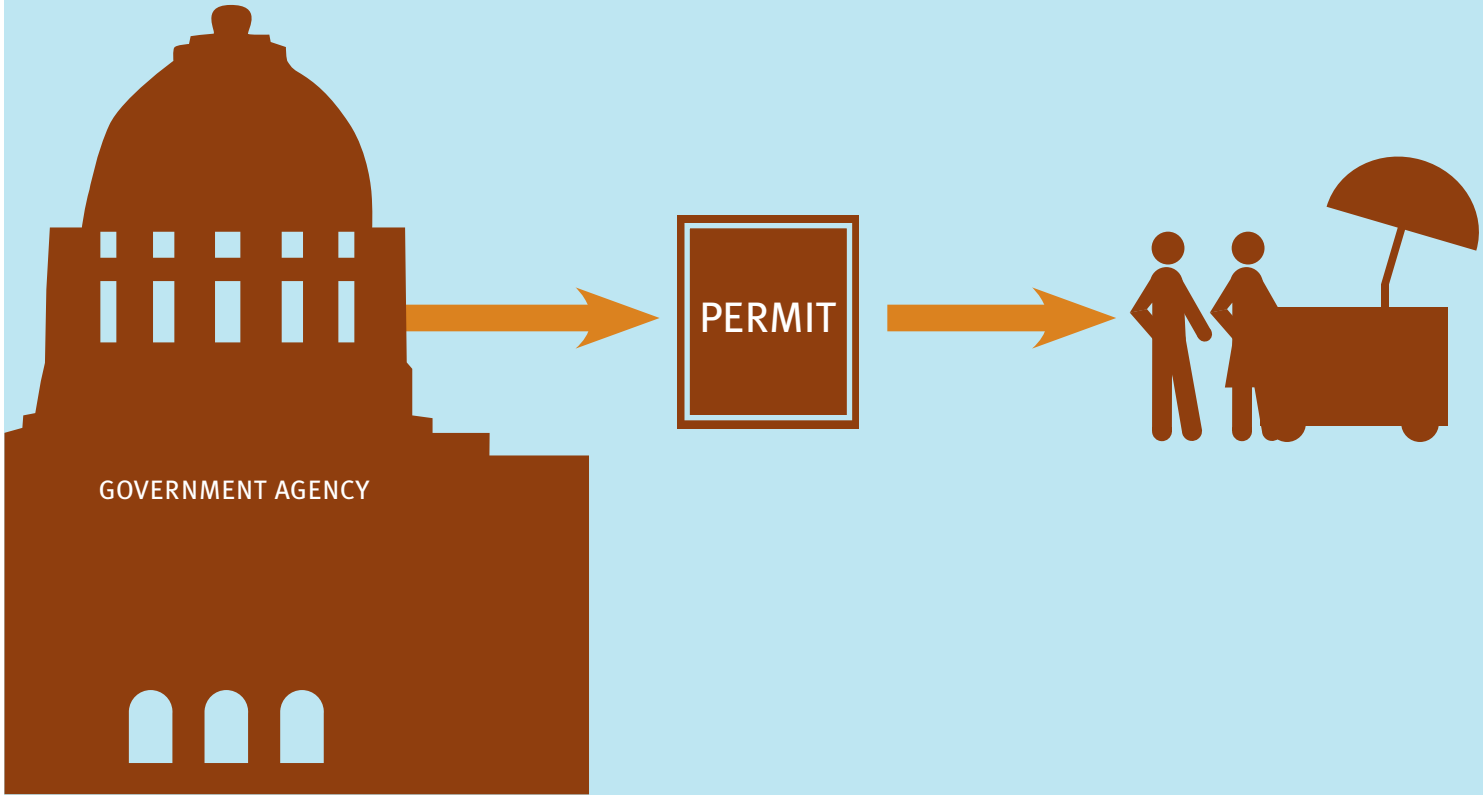
If a government entity decides to "contract out," state and local laws dictate the contracting process. Governments use a competitive solicitation process to ensure equal opportunities for potential bidders, get the best value for tax-payers' money, and provide safeguards against favoritism. Generally, the state or city issues a solicitation for bids or proposals – referred to as a *request for proposals* (RFP) or an *invitation for bids* (IFB) – in which the government specifies what goods and services it wants to purchase. The government's solicitation should include the healthy nutrition standards and any other conditions, such as requiring the bidders to demonstrate that they will prepare certain types of foods, use particular cooking techniques, meet nutrition standards, or otherwise demonstrate that the food they will serve will meet the government's standards.

