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Menu Labeling Legislation:

Options for Requiring the Disclosure of
Nutritional Information in Restaurants

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Executive Summary

Menu labeling has attracted growing medical, legislative, and public support in recent years. Numerous public health experts and advocacy organizations have endorsed menu labeling as a promising obesity prevention strategy. From 2003-2008, a number of states and localities considered laws requiring the disclosure of nutritional information in restaurants. As of December 2008, menu labeling legislation had been enacted in one state and nearly a dozen cities and counties. However, menu labeling legislation has been controversial and has engendered significant debate in the media, state and local legislative bodies, and in the courts.

This policy brief provides a synopsis of the current policy debate over menu labeling. It highlights arguments in favor of and in opposition to menu labeling legislation, discusses representative menu labeling proposals at the federal, state, and local levels, and analyzes legal considerations pertaining to menu labeling. It concludes that menu labeling is a viable policy option for state and local governments to pursue in their efforts to combat obesity, and that menu labeling legislation should survive legal challenge if it is carefully crafted to withstand claims of preemption and other constitutional arguments. However, this brief also notes that there is a trend to include preemption clauses in state menu labeling bills, as well as a campaign to pass federal menu labeling legislation that would preempt all state and local laws relating to the disclosure of nutritional information by restaurants. Finally, this brief provides policy recommendations for advocates and policymakers who are considering menu labeling legislation.

Introduction

Obesity is one of the most serious health threats facing our nation. More than two-thirds of American adults¹ and one-third of American youth² are now obese or overweight and rates continue to rise.³ Adult obesity rates have more than doubled in recent decades, from 15 percent in 1980 to over 30 percent in 2004.⁴ The obesity rate among children ages 6-11 has jumped almost five-fold and has more than tripled among adolescents ages 12-19.⁵ Experts estimate that if current trends continue, 75 percent of Americans will be obese or overweight by 2015.⁶

Although obesity is a complex, multi-causal problem, consumption of unhealthy foods is a major contributing factor. Americans are eating meals prepared outside of the home on an increasingly frequent basis. Numerous studies have suggested a strong correlation between the consumption of restaurant foods, excess caloric intake, and rising obesity rates in the United States.⁷ Restaurant foods tend to be higher in fat and calories and lower in other essential nutrients than meals cooked at home.⁸ Meals purchased in chain and fast food restaurants also tend to have disproportionately large portion sizes.⁹

Given their typically high caloric content and poorer nutritional value, requiring the disclosure of nutritional information about restaurant foods is a legitimate tactic in government efforts to curb the obesity epidemic and promote public health. While consumers can find nutritional information on the labels of the packaged foods they purchase in grocery stores, nutritional information is not readily available in restaurants. Menu labeling laws are aimed at bridging this information divide and providing consumers with meaningful information about the foods they eat outside of the home. It is hoped that such laws will have the benefits of influencing consumers' dietary choices in restaurants, reducing their caloric intake, and leading to population-level decreases in overweight and obesity.

The Public Health Rationale for Menu Labeling Legislation

Although consumers can find nutritional information on the product labels of the foods they purchase in grocery stores,¹⁰ this information is typically not readily available in restaurants, where Americans are spending an increasing percentage of their food dollars. Presently, federal law and the vast majority of state laws do not require restaurants to disclose nutritional information.¹¹ Menu labeling laws are aimed at remedying this information gap and helping consumers make informed choices about the foods they eat outside of the home.

Nutritional information should be provided on restaurant menus as a strategy to educate consumers and address the escalating obesity epidemic. The underlying premise of menu labeling is that consumers who are educated about the nutritional content of restaurant foods will make healthier choices when eating out, which will lead to decreased caloric intake and the prevention of weight gain. The rationale behind menu labeling legislation, and its promise in combating the obesity epidemic, is illustrated by the following points.

Americans are eating meals outside of the home far more often than they used to, and Americans tend to consume significantly more calories when they eat out.

Between 1972 and 2004, the total number of food service establishments in the United States nearly doubled.¹² Restaurant sales have increased roughly nine-fold in recent decades, from \$43 billion in 1970 to \$379 billion in 2000.¹³ Restaurant industry sales are expected to top \$558 billion in 2008.¹⁴ In 2002, Americans spent almost half (46 percent) of their food dollars outside the home, in comparison to 26 percent in 1970.¹⁵ American adults and children now consume one third of their total calories from food service establishments.¹⁶

Americans tend to consume significantly more calories when they eat out¹⁷ because restaurants typically serve calorically dense foods in large portions. It is not unusual for a restaurant meal to contain a half to a full day's worth of the daily recommended number of calories.¹⁸ Portion sizes in fast food

restaurants have increased dramatically in recent decades with the advent of “super sizing.”¹⁹ It has become common for restaurants to serve two to three times more than what is considered to be a standard serving size.²⁰ Americans’ average daily caloric intake increased by almost 200 calories between the late 1970s and the mid-1990s,²¹ and chain and fast food restaurants accounted for the fastest growing source of these calories.²²

Excess calorie consumption from fast food and restaurant meals causes weight gain and may contribute to the obesity epidemic.

