NOTE

MENU LABELING: KNOWLEDGE FOR A HEALTHIER AMERICA

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I. INTRODUCTION

Obesity has reached epidemic levels in the United States, contributing to a general decline in population health and rising medical costs.[1] In a nation committed to personal autonomy and, thus, limited in its ability to mandate changes in diet and exercise, curbing the growing obesity problem has no easy solution. However, small policy changes, even if they cannot eliminate the problem entirely, may contribute to an overall reduction in obesity levels. On March 21, 2010, Congress passed a menu-labeling provision as part of the Patient Protection and Affordable Care Act and President Obama signed the legislation into law on March 23.[2] Among other things, the legislation will require chain restaurants to post calorie information on their menus and drive-through signs.[3] This legislation has not yet been implemented and will likely face logistical difficulties, as well as legal challenges.[4] However, Congress has taken an important step by passing menu-labeling legislation, and requiring the Food and Drug Administration ("FDA") to use its expertise to propose specific regulations for implementing the legislation.[5] This Note discusses why a federal menu-labeling requirement is an important component of what should be a large-scale legislative effort to combat obesity and suggests guidelines for the implementation of maximally effective regulations, using existing state legislation as a model.

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[1] *See* Katherine M. Flegal et al., *Prevalence and Trends in Obesity Among US Adults, 1999–2008*, 303 JAMA 235, 238 (2010).

[2] Pub. L. No. 111-148, 124 Stat. 119 (2010).

[3] *Id.* § 4205, 124 Stat. at 125.

[4] *See* Stephanie Rosenbloom, *Calorie Data to Be Posted at Most Chains*, N.Y. TIMES, Mar. 23, 2010, *available at* http://www.nytimes.com/2010/03/24/business/24menu.html?scp=1&sq=Calorie%20Data%20to%20Be%20Posted%20at%20Most%20Chains&st=cse.

[5] § 4205.

As Americans consume an increasingly large portion of their food away from home[6] and portion sizes become larger and denser in calories, consumers need regulations that require restaurants to provide the nutritional information necessary to make healthy choices. The theory behind menu-labeling requirements is that if consumers see the calorie content of their food as they are making their choices, they may alter their purchasing patterns and, in response, manufacturers may alter their menus to offer healthier options. This theory is supported by results of the FDA's enactment of a comparable labeling requirement for packaged food, which produced positive nutritional effects on food purchased for preparation in the home.[7] Some restaurants already voluntarily offer nutrition information, and some state and local governments have implemented menu-labeling provisions.[8] However, the magnitude of the problem and the national presence of many chain restaurants require a uniform national menu-labeling regulation overseen by an experienced agency, such as the FDA. The Patient Protection and Affordable Care Act, which requires the FDA to promulgate regulations to implement these new requirements within one year and expressly preempts the existing state and local menu-labeling requirements,[9] is a crucial step. Legislation could go even further by extending the legislation to sit-down restaurants and smaller chains, while still considering the business interests of the regulated restaurants.

This Note begins, in Part II, by providing an overview of America's current obesity crisis and the related decline in health and rise in medical costs. In Part III, this Note discusses existing food-labeling requirements in the United States, including already implemented state and local menu-labeling laws and their limitations. Part IV explains the restaurant industry's large and growing role in America's obesity crisis, in particular the general con-

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[6] Rudd Ctr. for Food Policy & Obesity, Yale Univ., Menu Labeling in Chain Restaurants: Opportunity for Public Policy 2 (2008), *available at* http://www.yaleruddcenter.org/resources/upload/docs/what/reports/RuddMenuLabelingReport2008.pdf.

[7] Jennifer L. Pomeranz & Kelly D. Brownell, *Legal and Public Health Considerations Affecting the Success, Reach, and Impact of Menu-Labeling Laws*, 98 Am. J. Pub. Health, 1578, 1578 (2008); *see also* Prevention Inst. for the Ctr. for Health Improvement, Nutrition Labeling Regulations 1 (2002), *available at* http://www.preventioninstitute.org/component/jlibrary/article/download/id-497/127.html (explaining the benefits of the packaged food requirements in the Nutritional Labeling and Education Act of 1990 ("NLEA")).

[8] Prevention Inst. for the Ctr. for Health Improvement, Nutrition Labeling Regulations, *supra* note 7 at 2. For specific examples of restaurants making nutrition information available, *see* Chick-fil-A, Chick-fil-A—Nutrition Data, http://www.chick-fil-a.com/?#nutritiondata (last visited Apr. 4, 2010); Dunkin' Donuts, Dunkin' Donuts Nutrition Facts and Calorie Information, https://www.dunkindonuts.com/aboutus/nutrition/ (last visited Apr. 4, 2010); KFC, Nutrition, http://www.kfc.com/nutrition/ (last visited Apr. 4, 2010); McDonald's, McDonald's USA—Nutrition Spotlight, http://www.mcdonalds.com/usa/eat/nutrition_info.html (last visited Apr. 4, 2010); Starbucks Corporation, Nutrition - Starbucks Coffee Company, http://www.starbucks.com/menu/nutrition (last visited Apr. 4, 2010). For examples of state and local menu-labeling requirements, see National Conference of State Legislatures, Trans Fat and Menu Labeling Legislation, http://www.ncsl.org/default.aspx?tabid=14362 (last visited Mar. 25, 2010) [hereinafter Trans Fat and Menu Labeling Legislation].

[9] § 4205.

sumer ignorance about the nutritional content of restaurant meals and the deficiencies in currently implemented menu-labeling efforts. This part recognizes that menu-labeling is one of relatively few avenues of legislation available for improving individual dietary choices and suggests that, if properly implemented, such legislation could positively impact consumer choice at restaurants, which are an increasingly significant source of food consumption. In Part V, this Note discusses why menu-labeling requirements would be an effective method of addressing America's obesity crisis. Part VI then lays out suggested principles for a maximally effective menu-labeling regime using New York City's current regulations as a template. In Part VII, this Note evaluates the recently passed federal legislation and addresses the practical difficulties of implementing a federal menu-labeling requirement. Finally, Part VIII concludes that federal menu-labeling can make a valuable contribution to large-scale legislative and regulatory efforts to reduce obesity in America and that Congress and the FDA have the power and the expertise to enact and implement these requirements.

II. The Scope of the Obesity Crisis

America's obesity crisis has become increasingly difficult to ignore. Recent studies show that sixty-eight percent of American adults are classified as overweight, while thirty-two percent of adult men and over thirty-five percent of adult women are obese.[10] For adults aged twenty or older, the definition of overweight is a body mass index ("BMI") of at least twenty-five, and obesity is defined as a BMI of at least thirty.[11] The statistics relating to excess weight in children are no less disturbing. A recent study found that among children aged two through nineteen, approximately seventeen percent are obese and almost thirty-two percent are overweight.[12]

With the increased levels of overweight[13] and obesity, Americans are becoming increasingly vulnerable to the myriad health problems that scientists have linked to overweight and obesity. Research indicates that higher

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[10] Flegal et al., *supra* note 1, at 238.

[11] *Id.* at 236.

[12] Cynthia L. Ogden et al., *Prevalence of High Body Mass Index in US Children and Adolescents, 2007–2008*, 303 JAMA 242, 245 (2010). The process to determine whether children are overweight or obese is somewhat more complex than the process used for adults and involves calculating the ninety-fifth and eighty-fifth percentiles of BMI for several narrower age categories. For a detailed account of special challenges facing researchers trying to gauge weight problems in children, *see* Nancy F. Krebs et al., *Assessment of Child and Adolescent Overweight and Obesity*, 120 Pediatrics S193 (2007).

[13] The term "overweight" is used throughout this note to classify a range of weight that is greater than what is generally considered healthy for a given height and has been shown to increase the likelihood of certain diseases and other health problems, but does not reach the level of obesity. It is a term commonly used in the medical field. *See* Centers for Disease Control and Prevention, Defining Overweight and Obesity, *available at* http://www.cdc.gov/obesity/defining.html (last visted, Apr. 10, 2010).