Next, potential contractors submit bids or proposals that show how they will comply with the government's criteria. Depending on the nature of the goods or services being solicited, the government entity either rates the proposals according to their responsiveness to all the criteria or selects the lowest bidder. Once the top candidate is selected, the government agency negotiates a contract with the winning bidder. The contract details the contractor's responsibilities, including complying with the health and nutrition standards. The contract should also contain penalties for non-compliance, which should include monetary penalties (called "liquidated damages") and suspension and termination of the contract.



The Permit Process

If the city or county uses a permit process, there is an application and award procedure. The permitting department (which could be a health, parks and recreation, or other supervising department) evaluates the application to see if it complies with the permit requirements. If the application is approved, the applicant pays a fee and is awarded the permit. (Some jurisdictions may have a waiting list or other process for allocating permits when there are many applicants.) The permitting law will contain a process for monitoring and enforcing the policy, which likely includes fines for noncompliance and, ultimately, suspension and termination of the permit.



WHAT CAN HEALTHY PROCUREMENT LOOK LIKE?

This section explores in more depth the two main categories of government-purchased food affected by healthy procurement policies:

1) meals served to dependent community members in public institutions such as jails, public hospitals, and schools, and

2) items sold in vending machines, cafeterias, concession stands, and other retail outlets on government property.

DEPENDENT
MEALS AND SNACKS

States, counties, some larger cities, and school districts provide food at little or no cost to dependent members of their communities. Some do this directly, and others contract with nonprofit providers. Governments provide free or low-cost meals through federal nutrition programs like the National School Lunch Program, School Breakfast Program, Child and Adult Care Food Program, and Summer Food Service Program, among others. States, counties, and some cities also provide meals to people in jails and prisons, child and after-school care, juvenile facilities, homeless shelters, patients in public hospitals, and senior citizens in programs and residences.

Funds for many of these meals come from federal grant programs. To qualify for funding, state and local governments must comply with the federal laws and regulations governing use of the grant funds, including purchasing rules and nutrition standards. State laws also can dictate how federal funds are allocated to local governments.

State laws also regulate the procurement and provision of institutional meals. States generally regulate the building and operations of state and local prisons, jails, juvenile facilities, and child care settings;[6] often, these regulations set minimum standards for the nutritional content and frequency of meals and snacks.[7]

Generally, federal and state nutrition standards act as a baseline, meaning that local governments must meet the standards but may choose to exceed them. State and local governments can also impose higher standards through the contracts or grants they award to nonprofit providers. Usually, however, federal and state programs only set funding levels to meet the baseline standard. A government entity that chooses to exceed those standards (which may require more costly food) generally receives no additional funding; the locality either has to pay for the healthier food with existing money or find an additional source of funds.

"Buying Local" and Improving Nutrition

Many states, cities, and counties look to purchase healthier foods *and* support the local economy by instituting "buy local" policies. Many states have laws requiring state and local agencies to give purchasing preferences to food or agricultural products grown in state or commodities produced by in-state businesses.

Using Federal Child Nutrition Program Funds

As of 2008, institutions receiving funds through the Child Nutrition Programs may apply a geographic preference when procuring "unprocessed locally grown or locally raised agricultural products."[8] This provision applies to operators of all of the Child Nutrition Programs, as well as to fresh produce the Department of Defense or state agencies purchase for these programs. The procuring institution may define the area for any geographic preference.[9] In April 2010, the USDA issued a proposed rule defining the term *unprocessed locally grown or locally raised agricultural products* and requested public comment.[10] The final rule is pending. Through "farm-to-school" programs many school districts are serving healthier meals in their cafeterias, improving student nutrition, providing agriculture, health, and nutrition education, and supporting local and regional farmers.[11]

Using Other Funds

Generally, unless overriding state or local law or the funding source provide otherwise, government entities may use state or local preferences when they exercise their market participant power to buy or sell goods. (State and local governments are more restricted when using local preferences in their regulatory capacity.[12]) Within the limits set by state and local procurement laws, government entities may choose with whom and on what terms they purchase. Cleveland, for example, gives a preference to local food producers who seek to contract with the city.[13] San Francisco gives a small preference to local businesses, reasoning that local residents should benefit from local tax dollars.[14] Local preferences can raise potential legal issues, and state and local procurement laws vary; be sure to consult with a local government attorney before employing this strategy.

Community Involvement

Parents, students, and other community members can get involved in the development and implementation of healthy procurement and vending policies:

- Contact policymakers to propose a healthy procurement policy.
- Attend the public meetings when the legislature or city/county council discusses the healthy procurement policy and speak in favor of its adoption.
- Obtain copies of procurement and vending contracts. Once contracts are awarded, they are public documents and can be obtained under the state's public records act. Government agencies may prefer requests be made in writing and reference the state's public records laws.[15]
- Once the healthy procurement policy has been adopted, make sure new solicitations for vendors and purchases are consistent with the policy.
- Ensure new contracts or permits are consistent with the healthy procurement policy.