While no study has conclusively shown that consuming restaurant food causes obesity,²³ numerous studies have demonstrated a causal connection between the frequency of eating out, excess caloric intake, and weight gain.²⁴ Certainly, the greater availability of fast food has corresponded with rising obesity rates in the United States. According to one source, the increasing prevalence of fast food and chain restaurants in the United States since the 1970s accounts for 65 percent of the increase in the number of Americans who are obese.²⁵

Consumers have difficulty making informed choices about food purchases in restaurants because nutritional information is not easily accessible.

More than half (56 percent) of the nation’s largest chain restaurants do not provide adequate nutritional information.²⁶ The restaurants that do provide nutritional information often place it on corporate websites, in brochures that are available only upon request, or on materials that are provided to consumers only after they have ordered.²⁷ Without ready access to nutritional information at the point of sale, consumers are unaware of the number of calories in restaurant foods.²⁸ An FDA-commissioned report, *The Keystone Forum on Away-From-Home Foods*, concluded that consumers are unable to assess the caloric content of restaurant foods without access to nutritional information.²⁹ A 2006 study found that, on average, 90 percent of people underestimated the caloric content of restaurant foods by more than 600 calories.³⁰

Providing nutritional information appears to influence consumers’ food choices.

When nutritional information is made readily available to consumers, they appear to be influenced by it in making dietary choices. Roughly 75 percent of Americans report using the food labels found on packaged foods.³¹ One study found that about half (48 percent) of people reported that the nutritional information on food labels has caused them to change their minds about buying a food product.³² The evidence suggests that using the nutritional information on food labels is associated with making better food choices and having more healthy diets.³³

If consumers make healthier choices when eating out, Americans' caloric intake will decrease and rates of overweight and obesity will likely decline.

Recent research suggests that menu labeling holds promise in reducing Americans' caloric consumption and decreasing rates of weight gain and obesity. In 2008, the Los Angeles County Department of Public Health conducted a health impact assessment to determine the potential health effects of menu labeling.³⁴ Using conservative assumptions,³⁵ the researchers concluded that menu labeling would prevent close to 40 percent of the 6.75 million pounds that county residents gain each year.³⁶ Studies conducted in other cities have suggested that if calorie information is prominently posted in fast food restaurants, patrons will use that information to make healthier food choices, which, given the frequency of fast food consumption, may lead to significant reductions in population-level caloric intake and weight gain.³⁷

Recent Federal, State, and Local Menu Labeling Legislation

Scientific, legislative, and public support for menu labeling has grown considerably in recent years. In 2001, the U.S. Surgeon General recommended that action be taken to “increase availability of nutrition information for foods eaten away from home.”³⁸ In 2004, the Food and Drug Administration announced that it would encourage restaurants to engage in voluntary menu labeling as part of the federal government's new obesity prevention campaign.³⁹ Many leading national health authorities and organizations, including the American Medical Association, the Institute of Medicine, the American Public Health Association, the American Cancer Society, and the American Heart Association, have endorsed menu labeling as a strategy to address the obesity epidemic.⁴⁰ National public opinion polls indicate that a majority of Americans, from 67 to 83 percent, are in favor of nutrition labeling in restaurants.⁴¹ In response to scientific endorsement of and growing public demand for menu labeling, a number of menu labeling policies have been proposed, primarily at the local level, but also at the state and federal levels.

Proposed Federal Menu Labeling Legislation

At the federal level, two notably different menu labeling bills have been proposed. The first, the Menu Education and Labeling Act (MEAL),⁴² would amend the Food, Drug, and Cosmetic Act to extend the labeling requirements of the Nutrition Labeling and Education Act to standard menu items in national chain restaurants.⁴³ Specifically, the 2007 House version of the bill would require chain restaurants with 20 or more locations nationwide to provide information on the caloric, sodium, saturated fat, and trans fat content of standard items on menus, and to disclose the total number of calories in standard items on menu boards.⁴⁴ MEAL would not preempt more stringent state or local menu labeling laws and, in fact, contains an express

anti-preemption clause.⁴⁵ The House version of the bill did not progress during the 2007-08 session⁴⁶ and similar versions of it were defeated in earlier Congressional sessions⁴⁷ due, in part, to strong restaurant industry opposition. The Senate companion version of MEAL⁴⁸ was introduced in March 2008 and referred to the Senate Committee on Health, Education, Labor and Pensions. The MEAL Act is supported by a variety of health advocacy organizations, including the American College of Preventative Medicine, the American Public Health Association, and the Association of State/Territorial Health Officials, among others.⁴⁹