BMI levels can result in decreased longevity.[14] Type 2 diabetes, gallbladder disease, and high blood pressure are more prevalent among overweight and obese adults than in the normal-weight population.[15] Obesity also increases the risk of pancreatic cancer[16] and kidney stones.[17] Furthermore, evidence suggests that for women, weight gain can be a contributing factor to coronary heart disease.[18] Approximately 280,000 deaths per year are directly attributable to obesity.[19]

Studies confirm that, given the link between excess weight and a variety of health problems, overweight and obesity might also contribute to rising healthcare costs. For example, one study found that while the typical normal-weight white woman aged 35 to 44 spent an average of $2127 on healthcare costs annually, costs rose to $2358 for women in the same demographic with BMIs in the overweight range of 25 to 30.[20] As BMI rose to the level of obesity, so did annual health care costs: $2873 annually for women with BMIs between 30 and 35, $3058 annually for women with BMIs between 35 and 40, and $3506 annually for women with BMIs of 40 or higher.[21] If current healthcare trends continue, in the year 2018 the nation will spend $344 billion, or 21% of the total expected direct health care costs, on costs attributable to obesity.[22] This is an estimated $200 billion more than the nation would have to spend if obesity rates remained at 2009 rates.[23]

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[14] *See* Kevin R. Fontaine et al., *Years of Life Lost Due to Obesity*, 289 JAMA 187 (2003).

[15] *See* Aviva Must et al., *The Disease Burden Associated With Overweight and Obesity*, 282 JAMA 1523 (1999).

[16] *See* Dominique S. Michaud et al., *Physical Activity, Obesity, Height, and the Risk of Pancreatic Cancer*, 286 JAMA 921 (2001).

[17] *See* Eric N. Taylor et al., *Obesity, Weight Gain, and the Risk of Kidney Stones*, 293 JAMA 455 (2005).

[18] *See* Walter C. Willett et al., *Weight, Weight Change, and Coronary Heart Disease in Women*, 273 JAMA 461 (1995).

[19] *See* David B. Alson et al., *Annual Deaths Attributable to Obesity in the United States*, 282 JAMA 1530, 1530 (1999). *But see* Katherine M. Flegal et al., *Excess Deaths Associated With Underweight, Overweight, and Obesity*, 293 JAMA 1861, 1866 (2005) (asserting that measurements of this sort are subject to numerous methodological difficulties and suggesting the number of deaths due directly to obesity is actually much lower than 280,000 per year).

[20] *See* Christina C. Wee et al., *Health Care Expenditures Associated With Overweight and Obesity Among US Adults: Importance of Age and Race*, 95 Am. J. Pub. Health 159, 159 (2005).

[21] *Id.*

[22] United Health Found., Am. Pub. Health Ass'n & P'ship for Prevention, The Future Costs of Obesity: National and State Estimates of the Impact of Obesity on Direct Health Care Expenses 2 (2009), *available at* http://www.americashealthrankings.org/2009/report/Cost%20Obesity%20Report-final.pdf. For current economic trends in obesity spending, see Centers for Disease Control and Prevention, Overweight and Obesity for Professionals: Economic Consequences, http://www.cdc.gov/obesity/causes/economics.html (last visited Apr. 4, 2010). For information on state trends in obesity from 1998–2000, see National Conference of State Legislatures, Obesity Statistics in the United States, http://www.ncsl.org/IssuesResearch/Health/ObesityStatisticsintheUnitedStates/tabid/14367/Default.aspx#State_level (last visited Apr. 4, 2010).

[23] The Future Costs of Obesity: National and State Estimates of the Impact of Obesity on Direct Health Care Expenses, *supra* note 22 at 2.

As a result of the United States' commitment to publicly funding medical care for certain segments of the population through programs like Medicare and Medicaid, much of the financial burden of obesity will fall on the taxpayer. One study estimated that, on average, obesity-related medical costs constituted about six percent of adult medical expenditures, almost half of which are financed by Medicare and Medicaid.[24] In light of obesity's deleterious effects on public health and the public budget, and the anticipated intensification of those effects in the near future, the benefits of comprehensive federal legislation far outweigh any imposition on individual freedom of choice.[25]

III. An Overview of Food Labeling Rules in the United States[26]

Since its inception, the FDA has, in some capacity, regulated the information to which consumers are exposed when purchasing food. For example, the FDA's organic statute, the Federal Food Drug and Cosmetic Act of 1938 ("FDCA"), prohibits the misbranding of food.[27] In 1941, pursuant to the authority granted by the FDCA, the FDA promulgated its first regulations concerning nutritional information on food packaging.[28] The scope of the FDA's initial regulations was actually quite narrow and applied only to special dietary food,[29] not to the general-purpose food that is the foundation of most consumers' diets.

In 1973, the FDA promulgated stricter regulations requiring a uniform food-labeling format, under the heading of "Nutrition Labeling," for packaged foods.[30] These regulations only provided guidance for voluntary nutrition labeling.[31] Thus, between 1973 and 1990 FDA regulation of nutrition labeling was severely limited. During this time, Congress decided to take further action, and on November 8, 1990, President George H.W. Bush

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[24] Eric A. Finkelstein et al., *State-Level Estimates of Annual Medical Expenditures Attributable to Obesity*, 12 Obesity Res. 18, 21 (2004).

[25] The main objections to federal menu-labeling legislation are that individuals have the right to buy food without the restaurant providing any information about the nutritional content and that this "not a federal issue." *See* Rosenbloom, *supra* note 4.

[26] The following discussion of the Federal Food, Drug, and Costmetic Act of 1938 and the NLEA is a thumbnail sketch drawn mostly from Peter Barton Hutt, *A Brief History of FDA Regulation Relating to the Nutrient Content of Food*, *in* Nutrition Labeling Handbook 1 (Ralph Shapiro ed., 1995).

[27] FDCA, ch. 675, 52 Stat. 1040 (1938) (codified as amended in scattered sections of 21 U.S.C.).

[28] 6 Fed. Reg. 5921 (Nov. 22, 1941).

[29] *Id.*

[30] 38 Fed. Reg. 6951 (Mar. 14, 1973).

[31] *Id.* ("The Commissioner stated the conclusion that current information is insufficient to adopt mandatory nutrition labeling at this time."). Also, "Nutrition information relating to food may be included in the labeling of a product: *provided* that it conforms to the requirements of this section." *Id.* at 6959.

signed the Nutritional Labeling and Education Act of 1990 ("NLEA") into law.[32]

The NLEA consisted of six major components. First, the statute explicitly provided the FDA with a mandate to require and oversee nutrition labeling for *all* food products, not just certain products to which nutrients are added or for which nutrition claims are made.[33] Second, it instructed the FDA to define nutrient descriptors—terms like "high" in dietary fiber, "low" in fat, and "lite," which are commonly used by food producers—in order to ensure that consumers could rely on these descriptors when making purchasing decisions.[34] Third, it ordered the FDA to review disease-prevention claims that food producers were including on their packaging.[35] Fourth, it added requirements for listing additional ingredients on packaged food labels: mandatory components of standardized food, certified color additives, and the percent of fruit or vegetable juice.[36] Fifth, it declared that the FDCA preempts most state food labeling laws.[37] Finally, it gave state governments the right to pursue FDCA enforcement actions in federal court under limited conditions.[38]

The six components of the NLEA took steps to correct information asymmetries between producers and consumers of food. In the context of the packaged food industry, the NLEA furthered three admirable policy goals: "1) help customers make healthier food choices through improved access to nutrition information; 2) protect consumers from inaccurate or misleading health-related claims on packages; and 3) encourage manufacturers to improve the nutritional quality of their products by making nutrition content visible."[39] Despite these progressive steps with regard to packaged foods, the NLEA did nothing to address the similar, if not more pronounced, information asymmetries in the context of the restaurant industry. In fact, the NLEA added section 403(q)(5)(A)(i) to the FDCA, expressly exempting restaurants from having to display nutritional information on their menus.[40]

In recent years, state and local governments have attempted to fill this regulatory void. As of February 2010, the City of Philadelphia, Westchester County in New York, and King County in Washington have all implemented

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[32] Pub. L. No. 101-535, 104 Stat. 2353 (1990) (codified as amended in scattered sections of 21 U.S.C.); Statement on Signing the Nutrition Labeling and Education Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1795 (Nov. 8, 1990).

[33] *See* NLEA § 2, sec. 403(q)(1), 104 Stat. at 2353 (codified at 21 U.S.C. § 343(q)(1) (2006)).

[34] *Id.* § 3(b)(1)(A)(iii), 104 Stat. at 2361 (codified at note following 21 U.S.C. § 343).

[35] *Id.* § 3, sec. 403(r)(3)(B)(ii), 104 Stat. at 2359 (codified at 21 U.S.C. § 343(r)(3)(B)(ii)).