Healthier Procurement Standards

New York City and Massachusetts are leading the way in establishing healthier food standards for the foods they purchase and provide through their agencies. These standards build on federal and state laws, as well as program requirements for the settings where the foods are served.

For information on the programs referred to in this fact sheet, see the list of Resources on page 16.

New York City (upon which Massachusetts based its standards) sets specific nutrition requirements in two overlapping ways. First, it sets standards by food category (such as beverages, dairy, and bread). For example, beverages other than milk or juice may not contain more than 25 calories per eight-ounce serving, and all juices must consist of 100 percent juice. Second, it sets standards for the meals and snacks the agencies serve. These are based on the USDA's 2005 Dietary Guidelines for Americans. Finally, there are some population-based standards and exceptions to meet the specific nutrition needs of particular groups, such as children and seniors. For example, agencies must serve whole milk to children younger than two.

FOOD SOLD
TO EMPLOYEES AND THE PUBLIC

States, local governments, and school districts also procure food to sell to employees and the public, just as private businesses do. Many governments provide beverage and snack vending machines for students, employees, and visitors. Some have cafeterias (at public hospitals or government office buildings, for example), cafes (at city halls, libraries, or entertainment venues), or concession stands (at public pools or recreation facilities).

When selling food, government agencies are exercising their market participant power. The agencies must comply with the same health and sanitation requirements as private businesses. But unless there is an overriding law restricting what can be sold at particular venues, such as state laws limiting sales of certain foods and beverages at schools, the government can determine what type of food to sell, just like a private business can.

Schools: Leading the Way to Healthier Vending and Sales

Concerned about children's health, state lawmakers have passed laws to limit the sales of certain foods and beverages to students through vending machines and campus stores. To date, at least 28 states and the District of Columbia have restricted sales of "competitive" foods and beverages, the food and drinks sold at schools outside of (and in competition with) the federal meal programs.[16]

In addition, schools nationwide have reduced the amount of sugar-sweetened beverages they offer, having implemented the Alliance School Beverage Guidelines.[17] According to the American Beverage Association's March 2010 progress report, the total volume of beverages shipped to schools dropped by 72 percent between the 2004–2005 school year and the 2009–2010 school year. The volume of full-calorie soft drinks shipped to schools dropped by 95 percent during the same period.[18]

Healthier Beverages and Snacks in Vending Machines

Some cities, counties, and other local entities have healthy vending policies that require food and beverages sold in government vending machines to meet certain nutrition standards. For example, San Diego requires all snacks sold in vending machines at recreation centers and sports facilities to meet nutrition standards that include a limit of 250 calories and limits on fat, added sugars, and sodium. Beverages sold in these venues (including milk, juice, soda, and sports drinks) also are subject to limits on calories, added sweeteners, and portion size. The Los Angeles city council has also adopted healthy standards for its vending machines.

Calorie Disclosure on Vending Machines

The new health care reform bill (the Patient Protection and Affordable Care Act of 2010) requires nutrition labeling for foods sold at chain restaurants with 20 or more outlets and in vending machines operated by a person or entity that owns or operates at least 20 vending machines.[19] Vending machines will require "a sign in close proximity to each article of food or the selection button that includes a clear and conspicuous statement disclosing the number of calories contained in the article [of food]," unless the vending machine allows a prospective purchaser to examine the Nutrition Facts Panel before purchasing the food item or otherwise provides visible nutrition information at the point of purchase.[20] The law requires the Food and Drug Administration to issue proposed regulations to carry out this new law by March 23, 2011, although no date for final regulations is specified.[21] In August 2010, the FDA issued some guidance documents; final regulations are pending.[22]

Healthier Standards for Other Government Food Retail Outlets

State and local governments can also set healthier standards for other government food sales. Chain restaurants that are subject to the new federal health care law and located on government property will be required to post calorie counts on menus and menu boards. A city could require restaurants that are not subject to the new federal law to post nutrition information. Or a city could require restaurants to provide healthy entrée choices.