More recently, the Labeling Education and Nutrition Act (LEAN) was introduced in Congress in late September 2008.⁵⁰ LEAN would amend the Food, Drug, and Cosmetic Act to require chain restaurants with 20 or more locations nationwide to disclose the caloric content of standard menu items.⁵¹ LEAN would give restaurants more flexibility in labeling formats, allowing them the option of placing calorie information on menus or on supplements, inserts, or appendices to menus.⁵² Restaurants using menu boards would have the choice of listing calories on the menu board, on a sign near the menu board, or on a sign visible from the ordering line.⁵³ Notably, LEAN would create a uniform national menu labeling standard and would preempt all existing and future state and local menu labeling laws.⁵⁴ It would also provide liability protection to restaurants that comply with the law. The LEAN Act has been publicly endorsed by the National Restaurant Association, which is urging Congress to replace “a patchwork of inconsistent state and local [menu labeling] ordinances with a national standard.”⁵⁵

Public health advocates and the restaurant industry are sharply divided over whether MEAL or LEAN is the better bill. Most health advocates endorse the MEAL Act on the grounds that it is more likely to accomplish the goal of disseminating meaningful nutrition information to consumers. They assert that the LEAN Act purports to create a federal mandate for menu labeling, but by permitting restaurants to place nutrition information somewhere other than menus and menu boards, it protects restaurant owners, not consumers. In other words, the LEAN Act is unlikely to influence consumers’ choices because it permits restaurants to post nutrition information in areas where consumers are less apt to see it. The restaurant industry, on the other hand, asserts that the MEAL Act imposes unreasonable burdens on restaurants. The industry argues that the LEAN Act is preferable because it establishes a uniform national menu labeling standard, while providing restaurants with necessary flexibility in complying with it. Both bills stalled in committee during the 110th Congress. It is uncertain whether either bill will be reintroduced or will progress during the 111th Congress, in light of competing legislative priorities and the nation’s economic crisis.

State and Local Menu Labeling Legislation

Until very recently, efforts to pass statewide menu labeling legislation have been unsuccessful. From 2003-08, approximately twenty states and the District of Columbia considered a variety of menu labeling

bills.⁵⁶ To date, statewide menu labeling legislation has passed only in California. Proposals have been defeated in other states, largely due to opposition from the restaurant industry.⁵⁷

Most menu labeling legislative activity has occurred at the local level, where advocates are able to organize grassroots campaigns and exert greater influence on decision makers. Presently, menu labeling ordinances have been enacted in New York City; Westchester County, New York; San Francisco; Santa Clara County, California; San Mateo County, California; King County (Seattle), Washington; Multnomah County (Portland), Oregon; Montgomery County, Maryland; and Philadelphia.⁵⁸ Other localities that have or are presently considering menu labeling legislation include Boston, Chicago, Minneapolis, and Nassau County, New York.⁵⁹

State and local menu labeling legislation in three different locales—New York City, King County, Washington, and California—will be discussed below to illustrate some of the key features of menu labeling legislation, the issues that have been the most controversial, and the compromises that have been reached between advocates of and opponents to menu labeling.

The New York City Experience

New York City's menu labeling regulation, like its trans fat ban, has served as a model for other municipalities' policies. To date, it is the only local menu labeling law that has been defended in court, implemented, and enforced.

In December 2006, the New York City Board of Health passed Regulation 81.50, requiring restaurants that already voluntarily disclosed calorie information in some form to post the calories in standard menu items on menus and menu boards.⁶⁰ The New York State Restaurant Association (NYSRA) filed a lawsuit on June 15, 2007, just fifteen days before the regulation was scheduled to go into effect, alleging that it was preempted by the Nutrition Labeling and Education Act of 1990 (NLEA).⁶¹ In September 2007, the federal district court ruled in favor of the NYSRA, holding that the regulation was expressly preempted by the NLEA because it applied only to restaurants that were already voluntarily providing nutritional information.⁶² However, the court affirmed that the City had the authority to require menu labeling and stated that the regulation would comply with the NLEA if it uniformly applied to all chain restaurants meeting a standard definition (e.g., with a particular number of locations).⁶³ Rather than appeal the ruling, the City revised the regulation in January 2008 to require calorie disclosure on menus, menu boards, and food tags by all chain restaurants with 15 or more locations nationwide.⁶⁴ The NYSRA then challenged the amended regulation, arguing that it was still preempted by the NLEA and also violated the First Amendment rights of affected restaurants by compelling them to convey the government's message about the importance of calories. In April 2008, the federal district court ruled in favor of the City,⁶⁵ upholding the amended regulation and denying the NYSRA's request for a stay of its enforcement pending the outcome of an appeal.⁶⁶ (The specific claims at issue in the NYSRA litigation will be discussed in more detail below.)