[36] *Id.* § 7, sec. 403(i), 104 Stat. at 2364 (codified as amended at 21 U.S.C. § 343(i)).

[37] *Id.* § 6, sec. 403A, 104 Stat. at 2362–63 (codified as amended at 21 U.S.C. § 343-1).

[38] *See id.* § 4, sec. 307, 104 Stat. at 2362 (codified at 21 U.S.C. § 337).

[39] PREVENTION INST. FOR THE CTR. FOR HEALTH IMPROVEMENT, *supra* note 7, at 1.

[40] NLEA, § 2, sec. 403(q)(5)(A)(i), 104 Stat. 2353, 2355 (codified at 21 U.S.C. § 343(q)(5)(A)(i)).

restaurant menu-labeling regimes.[41] The states of California, Oregon, Maine, Massachusetts, and New Jersey have all approved menu-labeling requirements, and three counties in New York, Montgomery County in Maryland, and Davidson County in Tennessee have followed suit.[42] In 2009 alone, legislators in sixteen states and the District of Columbia introduced some form of menu-labeling rule.[43]

New York City's fight for menu labeling has been especially notable. On January 2, 2008, the New York Board of Health and Mental Hygiene ("BOHMH") adopted Regulation 81.50,[44] which officials estimated "could reduce the number of obese New Yorkers by 150,000 [within] five years and prevent 30,000 cases of diabetes."[45] The regulation requires any restaurant with fifteen or more establishments to post the calorie content next to the names of items on the menu or menu board[46] in the same font as either the item names or prices.[47]

Regulation 81.50 was actually BOHMH's second attempt at formulating menu-labeling regulations; the District Court for the Southern District of New York struck down the first attempt on the grounds that the City's regulation was preempted by federal law.[48] Regulation 81.50, New York City's second attempt, was also challenged on federal preemption and First Amendment grounds, but the court upheld the regulation in *New York State Restaurant Association v. New York City Board of Health* ("*NYRSRA II*").[49]

IV. The Restaurant Industry's Contribution to the Obesity Crisis

A. *The Growing Popularity of Away-From-Home Food*

Food prepared away from home is a thriving business in the United States. The U.S. Census Bureau reports that in 2007, "limited-service restaurants," popularly known as fast food restaurants, netted approximately

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[41] *See* Center for Science in the Public Interest, State and Local Menu Labeling Policies, http://cspinet.org/new/pdf/ml_map.pdf (last visited Apr. 4, 2010) [hereinafter State and Local Menu Labeling Policies]; *see also* Trans Fat and Menu Labeling Legislation, *supra* note 8.

[42] *See* State and Local Menu Labeling Policies, *supra* note 41.

[43] *See id.*

[44] N.Y., N.Y., New York City Health Code tit. IV, pt. A, art. 81, § 81.50 (2008).

[45] Roni Caryn Rabin, *New Yorkers Try to Swallow Calorie Sticker Shock*, MSNBC, July 16, 2008, http://www.msnbc.msn.com/id/25464987/.

[46] Requiring nutritional content to be posted on menus and menu boards will ensure that consumers see this information when they are actually making their ordering decisions. For definitions of "menu," "menu board," and "menu item" see § 81.50(a)(2)–(4).

[47] § 81.50(a)(1), (c).

[48] *See* N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health (NYSRA I), 509 F. Supp. 2d 351 (S.D.N.Y. 2007).

[49] 556 F.3d 114, 117 (2d Cir. 2009).

$151.7 billion in sales.[50] Adjusted for inflation, this represents a 13% increase from the 2002 sales figure[51] and a 24% increase over the 1997 sales figure.[52] The full-service restaurant industry has seen similar growth. In 2007, sales at these restaurants amounted to over $191 billion,[53] which, after adjusting for inflation was 15% higher than sales in 2002[54] and 32% higher than sales in 1997.[55] Each day, approximately one out of every four American adults visits a fast food restaurant.[56] In addition, Americans are spending a much greater proportion of their food budgets on food prepared outside the home: 45% in 2002, as compared to 27% in 1962.[57]

B. The Relative Unhealthiness of Away-From-Home Food

The trend of weight gain among Americans appears to be correlated with the consumption of greater amounts of food outside the home.[58] For example, one study showed that children aged seven to seventeen tend, on average, to consume fifty-five percent more calories from meals originating in restaurants than from meals originating in the home.[59]

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[50] U.S. Census Bureau, 2007 Economic Census: Accomodation and Food Services: Preliminary Comparative Statistics for the United States, 2007 and 2002, http://factfinder.census.gov/servlet/IBQTable?_bm=&-geo_id=&-ds_name=ec0772I2&-_lang=en (last visited Apr. 4, 2010) [hereinafter 2007 Economic Census]. The Census Bureau defines "limited-service restaurant" as:

> establishments primarily engaged in providing food services (except snack and nonalcoholic beverage bars) where patrons generally order or select items and pay before eating. Food and drink may be consumed on premises, taken out, or delivered to the customer's location. Some establishments in this industry may provide these food services in combination with selling alcoholic beverages.

U.S. Census Bureau, Limited-Service Restaurants, http://factfinder.census.gov/servlet/MetadataBrowserServlet?type=codeRef&id=722211&ibtype=NAICS2002&dsspName=ECN_2007&_lang=en (last visited Mar. 30, 2010).

[51] *See* 2007 Economic Census, *supra* note 50. According to the 2007 Economic Census, in 2002, limited-service restaurants made sales of approximately $116.5 billion in real dollars. Assuming Consumer Price Indexes ("CPIs") of 179.9 in 2002 and 207.3 in 2007, this translates into $134.3 billion in 2007 dollars, and it is this figure that was used to calculate the increase.

[52] *See* U.S. Census Bureau, 2002 Economic Census: Accomodation and Food Services: Comparative Statistics for the United States, 2002 and 1997, http://factfinder.census.gov/servlet/IBQTable?_bm=Y&-geo_id=&-ds_name=EC0272I2&-_lang=en (last visited Apr. 4, 2010) [hereinafter 2002 Economic Census]. In real dollars, the 1997 sales figure was approximately $94.7 billion. This translates into $122.3 billion in 2007 dollars, assuming CPIs of 160.5 in 1997 and 207.3 in 2007.

[53] *See* 2007 Economic Census, *supra* note 50.

[54] *See id.*

[55] *See* 2002 Economic Census, *supra* note 52.

[56] Eric Schlosser, Fast Food Nation 3 (2001).

[57] Jayachandran N. Variyam, U.S. Dep't of Agric., Nutrition Labeling in the Food-Away-From-Home Sector: An Economic Assessment 1 (2005), *available at* http://www.ers.usda.gov/publications/err4/err4.pdf.

[58] *See generally* J.K. Binkley, J. Eales & M. Jekanowski, *The Relation between Dietary Change and Rising US Obesity*, 24 Int'l J. Obesity 1032 (2000).

[59] Christine Zoumas-Morse et al., *Children's Patterns of Macronutrient Intake and Associations With Restaurant and Home Eating*, 101 J. Am. Dietetic Ass'n 923, 925 (2001).

Policymakers seeking to address the problems of overweight and obesity should be particularly concerned with the steady rise in fast food sales. Fast food is "designed to promote consumption of a maximum amount of energy in a minimum amount of time."[60] Its components, which include high energy density, low fiber content, low satiating value, and extensive food processing that eliminates the need for much chewing and promotes rapid swallowing, lead to "excess energy intake," which leads to weight gain while delivering little in the way of nutritional quality.[61] Thus, it is no surprise that research links fast food consumption with higher BMI in adults.[62]

Growing portion sizes at fast food restaurants pose an additional risk of weight gain. This trend is known to some as "super sizing"—a term popularized first by the McDonald's fast food chain and later by the 2004 documentary *Super Size Me* that lambasted McDonald's.[63] Another name for the trend is "portion distortion."[64] Regardless of the name, portion growth is a problem because, not surprisingly, when people are offered larger portions of food, studies have shown that they tend to consume more calories.[65]

As the original source of the term, McDonald's is perhaps the best illustration of the super-sizing phenomenon. When the first McDonald's opened its doors in the middle of the twentieth century, the restaurant offered one size for an order of French fries; today, the chain offers three sizes, with the original size as the smallest option.[66] In the early days, the typical McDonald's meal contained a hamburger, a side of fries, and a twelve-ounce Coke for a total of 590 calories.[67] By 2002, a typical order might be a Quarter Pounder with Cheese Extra Value Meal with super-sized French fries and a Coke, totaling 1550 calories.[68]

Various theories seek to explain the super-sizing phenomenon in the fast food industry. One theory posits that as the market became more geographically saturated with fast food franchises in the 1970s, fast food chains began trying to differentiate themselves from their competitors by offering

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[60] Cara B. Ebbeling et al., *Compensation for Energy Intake From Fast Food Among Overweight and Lean Adolescents*, 291 JAMA 2828, 2832 (2004).