The federal government is working toward providing healthier food at its cafeterias and concessions. The Government Services Administration (GSA) is implementing new wellness (and sustainability) criteria for food services at the properties it manages. The wellness criteria for selecting food service operators include whether concessionaires will use a registered dietitian or nutritionist when preparing menus, use healthier cooking techniques as much as possible, provide nutrition information, and use a pricing strategy that promotes healthier choices.[23]

Kansas City, Mo., has adopted healthy vending standards for anyone selling food and beverages in its parks. Park vendors who sell healthy food (as defined in the policy) receive discounts on the price of a park permit or are allowed to sell at multiple parks with a single permit. In addition, the city council in Brentwood, Calif., has adopted an administrative wellness policy that sets nutrition standards for all foods sold in vending machines and concessions at city-owned parks and facilities.

By using both their purchasing power and their regulatory authority, state and local government agencies can provide more nutritious food and better health to their community.

NEW WELLNESS CRITERIA

CONSULT A DIETITIAN OR NUTRITIONIST

USE HEALTHY COOKING TECHNIQUES

PROVIDE NUTRITION INFO

LEVERAGE PRICING STRATEGIES

An Alternative to Procurement: Regulations to Promote Healthy Food

State and local governments can also improve access to healthy food and decrease access to unhealthy food by exercising their regulatory authority, their traditional role of passing laws to promote the community's health and general welfare. Zoning and other laws regulate what activities can occur in particular areas within the community; some communities use that regulatory power to limit or ban fast food restaurants. Many communities also have permit programs for street and sidewalk vendors, and some cities ban vending near schools.[24] New York City uses its "Green Cart" produce vending program to put sidewalk produce vendors into neighborhoods lacking access to fresh fruits and vegetables.[25]

NPLAN has developed a variety of model ordinances to promote access to healthier food and restrict access to less healthy food:

Model Produce Cart Ordinance

Model language to create an incentive-based permit program for sidewalk vendors who sell fresh produce. More information is available at: **www.nplan.org/nplan/products/model-produce-cart-ordinance**

Establishing Land Use Protections for Community Gardens

Model zoning language to protect and promote community gardens. More information is available at: **www.nplan.org/nplan/products/establishing-land-use-protections-community-gardens**

Establishing Land Use Protections for Farmers' Markets

Model zoning language to protect and promote farmers' markets. More information is available at: **www.nplan.org/nplan/products/establishing-land-use-protections-farmers-markets**

Model Healthier Toy Giveaway Meals

Model ordinance requiring restaurant toy giveaways to be tied to healthier food. More information is available at: **www.phlpnet.org/childhood-obesity/products/model-ord-healthy-toy-giveaway**

Model Healthy Food Zone Ordinance

Model language prohibiting fast food restaurants and mobile venders from locating within a certain distance of schools. More information is available at: **www.nplan.org/nplan/products/model-healthy-food-zone-ordinance**

RESOURCE LIST

HEALTHY AGENCY FOOD STANDARDS

Massachusetts State Agency Food Standards
www.mass.gov/Eeohhs2/docs/dph/com_health/nutrition_phys_activity/e0509_proposed_food_standards.pdf

NYC Agency Food Standards
www.nyc.gov/html/doh/html/cardio/cardio-vend-nutrition-standard.shtml

Washington, DC
Healthy Schools Act of 2010
www.dccouncil.washington.dc.us/images/00001/20100510112429.pdf

HEALTHY VENDING POLICIES, STANDARDS, AND TOOLKITS

Beverage Vending

Public Health Law & Policy
Developing a Healthy Beverage Vending Agreement (fact sheet)
www.nplan.org/nplan/products/creating-healthy-food-zone-around-schools

Public Health Law & Policy
Model Healthy Beverage Vending Agreement
www.nplan.org/nplan/products/model-healthy-beverage-vending-agreement

American Beverage Association/Clinton Foundation Beverage Standards
www.schoolbeverages.com

Bay Area Nutrition & Physical Activity Collaborative (BANPAC)
Healthy Vending Machine Toolkit
www.banpac.org/healthy_vending_machine_toolkit.htm

Beverage and Food Vending Machine Policies

Baldwin Park, CA
Resolution No. 2008-014
www.baldwinpark.com/index.php?option=com_docman&task=doc_download&gid=949&Itemid=218

Monterey County, CA
Healthy Vending Machine Policy
www.co.monterey.ca.us/admin/pdfs/HealthyVendingPolicy.pdf

San Diego, CA

Healthy Choice Options in Vending Machines on County Property–Policy No. K-14
www.co.san-diego.ca.us/cob/docs/policy/K-14.pdf

Santa Ana, CA

Resolution No. 2006-053
http://eatbettermovemore.org/sa/policies/pdftext/StAnaHealthySnacks.pdf

New York, NY

New York City Beverage Vending Machine Standards
www.nyc.gov/html/doh/downloads/pdf/cardio/cardio-vending-machines-standards.pdf

HEALTHY CONCESSIONS/MOBILE VENDING ON GOVERNMENT PROPERTY

Brentwood, CA

City Council Resolution No. 2007-236
www.healcitiescampaign.org/employee_wellness.html

Kansas City, MO

Parks and Recreation Vending Policy 4.7.08
www.kcmo.org/idc/groups/parksandrec/documents/parksrecreation/012710.pdf

U.S. Government Services Administration

Concessions and Cafeterias: Healthy Food in the Federal Workplace
www.gsa.gov/portal/content/104429

The National Policy & Legal Analysis Network to Prevent Childhood Obesity (NPLAN) is a project of Public Health Law & Policy (PHLP).

PHLP is a nonprofit organization that provides legal information on matters relating to public health. The legal information provided in this document does not constitute legal advice or legal representation. For legal advice, readers should consult a lawyer in their state.

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1 Frazao E. *High Costs of Poor Eating Patterns in the United States*. Economic Research Service, U.S. Department of Agriculture. 1999, p. 5–32.

2 Massachusetts Executive Order No. 509. More information is available at: **www.mass.gov/Eeohhs2/docs/dph/com_health/nutrition_phys_activity/eo509_qa.doc**.

3 Tennessee Executive Order No. 69 (August 6, 2010). More information is available at: **http://tennessee.gov/sos/pub/execorders/exec-orders-bred69.pdf**.

4 Baldwin Park, CA. Resolution No.2008-014. Available at: **www.baldwinpark.com/index.php?option=com_docman&task=doc_download&gid=949&Itemid=218**.

5 New York, NY. Executive Order No. 122 (September 19, 2008). More information is available at: **www.nyc.gov/html/doh/html/cardio/cardio-vend-nutrition-standard.shtml**.

6 *See, e.g.*, 15 CCR Division 1 (California Corrections Standards Authority).

7 *See, e.g.*, 15 CCR §1460 (California standard for frequency of food served in juvenile facilities); §1461(California minimal nutrition standards for food served in juvenile facilities).

8 42 USCA § 1758(j); U.S.D.A. Food and Nutrition Service Memo SP 01-2010 CACFP 01-2010 SFSP 01-2010 (October 9, 2009).

9 USDA Food and Nutrition Service Memo SP 01-2010, *supra* note 8.

10 75 F. 74, p. 20316 (April 19, 2010).

11 More information on Farm-to-School programs is available at: **www.farmtoschool.org**.

12 For more information on constitutional restrictions on local preferences, see Denning, Graff, and Wooten. "Laws to Require Purchase of Locally Grown Food and Constitutional Limits on State and Local Government: Suggestions for Policymakers and Advocates." *Journal of Agriculture, Food Systems, and Community Development (JAFSCD)*, August 2010. Available at: **www.agdevjournal.com/inaugural-issue/115-laws-to-require-purchase-of-locally-grown-food-and-constitutional-limits-on-state-and-local-government-suggestions-for-policymakers-and-advocates.html?catid=58%3Aopen-call-papers**.

13 Cleveland, OH Municipal Code ch. 187A.

14 S.F. Admin. Code ch. 12DA.

15 For more information about public records laws, see the Reporter's Committee for Freedom of the Press' Open Government Guide available at: **www.rcfp.org/ogg**.

16 Trust for America's Health. *F as in Fat: How Obesity Threatens America's Future*. 2010, p. 26. Available at: **healthyamericans.org/reports/obesity2010/Obesity2010Report.pdf**.

17 In 2006, the Alliance for a Healthier Generation brokered a voluntary agreement with representatives of The Coca-Cola Company, the Dr Pepper Snapple Group, PepsiCo and the American Beverage Association (ABA) to implement the Alliance School Beverage Guidelines.

18 American Beverage Association. *Alliance School Beverage Guidelines Final Progress Report*. March 8, 2010, p. 3. Available at: **www.healthiergeneration.org/schools.aspx?id=3425**.

19 21 USCA § 343(b).

20 21 USCA § 343(b)(viii).

21 21 USCA § 343(x); *see also* 75 FR 39026-01(July 7, 2010).

22 USDA. Guidance for Industry: Questions and Answers Regarding the Effect of Section 4205 of the Patient Protection and Affordable Care Act of 2010 on State and Local Menu and Vending Machine Labeling Laws. Available at: **www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodLabelingNutrition/ucm223408.htm**.

23 More information on the Government Services Administrations wellness standards is available at: **www.gsa.gov/HDR_o_home**.

24 *See, e.g.*, Seattle, WA. Municipal Code §15.17.010 (2009) (banning mobile vending within 1000 feet of a public school).

25 New York City Admin. Code § 17-307.