[61] *See id.*

[62] Shaunthy A. Bowman & Bryan T. Vinyard, *Fast Food Consumption of U.S. Adults: Impact on Energy and Nutrient Intakes and Overweight Status*, 23 J. AM. C. NUTRITION 163 (2004).

[63] SUPER SIZE ME (Hart Sharp Video 2004).

[64] Brian Wanskink & Koert van Ittersum, *Portion Size Me: Downsizing Our Consumption Norms*, 107 J. AM. DIETETIC ASS'N 1103, 1103 (2007).

[65] *See, e.g.*, Barbara J. Rolls et al., *Portion Size of Food Affects Energy Intake in Normal-Weight and Overweight Men and Women*, 76 AM. J. CLINICAL NUTRITION 1207 (2002); *see also* Jenny H. Ledikwe et al., *Portion Sizes and the Obesity Epidemic*, 135 J. NUTRITION 905, 905 (2005) (collecting and analyzing multiple studies).

[66] Pomeranz & Brownell, *supra* note 7, at 1578.

[67] NAT'L ALLIANCE FOR NUTRITION & ACTIVITY, FROM WALLET TO WAISTLINE: THE HIDDEN COST OF SUPER SIZING 5 (2002), *available at* http://www.preventioninstitute.org/component/jlibrary/article/download/id-499/127.html [hereinafter HIDDEN COST].

[68] *Id.*

larger servings of food.[69] A related theory suggests that, because the marginal costs of purchasing and preparing the additional food for the larger portions is so small, fast food restaurants can increase their profits substantially by offering larger portions at somewhat higher prices, which still seem like values to consumers.[70]

The problem is that as the fast food companies' profit margins rise from providing more food for lower prices, calorie consumption also increases. For example, when a customer of the Cinnabon chain orders a Classic Cinnabon instead of the smaller Minibon, the difference in cost is a mere $0.48; however, the difference in calories is 370.[71] That represents a 24% price increase for a 123% calorie increase.[72] A Baskin Robbins customer may choose to purchase a double scoop of chocolate chip ice cream for $1.62 more than the kids scoop (a 129% price increase), but when she does, she increases the calorie count by 390 (a 260% calorie increase).[73] Normally, transferring more to consumers for a relatively smaller amount of money seems like a positive outcome. However, this evaluation fails to account for the additional cost to consumers, in the form of excess calories, and the externalization of those costs onto society in the form of increased health care costs.

Meals with unhealthily high calorie counts are most often associated with the fast food industry, but calorie counts may be even higher at sit-down chain restaurants. One study found that adolescents who ate at sit-down chain restaurants such as Chili's, Denny's, and Outback Steakhouse, consumed more calories, on average, than adolescents who ate at fast food restaurants such as McDonald's and Taco Bell.[74] Furthermore, even meals that appear healthy can contain a deceptively large number of calories. For example, four ounces of Atlantic salmon cooked at home normally contains about 233 calories and is considered a good low calorie meal choice.[75] A consumer may therefore be surprised to learn that the Miso Salmon at Cheesecake Factory has 1673 calories,[76] more than three times the amount of calories in a large order of McDonald's french fries.[77] The Miso Salmon meal

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[69] *See* Wanskink & van Ittersum, *supra* note 64, at 1105.

[70] *See* Hidden Cost, *supra* note 67, at 1.

[71] *See id.* at 2.

[72] *Id.*

[73] *Id.* at 7.

[74] See Julienne A. Yamamoto et al., *Adolescent Calorie/Fat Menu Ordering at Fast Food Restaurants Compared to Other Restaurants*, 65 Haw. Med. J. 231, 232–34 (2006).

[75] CalorieKing, Calorie Counter—Calories in Fresh Fish: Salmon, Atlantic, Cooked, Dry Heat, http://www.calorieking.com/foods/calories-in-fresh-fish-salmon-atlantic-cooked-dry-heat_f-Y2lkPTU3JmJpZD0xJmZpZD03MDc5NCZlaWQ9NTM2NTk0Nzc3JnBvcz0xJnBhcj0ma2V5PWNvb2tlZCBhdGxhbnRpYyBzYWxtb24.html (last visited Feb. 10, 2010).

[76] Calorielab.com, Cheesecake Factory Nutrition Facts, http://calorielab.com/news/wp-images/post-images/cheesecake-factory-nutrition-facts-calories-05.gif (last visited Feb. 10, 2010) [hereinafter Cheesecake Factory Nutrition Facts].

[77] *See* McDonald's, McDonald's USA Nutrition Facts for Popular Menu Items, http://nutrition.mcdonalds.com/nutritionexchange/nutrition_facts.html (last visited Apr. 4, 2010).

pales in comparison with the Cheesecake Factory's Bistro Shrimp Pasta, which contains a shocking 2285 calories,[78] 285 more than the U.S. Department of Agriculture's ("USDA") recommended daily calorie intake of around 2000.[79] Thus, although fast food chains are generally the focus of restaurants' contributions to overweight and obesity, the far more limited awareness of even higher calorie counts at sit-down restaurants demands that, where possible, sit-down restaurants, including non-chain establishments, should be included in any plan to combat America's obesity problem.

C. Lack of Access to Nutritional Information at Restaurants

The relative ignorance about increasing calorie counts in restaurant meals is attributable to the fact that nutritional information about restaurant food is often difficult—and occasionally impossible—to find. The Cheesecake Factory sit-down chain is an extreme example: it has a strict policy of not releasing nutritional information about the food it serves—not even on the company website.[80] Thus, unless a consumer finds information on an outside website, even a health-conscious consumer who seeks to make nutritious choices may end up mistakenly purchasing the calorie-packed Miso Salmon or the Bistro Shrimp Pasta.[81]

Silence on the part of restaurants is unusual. Most restaurants have a system for distributing nutritional information about their products.[82] However, fast food restaurants rarely publish this information on the menu board that the customer consults when making her selection or on the packaging of the food item itself. Restaurants are more likely to distribute nutritional information through such channels as brochures, websites, and wall displays that are removed from the area where consumers actually place their orders.[83] Further, the type and availability of voluntarily-provided nutrition information varies greatly across restaurants. For example, Uno Chicago Grill has a corporate policy of maintaining electronic kiosks at the front of every store, where customers may look up the nutritional information of all items on the menu.[84] While at first glance this seems like an effective way of providing consumers with nutritional information, the system is flawed in several important ways.[85] Since the menu item selection process takes place at

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[78] Cheesecake Factory Nutrition Facts, *supra* note 76.

[79] Food & Nutrition Serv., USDA, Nutrition Essentials 51-52 (2007), *available* at http://www.fns.usda.gov/tn/Resources/ne_amounts4uadults.pdf.

[80] *See* The Cheesecake Factory, About Us, http://home.thecheesecakefactory.com/aboutus.htm (last visited Feb. 10, 2010) (click "FAQs," followed by "4. Nutritional Information").

[81] *See supra* text accompanying notes 76–79.

[82] *See* Guy E. Livingston, *NLEA and the Foodservice Industry*, *in* Nutrition Labeling Handbook, *supra* note 26, at 449, 462.

[83] *See* Variyam, *supra* note 57, at 4 (listing such examples as posting nutritional information on wall displays or on websites).

[84] *See* Paul Frumkin, *Make Menu Labeling Work for You by Beating Mandates to the Punch*, Nation's Restaurant News, Jan. 26, 2009, at 38.

[85] *See id.*

diners' tables, for a consumer to benefit from the kiosk, she must know what she wants to order before being seated or remove herself from her table during the selection process to view the information on the kiosk. In short, simply accessing the information contained in the kiosk requires a level of effort that restaurant customers may not exert. Further, even among customers who are willing to make the effort to obtain nutritional information at the kiosk, misunderstandings are likely. An individual briefly checking the kiosk prior to returning to the table to order might read that the somewhat misleadingly named "individual" Cheese & Tomato Pizza contains 580 calories and miss the fact that the individual pizza actually contains three servings for a total of 1740 calories.[86]

Thus, while nutritional information disclosures like the one offered by Uno Chicago Grill may aid the health-conscious consumer who is willing to go out of her way to obtain nutritional information, this kind of information distribution may not reach individuals who are less conscious about their dietary choices, and, thus, prone to becoming overweight. In the spring of 2007, the New York City Board of Health conducted an exit interview survey of nearly twelve thousand consumers who had dined at 274 randomly selected chain restaurants and found that customers of most restaurants, including McDonald's, Dunkin' Donuts, and Au Bon Pain, had not seen the nutritional information provided by the restaurants.[87] If the goal of menu-labeling is to influence the dietary decisions of a wide range of consumers, merely making nutritional information available *somewhere* is not enough. Currently, restaurants' nutritional disclosures are often far removed from the point of selection and are inconsistently placed across different chains. These voluntary and, in the cases of restaurants serving highly caloric meals, likely half-hearted efforts to educate consumers are insufficient to address this intractable problem.

V. Evidence for Potential Benefits from Federal Menu-Labeling Rules

As explained above, the epidemic of weight problems in the United States is a major public health problem costing the nation billions of dollars,[88] and one would expect the cost only to grow in the coming years unless the underlying health trend is reversed.[89] The harmful effects weight problems have both on the economy and on Americans' health, coupled with

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[86] *See* Uno Chicago Grill, Nutrition, http://www.unos.com/kiosk/nutritionUnos.html (last visited Feb. 10, 2010).

[87] *See* Declaration of Thomas R. Frieden at 28–29, N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 545 F. Supp. 2d 363 (S.D.N.Y. 2008) (No. 08 Civ 1000). The single exception was the Subway chain, where just over thirty-one percent of customers reported noticing some kind of nutritional information. *Id.* at 28.

[88] *See supra* text accompanying footnotes 13–21.

[89] *See supra* text accompanying footnotes 22–23.

the recent attention focused on health care costs by policymakers,[90] has spurred legislators' interest in exploring federal initiatives about menu labeling. While Congress has already taken a first step in this process, the severity of these effects should encourage Congress to pass even stricter regulations to reduce the prevalence of weight problems in America to the greatest extent possible.

Unfortunately, the federal government's options for regulating calorie information and intake beyond menu labeling are few. The NLEA already requires producers to print nutritional information on the packaging of foods consumed at home.[91] Additionally, while research indicates that the increase in portion sizes at restaurants has been paralleled by an increase in portion sizes in meals consumed at home,[92] further regulation of at-home meals beyond packaging requirements would be impractical or impossible. Any legislative attempt to mandate that Americans engage in less sedentary lifestyles would be wholly inconsistent with American society's deeply embedded ideal of personal autonomy. Thus, regulations on Americans' activities when in public offer a much more feasible avenue by which legislatures can effect positive change in America's weight crisis. As such, food prepared away from home makes for a sensible object for government regulation.[93] Thus, in the restaurant arena, there is at least one concrete step the federal government can take that has potential to favorably influence consumer and restaurant behavior: requiring some nutrition information to be posted on restaurant menus.

Of course, a central legislative question is whether such a federal regulation would be effective. What is clear from several empirical studies is that when nutrition information is posted on menus at full-service restaurants, or on menu boards at fast food restaurants, consumers are more likely to notice the information. The results of research on whether menu labeling actually has an effect on how many calories restaurant patrons consume, however, have been mixed.

One study,[94] which was published on the *Health Affairs* website in October 2009 and drew high-level media attention,[95] suggested that no favorable effect on calorie consumption resulted from a menu-labeling scheme.[96] After New York City implemented public health regulations re-

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[90] For archived news articles about the debate surrounding health care reform dating back to 2009, see Kaiser Health News, Health Reform, http://www.kaiserhealthnews.org/Topics/Reform.aspx (last visited Feb. 10, 2010).

[91] NLEA, 21 U.S.C. § 343(q) (2008).

[92] *See* Samara Joy Nielsen & Barry M. Popkin, *Patterns and Trends in Food Portion Sizes, 1977–1998,* 289 JAMA 450 (2003).

[93] *See supra* text accompanying notes 58–64.

[94] *See* Brian Elbel et al., *Calorie Labeling and Food Choices: A First Look at the Effects on Low-Income People in New York City*, 28 HEALTH AFF. w1110 (2009).

[95] *See, e.g.*, Anemona Hartocollis, *Calorie Postings Don't Change Habits, Study Finds*, N.Y. TIMES, Oct. 6, 2009, at A26.

[96] *See* Elbel et al., *supra* note 94.

quiring that calorie counts be posted next to menu item names at the point of purchase, researchers from New York University and Yale University sought to determine whether the labels had any effect on the decisionmaking of low-income, minority fast food customers in New York City.[97] The study consisted of interviewing customers leaving fast food restaurants in the newly-regulated New York City, as well as those leaving restaurants in Newark, New Jersey, a city without a menu-labeling regime.[98] Researchers also collected and analyzed the receipts of the fast food customers interviewed to determine how many calories they had purchased.[99]

Taken at face value, the results of this study were mixed in evaluating the efficacy of menu-labeling requirements in shifting consumer purchase decisions. Fifty-four percent of the study's New York City subjects reported noticing nutritional information while inside the restaurant, as compared to less than twenty percent among the Newark subjects.[100] Of the New York City subjects who did notice the nutritional information, roughly twenty-seven percent said that they had taken the information into account when making their purchasing decisions.[101] This disparity notwithstanding, after analyzing the customers' receipts and tabulating the number of calories purchased, the researchers found no effect on the total number of calories purchased—even among those subjects who both noticed the calorie labels and claimed to have been influenced by them.[102]

As its authors themselves suggested, however, the *Health Affairs* study was limited in its ability to answer the question of whether menu labeling can effect a reduction in calorie intake.[103] Three of the study's limitations merit particular attention. First, the researchers conducted the study over a relatively short span of time and did so very soon after the implementation of New York City's menu-labeling regime.[104] Therefore, the *Health Affairs* study would have missed any long-term alterations to consumers' behavior resulting from repeated exposure to calorie labels and increased consumer understanding of the product differences over time.[105] Second, because researchers only studied subjects already having made purchases at fast food restaurants, the study was unable to take into account consumers who were avoiding fast food restaurants in the first instance. It is possible that these excluded consumers had already reacted to the calorie postings that they had seen during prior fast food restaurant visits.[106] And third, the *Health Affairs*

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[97] *See id.* at w1110.
[98] *See id.*
[99] *See id.* at w1113.
[100] *Id.* at w1114–15.
[101] *See id.*
[102] *See id.* at w1117.
[103] *See id.* at w1118–19.
[104] *See id.* at w1118.
[105] *See id.*
[106] *See id.*

study focused narrowly on low-income, minority consumers,[107] therefore failing to capture any possibility of reduced calorie consumption among other demographic subgroups as a result of menu labeling.[108]

When taken in combination, the second and third limitations of the *Health Affairs* study noted above are especially serious when one considers that the low-income, minority consumers who were the subject of the study may have had few, if any, options for obtaining healthier food.[109] These failings are heightened because fast food companies sometimes specifically target low-income minority communities,[110] and low-income consumers may be especially susceptible to tactics such as "super-sizing."[111] Studies appearing in the public health literature show that lower-income neighborhoods generally have less access to full-service restaurants and full-line supermarkets, but greater access to fast food restaurants and convenience stores.[112] Likewise, it would make sense that lack of access to healthy full-service restaurants and supermarkets and ease of access to fast food and convenience stores would lead to increased risk of obesity. Therefore, those in the demographic subgroup on which the *Health Affairs* focused are among those least likely to change their eating behaviors in response to new menu-labeling information.

Despite the *Health Affairs* study, other empirical studies suggest that menu labeling does help lessen calorie intake. Just weeks after the release of the *Health Affairs* study, the New York City Department of Health and Mental Hygiene ("DOHMH") presented the preliminary results of a study that it claimed overcame some of the limitations of the *Health Affairs* study.[113] The DOHMH study targeted a much greater number of customers (over twelve thousand experimental group subjects,[114] as compared to 1156 in the *Health Affairs* study[115]), was conducted over a longer period of time, and covered randomly selected neighborhoods that better represented New York City at large.[116] The preliminary results of the DOHMH study showed that fifty-six percent of customers noticed the nutritional information posted

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[107] *See id.* at w1112.

[108] *See id.* at w1119.

[109] *See* Ashley B. Antler, *The Role of Litigation in Combating Obesity Among Poor Urban Minority Youth: A Critical Analysis of* Pelman v. McDonald's Corp., 15 CARDOZO J.L. & GENDER 275, 282–83 (2009) (noting a high concentration of fast food restaurants in poor urban areas, including New York City).

[110] *Id.* at 283.

[111] *See* Greg Critser, *Let them Eat Fat: The Heavy Truths About American Obesity*, HARPER'S MAG., Mar. 2000, at 41–42.

[112] *See* Nicole I. Larson et al., *Neighborhood Environments: Disparities in Access to Healthy Foods in the U.S.*, 36 AM. J. PREVENTITIVE MED. 74, 74 (2009) (collecting and analyzing empirical studies).

[113] Press Release, Obesity Soc'y, Preliminary Data from New York City Show Menu Labels Impact Food Purchases (Oct. 26, 2009), *available at* http://www.obesity.org/news/Menu-Labeling_10262009.pdf [hereinafter DOHMH Study].

[114] *Id.*

[115] Elbel et al., *supra* note 94, at w1110.

[116] *See* DOHMH Study, *supra* note 113.

at the point of purchase[117]—a result in line with that of the *Health Affairs* study.[118] In contrast to the *Health Affairs* study, however, the DOHMH study found that consumers who both saw and claimed to have considered the calorie information, on average, purchased 106 fewer calories per visit.[119] This finding represents an encouraging sign for proponents of expanding the use of menu labeling.

Likewise, a different kind of study, conducted by researchers at Yale University, lends encouraging, concrete support for the theory that menu labeling can result in healthier eating choices.[120] This study, conducted in a classroom, rather than in a retail environment, divided subjects into three groups.[121] Those in the first group received menus without any calorie information, those in the second group received menus listing calorie statistics next to the menu items, while those in the third group received menus listing calorie counts along with information about the daily recommended number of calories for the average adult.[122] The study found that, when compared to the group receiving no calorie information at all, the second group ordered an average of 124 fewer calories.[123] Further, the third group ordered an average of 203 fewer calories than the "no information" group.[124] Thus, this Yale study suggests that each of the two pieces of additional calorie information, the menu item's calorie figure and the suggested daily calorie intake figure, had a beneficial effect on consumers' decisions to eat lower calorie meals. In addition to the DOHMH and Yale studies, other researchers have also uncovered evidence that menu labeling has a favorable effect on consumers' food-purchasing decisions.[125]

Besides its possible effect on consumers' decisions, another reason counsels in favor of requiring restaurants to post nutritional information at the point of purchase: it may encourage restaurants to offer healthier food

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[117] *Id.*

[118] *See* Elbel et al., *supra* note 94, at w1114–15.

[119] DOHMH Study, *supra* note 113.

[120] *See* Christina A. Roberto et al., *Evaluating the Impact of Menu Labeling on Food Choices and Intake*, 100 AM. J. PUB. HEALTH 312, 312 (2010).

[121] *See id.*

[122] *See id.* at 312.

[123] *See id.*

[124] *See id.* at 316.

[125] *See, e.g.*, Mary T. Bassett et al., *Purchasing Behavior and Calorie Information at Fast-Food Chains in New York City, 2007*, 98 AM. J. PUB. HEALTH 1457, 1457 (2008) (showing that, before the institution of the New York City menu-labeling regulation, thirty-two percent of customers of the Subway fast food chain, which posted calorie counts of some menu items at the point of purchase, would notice calorie information compared to four percent of customers of other chains and that Subway patrons who did notice the calorie information purchased an average of fifty-two fewer calories than other Subway patrons); Bryan Bollinger et al., Calorie Posting in Chain Restaurants 1–2 (Jan. 2010) (unpublished working paper), *available at* http://www.stanford.edu/~pleslie/calories.pdf (finding that among all Starbucks customers in post-menu labeling New York City, customers consumed an average of six percent fewer calories as compared to all Starbucks customers in two major cities without menu-labeling requirements).

items. This theory, known as "reformulation,"[126] states that as nutritional information is presented to consumers with increasing consistency and salience, retailers will engage in "calorie competition" with each other, thereby eventually driving calorie counts downward.[127] This phenomenon, in theory, is similar to the downward pressure on market prices that results from price competition. It is impossible to definitively say ex ante whether restaurant chains will engage in dramatic calorie cutting if national menu-labeling rules are implemented; nevertheless, anecdotal evidence suggests that the calorie-posting regulations recently passed in New York City and other jurisdictions have already prompted some chains to revise their menus.[128] Additionally, manufacturer competition was one reason for passing the package-labeling portions of the NLEA,[129] suggesting that it could also be a reason for passing a menu-labeling regulation.

VI. Principles for Effective Menu Labeling

When one considers the context of the current food-labeling regulatory scheme, as well as the empirical studies beginning to shed light on the effects of menu labeling on food-purchasing decisions, six foundational principles for an effective federal menu-labeling regime emerge. First and foremost, because of its extensive experience with administering labeling requirements for packaged foods, the FDA should be given the authority to administer any future restaurant menu-labeling requirement.

Second, to maximize nutritional information's potential impact on consumers, regulators should require that the information is provided at the point of purchase. Logically, if a consumer sees the relevant information at the precise moment at which she is making her food-purchase decision, she is more likely to consider that information in making her selection. This is especially true in the context of fast food restaurants; after all, one reason that consumers patronize these restaurants is the short amount of time it takes to complete fast food transactions.[130] Thus, such a consumer may be

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[126] For a detailed discussion of reformulation that collects several studies of reformulation in the packaged food industry following the relaxation of rules prohibiting health claims in the mid-1980s, as well as after the implementation of the NLEA in the 1990s, see Variyam, *supra* note 57, at 11–15.

[127] *See id.*

[128] *See* Julie Jargon, *Restaurants Begin to Count Calories*, Wall St. J., Jan. 22, 2010, http://online.wsj.com/article/SB10001424052748704381604575005530811257728.html (discussing changes in menu offerings by the Applebee's, Starbucks, and Taco Bell chains).

[129] Interview with Peter Barton Hutt, Senior Counsel, Covington & Burling LLP, in Washington, D.C. (Mar. 29, 2010).

[130] *See* Nola M. Ries, Comment, *Food, Fat and the Law: A Comment on Trans Fat Bans and Public Health*, 23 Windsor Rev. Legal Soc. Issues 15, 22–23 (noting many people consume unhealthy trans-fat because they seek convenient and inexpensive food); *see also* Monica Williams, *Fast Food Nation: Why Do We Eat Fast Food? Reasons Why Fast Food is More Appealing than Healthy Foods,* The East Carolinian, June 16, 2009, http://www.theeastcarolinian.com/2.5280/fast-food-nation-why-do-we-eat-fast-food-1.807247 ("In traveling to three fast food restaurants—McDonald's, Burger King, and Wendy's—customers and man-

unwilling to invest additional time researching the nutritional content of her food options by requesting and then examining a brochure or by scouring a website prior to her restaurant visit. It therefore makes sense that point-of-purchase information, with its lessened demands for consumer time and initiative, would likely be most effective in these contexts.

Besides the kiosk alternative mentioned above, other alternative methods of nutritional information disclosure are similarly less effective because of their lessened likelihood to supply information that will actually be used by consumers in making decisions. For example, if restaurants print the information on tray liners, consumers may fail to remember the caloric content of their food when they return to the restaurant in the future.[131] Providing nutritional information at the point of purchase ensures both that consumers will be exposed to the information, and that they will have the maximum opportunity to take such information into account in their purchasing behavior.

New York City Regulation 81.50[132] provided a good, but not perfect, model for the recently-enacted federal rule. While Regulation 81.50 wisely requires restaurants that are subject to the regulation to disclose nutritional information at the point of purchase,[133] its definition of a "menu" on which the information must appear is perhaps too broad. Regulation 81.50 defines menu as "a printed list or pictorial display of food item or items, and their price(s), that are available for sale from a covered food service establishment and shall include menus distributed or provided outside of the establishment."[134] However, as Domino's Pizza LLC noted in a declaration filed in *New York State Restaurant Association v. New York City Board of Health*, "[u]nder the Regulation, 'menus' is so broadly defined that it includes any writing that contains a picture or description of a food item and a price. That would include newspaper inserts, direct mail flyers, online ordering, box-top coupons, doorhangers, translights, window clings, counter tent top and other promotional materials."[135] While menu labeling is necessary, it is not always feasible for restaurants to post calories on doorhangers and flyers, which may have even more limited space than menu boards. Thus, a better definition of "menu" would limit the term to those materials that consumers read immediately before purchasing food, including any take-out menus. Such a

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agers were asked about their selection of fast food items and why they chose to eat there. Of 30 customers interviewed at these fast food locations, 20 stated that they ate fast food because it was a convenient and cheap choice; seven said it was because they had a craving for one of the menu items; and three said it was because they didn't feel like cooking at home.").

[131] *Cf.* Mark Berman & Risa Lavizzo-Mourey, *Obesity Prevention in the Information Age: Caloric Information at the Point of Purchase*, 300 JAMA 433, 434 (2008) (discussing the difficulty for consumers to recall nutritional information from restaurant websites at the time of food purchase).

[132] N.Y., N.Y., New York City Health Code tit. IV, pt. A, art. 81, § 81.50 (2008).

[133] § 81.50(b).

[134] § 81.50(a)(2).

[135] Declaration of Domino's Pizza LLC at 2, N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 545 F. Supp. 2d 363 (S.D.N.Y. 2008) (No. 2008 Civ. 1000).

limitation would balance the interests of the public with those of restaurants. With such a distinction, restaurant advertisements would be unimpeded, while point-of-purchase menus could be regulated without the leveling down necessary to feasibly include these other "menus."

For the sake of menu board clarity, a clear and standard format for posting the caloric content on the menu board is advisable; on this point, Regulation 81.50 again provides an able guide for federal policymakers. Regulation 81.50 requires that restaurants post the caloric content in the same type size as either the name or the price of the menu item.[136] This requirement ensures that restaurants cannot hide calorie information by making it difficult for consumers to read. Further, the value of this type-size rule is an additional reason to limit the definition of "menu." It would be especially infeasible to implement the type-size requirement on box-top coupons and other forms of advertisement-like channels, given their relatively restrictive space limitations.

The third foundational principle guiding Congress's efforts ought to be that the total number of calories is the single most important piece of nutritional information to communicate to consumers as they make their purchasing decisions. At the most basic level, weight loss is a function of calorie inputs and calorie outputs.[137] This principle is especially important because consumers tend to underestimate the caloric content of their foods, particularly when it comes to less healthy food items.[138] While it is important to provide consumers with information about the caloric content of food at the point of purchase, it would be a mistake to overload them with additional information at this point. People tend to ignore all information when, beyond a certain threshold, it becomes too abundant or too complex.[139] In addition, it is simply impractical to expect restaurants to post information about fat content, sodium content, and the content of myriad other macro-nutrients and micro-nutrients on their menu boards. Such a requirement would compromise the restaurant's abilty to assure that the item and its calorie listings appear with sufficient size and readability. Accordingly, the FDA should require only the most important information—caloric content—up front. The fourth foundational principle is that although nutritional information be-

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[136] § 81.50(c).

[137] Centers for Disease Control and Prevention, Healthy Weight: Caloric Balance, http://www.cdc.gov/healthyweight/calories/index.html (last visited Apr. 4, 2010) [hereinafter CDC Caloric Balance] ("When it comes to maintaining a healthy weight for a lifetime, the bottom line is—*calories count!* Weight management is all about balance—balancing the number of calories you consume with the number of calories your body uses or 'burns off.'").

[138] *See* Berman & Lavizzo-Mourey, *supra* note 131, at 433; Scot Burton et al., *Attacking the Obesity Epidemic: The Potential Health Benefits of Providing Nutrition Information in Restaurants,* 96 AM. J. PUB. HEALTH 1669, 1671 (2006); Pierre Chandon & Brian Wansink, *The Biasing Health Halos of Fast-Food Restaurant Health Claims: Lower Calorie Estimates and Higher Side-Dish Consumption Intentions*, 34 J. CONSUMER RES. 301 (2007).

[139] John Cawley, *The Economics of Childhood Obesity Policy, in* OBESITY, BUSINESS, AND PUBLIC POLICY 27, 38–39 (Zoltan J. Acs & Alan Lyles eds., 2007) (noting that at "some level of information complexity consumers refuse to process the information").

yond caloric content need not be posted at the point of purchase, federal legislation should require that restaurants make this information available elsewhere. However, any federal rule should allow restaurants some flexibility in choosing the methods for distributing this additional information. For example, restaurants could be allowed to distribute the information through a separate menu board at the customers' eye level or on another board adjacent to the main menu board.[140] Some small fast food establishments might not be able to fit an extra information board on the wall of the store; thus, such restaurants could be allowed to distribute brochures or to prominently display the address of a website where the information can be found. Analogously, sit-down restaurants could be allowed to use menu inserts to convey the supplementary nutritional information.[141]

The fifth foundational principle is that more, rather than fewer, restaurants should be subject to the requirements of any federal menu-labeling rule. Here, federal policymakers should depart from the example of New York City's Regulation 81.50, which applies only to restaurant chains with fifteen or more locations.[142] Requiring only chain restaurants to post calories necessarily puts those restaurants at a competitive disadvantage as compared with local establishments that need not conform to the regulations. Aside from this market unfairness, America's weight crisis is a public concern, responsibility for which should ideally be borne equally by all business owners, big or small, unless there is a strong showing that a regulation would be commercially impracticable for a given class of businesses.

The sixth and final foundational principle is that a menu-labeling requirement, whatever its virtues, is not by itself enough to effectively combat obesity; rather, a comprehensive and complementary education campaign is also needed. Fines collected from restaurants that violate the new menu-labeling requirements could be used to offset some of the cost of such a campaign. For example, following its implementation of Regulation 81.50, New York City designed such an education campaign, which included placing signs in subway cars informing riders that the average person only needs about two thousand calories per day.[143] Further, researchers have demonstrated that in the course of food-purchasing decisions, nutrition ranks second to taste in terms of factors considered by consumers.[144] An education campaign might tip the balance in favor of nutrition, thereby further rein-

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[140] Coalition for Responsible Nutrition Information, Mission, http://www.nationalnutritionstandards.com/mission.html (last visited Feb. 18, 2010) (follow "Senate Legislation" and "House Legislation" hyperlinks).

[141] *See id.*

[142] N.Y., N.Y., New York City Health Code tit. IV, pt. A, art. 81, § 81.50(a)(1) (2008).

[143] Kim Severson, *Calories Do Count*, N.Y. Times, Oct. 29, 2008, at D1.

[144] *See* Joanne F. Guthrie et al., *What People Know and Do Not Know about Nutrition*, *in* Food & Rural Econ. Div., U.S. Dep't of Agric., America's Eating Habits: Changes and Consequences 243, 265 tbl.5 (E. Frazao ed., 1999) (displaying data that shows that over the period from 1989 to 1998, taste and nutrition were consistently ranked the first and second, respectively, among the most important attributes of food choice among consumers).

forcing the goal of consumer behavior alteration that underlies the idea of menu-labeling requirements.

VII. Congressional Proposals

Until recently, congressional attempts to pass federal menu-labeling legislation have been met with stiff resistance. In May 2007, Senator Tom Harkin (D-Iowa) introduced a menu-labeling provision as part of a bill called the Healthy Lifestyle and Prevention ("HeLP") America Act.[145] Representative Tom Udall (D-N.M.) introduced a similar nutrition and menu-labeling bill in the House.[146] When those bills failed, Senator Harkin introduced another menu-labeling bill in the Senate entitled the Menu and Education Labeling Act ("MEAL")[147]; Representative Rosa DeLauro (D-Conn.) proposed an identical measure in the House.[148] None of these bills managed to draw the support of the restaurant industry, and passage failed in both Houses. In 2008, Senator Tom Carper (D-Del.), Senator Lisa Murkowski (R-Alaska), and Representative Jim Matheson (D-Utah) introduced the Labeling Education and Nutrition Act ("LEAN") to their respective chambers.[149] While LEAN, unlike predecessor bills, enjoyed the restaurant industry's support,[150] it did not have enough momentum, and ultimately failed as well.

Despite past failures, both the House and the Senate recently passed a menu-labeling provision as part of the Patient Protection and Affordable Care Act.[151] This newest menu-labeling provision makes up a small part of the much publicized health care reform bill. It amends the FDCA to require menu-labeling for chain restaurants.[152] Notably, the National Restaurant Association trade group supported these menu-labeling requirements[153] and has lauded the labeling regime as providing the group with a consistent national standard.[154]

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[145] S. 1342, 110th Cong. § 401 (2007).

[146] Healthy Lifestyles and Prevention America Act, H.R. 2633, 110th Cong. (2007).

[147] S. 2784, 110th Cong. (2008).

[148] Menu Education and Labeling Act, H.R. 3895, 110th Cong. (2007).

[149] H.R. 7187, 110th Cong. (2008); S. 3575, 110th Cong. (2008).

[150] The Coalition for Responsible Nutrition Information, Lean Act Senate, http://www.nationalnutritionstandards.com/senatelegislation.html (last visited Feb. 18, 2010); The Coalition for Responsible Nutrition Information, Lean Act House, http://www.nationalnutritionstandards.com/houselegislation.html (last visited Feb. 18, 2010).

[151] Pub. L. No. 111-148, 124 Stat. 119 (2010).

[152] Patient Protection and Affordable Care Act § 4205(b), sec. 403(q)(5)(H)(i), 124 Stat. at 573 (to be codified at 21 U.S.C. § 343(q)(5)(H)(i)).

[153] *See* National Restaurant Association, Public Policy Issue Briefs: Menu Labeling/Nutrition Information, http://restaurant.org/advocacy/issues/issue/?Issue=menulabel (last visited Feb. 18, 2010).

[154] *See* Rosenbloom, *supra* note 4 (quoting a spokeswoman as saying "[t]he association and the industry were supportive because consumers will see the same types of information in more than 200,000 restaurant locations across the country").

The provision requires restaurants to provide point-of-purchase calorie labeling as a part of general nutrition information.[155] However, while the provision implements many of the fundamental menu-labeling principles at chain restaurants, it still exempts smaller restaurants, often even if they are able to provide calorie information despite their small size.[156] Therefore, while the provision in the current health care reform bill is an excellent start, it does not constitute an ideal solution to implementing menu-labeling policy on a national level if the goal is to maximize the policy's potential impact on the nation's weight crisis.

Yet, with the above exception, the provision meets the rest of the requirements laid out in this proposal. The provision requires restaurants with twenty or more retail food establishments to offer calorie information for standard menu items[157] on menus,[158] menu boards, and drive-through menus.[159] The bill, consistent with the above discussion, would require restaurants to post the caloric content of their foods adjacent to the item names at the point of purchase.[160] The bill further requires restaurants to post a statement informing consumers of the suggested daily caloric intake on the menu[161] or menu board.[162] This statement is short enough so as not to overwhelm consumers, while still providing them with additional information. It also requires that restaurants make supplementary nutritional information available to customers upon request,[163] and that they provide a clear statement communicating the availability of such additional information.[164]

The provision also considers the nuisances of menu labeling in a satisfactory way. The provision recognizes complications such as self-service food, display food,[165] and vending machines,[166] thus improving on the suggestions above. It also requires the Secretary to make rules for combination

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[155] § 4205(b).
[156] *See id.*
[157] *Id.* (the restaurants need not have the exact menus but "substantially the same menu items").
[158] *Id.* § 4205(b), § 403(q)(5)(H)(ii)(I)(aa), 124 Stat. at 573–74 (to be codified at 21 U.S.C. § 343(q)(5)(H)(ii)(I)(aa)).
[159] *Id.* § 4205(b), sec. 403(q)(5)(H)(ii)(II)(aa), 124 Stat. at 574 (to be codified at 21 U.S.C. § 343(q)(5)(H)(ii)(II)(aa)).
[160] *Id.* § 4205(b), sec. 403(q)(5)(H)(ii)(I)(aa).
[161] *Id.* § 4205(b), sec. 403(q)(5)(H)(ii)(I)(bb), 124 Stat. at 574 (to be codified at 21 U.S.C. § 343(q)(5)(H)(ii)(I)(bb)).
[162] *Id.* § 4205(b), sec. 403(q)(5)(H)(ii)(II)(bb), 124 Stat. at 574 (to be codified at 21 U.S.C. § 343(q)(5)(H)(ii)(II)(bb)).
[163] *Id.* § 4205(b), sec. 403(q)(5)(H)(ii)(III), 124 Stat. at 574 (to be codified at 21 U.S.C. § 343(q)(5)(H)(ii)(III)).
[164] *Id.* § 4205(b), sec. 403(q)(5)(H)(ii)(IV), 124 Stat. at 574 (to be codified at 21 U.S.C. § 343(q)(5)(H)(ii)(IV)).
[165] *Id.* § 4205(b), sec. 403(q)(5)(H)(iii), 124 Stat. at 574 (to be codified at 21 U.S.C. § 343(q)(5)(H)(iii)).
[166] *Id.* § 4205(b), sec. 403(q)(5)(H)(viii), 124 Stat. at 575 (to be codified at 21 U.S.C. § 343(q)(5)(H)(viii)).

meals.[167] At the same time, the provision exempts certain items from the requirements.[168] For example, the provision does not apply to daily specials, items not listed on the menu board, items that appear on the menu for fewer than sixty days, or food items that are part of a customary market test.[169] Finally, the law allows for the voluntary display of information from restaurants that are not required to follow the provision.[170]

The menu-labeling provision of the health care bill is promising, but it misses an important opportunity for broad menu-labeling implementation by exempting smaller, non-chain restaurants. As mentioned above, it is important to include smaller sit-down restaurants because they often have as many, if not more, calories than fast-food restaurants per consumer visit. This proposal offers some solutions to lawmakers, but the current version of the bill only includes voluntary disclosure for these restaurants.[171] If non-chain restaurants are exempted from the requirements without having to show any hardship, the law could create unfair business competition between restaurants, and it would also under-deliver on the provision's goals by not fully informing consumers on the underlying choices they are making when selecting which restaurants to frequent. Without this comparability between types of restaurants, the requirements' ability to shift consumers' mindsets inevitably would be limited. The true victory sought, after all, should not only be to cause an individual consumer already in the door of a restaurant to make a healthier selection; rather, the overarching goal should be to change, in the aggregate, the restaurants that consumers select and the food items that restaurants, as a result, choose to provide. With each restaurant, or group of restaurants, that is exempted from menu-labeling requirements, the efficacy of these requirements is marginally lessened.

Despite this reservation, the current menu-labeling provision meets many of the fundamental principles laid out above. Hopefully, this step will help consumers make healthier food choices and will encourage retailers to offer healthier products. However, the provision would be even more promising were it to bring non-chain restaurants within its regulatory scope. By taking this next step, Congress could maximize the provision's chances of combating the weight crisis facing America.

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[167] *Id.* § 4205(b), sec. 403(q)(5)(H)(v), 124 Stat. at 574 (to be codified at 21 U.S.C. § 343(q)(5)(H)(v)).

[168] *Id.* § 4205(b), sec. 403(q)(5)(H)(vii)(I), 124 Stat. at 575 (to be codified at 21 U.S.C. § 343(q)(5)(H)(vii)(I)).

[169] *Id.* § 4205(b), sec. 403(q)(5)(H)(vii)(I)(aa)–(cc), 124 Stat. at 575 (to be codified at 21 U.S.C. § 343(q)(5)(H)(vii)(I)(aa)–(cc)).

[170] *Id.* § 4205(b), sec. 403(q)(5)(H)(ix), 124 Stat. at 575 (to be codified at 21 U.S.C. § 343(q)(5)(H)(ix)).

[171] *Id.*

VIII. Conclusion

Menu labeling regulation represents a promising first step in reducing the country's obesity levels. Fast food and sit-down restaurants continue to offer large portions with high calorie counts to a continually growing number of unknowing consumers, thus risking consumer health across America. The FDA is an experienced agency with the ability to craft effective regulations to properly implement menu-labeling legislation. To enable menu labeling to reverse the trend of unhealthy food decisions, legislation and FDA regulations must provide consumers with the most important piece of nutrition information, calorie information, at the point that the consumers make their purchasing decisions, and without the distraction of overwhelming additional information. However, effective menu-labeling legislation requires that restaurants make additional nutritional information available by request so that consumers can understand the overall impact of their food choices beyond simple calorie content. The greater the number of restaurants subject to any such labeling regulation, the more likely it is that menu labeling will effect a maximum reduction in overweight and obesity levels. Finally, menu-labeling legislation should coincide with a national education campaign to inform consumers of how and why to make healthy choices.

Menu labeling alone cannot solve the obesity crisis, but the recently-enacted provision has the potential to make a significant contribution towards reducing obesity levels.