New York City began issuing fines to noncompliant restaurants in July 2008. Although the final outcome of New York City's menu labeling regulation is uncertain, because an appellate decision is still pending, its implementation appears to have gone rather smoothly and consumer reaction has been overwhelmingly positive. According to a September 2008 study conducted to gauge consumer awareness of and reaction to the law, 86 percent of respondents reported that they considered the law a positive measure and 75 percent of respondents reported that seeing calorie information on menus had made an impact on their ordering decisions.⁶⁷

The King County, Washington Experience

King County, Washington's menu labeling law evolved considerably from 2007 to 2008. The King County experience demonstrates the increasing influence that the restaurant industry is exerting on the political process of defining the scope of state and local menu labeling laws.

In July 2007, the King County Board of Health adopted Rule and Regulation 07-01, which required chain restaurants with ten or more national locations to display the calorie, fat, sodium, and carbohydrate content of standard menu items on menus and menu boards by August 1, 2008.⁶⁸ In early 2008, House Bill 3160 passed the Washington House of Representatives and a companion bill moved to committee in the Senate.⁶⁹ The bill would have required chain food establishments to make nutrition information available only upon consumer request, and would have made King County's menu labeling regulation null and void.⁷⁰ At the urging of the Washington Restaurant Association (WRA), the bill also contained a broad preemption clause that would have prohibited any local board of health in the state from adopting regulations regarding menu labeling or nutrition information.⁷¹ At the request of state legislators, representatives from King County and the WRA agreed to enter negotiations in an attempt to reach a compromise among the parties divided over the state bill and the King County regulation.⁷² An agreement was reached on March 8, 2008.⁷³ Under the terms of the agreement, the WRA agreed to request that the state legislature not take action on House Bill 3160.⁷⁴ The WRA also agreed not to be a party to any lawsuit filed against King County regarding its rules and regulations requiring nutrition labeling in chain restaurants.⁷⁵ (The agreement binds the restaurant association but not its individual members; therefore, restaurants are free to challenge King County's menu labeling regulation.⁷⁶) The agreement required King County, in turn, to amend its menu labeling regulation pursuant to negotiations with the WRA.⁷⁷ In March and April 2008, the King County Board of Health amended its menu labeling regulation significantly to comply with the conditions it had negotiated with the restaurant industry.⁷⁸

The 2008 version of King County's menu labeling regulation differs in many respects from its 2007 predecessor. For one, the amended regulation narrows the definition of affected businesses so that it now applies to "chain restaurants" (as opposed to "chain food service establishments") with at least fifteen locations in the U.S. (as opposed to ten locations), and expressly excludes grocery stores, convenience stores, and movie theaters.⁷⁹ Of greatest significance, the amended regulation expands the acceptable methods for

nutrition labeling, giving affected restaurants more flexibility in terms of how they can comply with the regulation. In lieu of posting nutrition information directly next to items on menus, restaurants can opt to provide the required information via menu inserts, supplemental menus, appendices attached to the back of menus, or electronic kiosks.⁸⁰ In fast food restaurants, calorie information, which previously had to be printed directly on menu boards, can now be posted on signs that are either adjacent to menu boards or placed so they can be seen by customers waiting in line to order.⁸¹ Moreover, restaurants are permitted to propose other “substantially equivalent methods of nutrition labeling” if they can demonstrate, in a written proposal with supporting documentation, that an alternate method will be as effective at providing nutritional information to consumers.⁸² Enforcement of the King County regulation was stayed through December 31, 2008 for restaurants that could show they had taken steps to obtain nutrient analysis and create nutrition labeling.⁸³ Enforcement as to labeling on drive-through menu boards is stayed until August 1, 2009.⁸⁴

On the one hand, the outcome of the King County/WRA negotiations can be described as a success. The compromise prevented King County’s menu labeling regulation from being completely invalidated and stopped the passage of a weak, preemptive statewide bill that would have stripped local boards of health of the power to require nutritional disclosures by restaurants. Publicly, the King County Board of Health declared the outcome a victory in the fight against obesity and described the compromise as a “win-win,” which maintained the board’s intent in passing the regulation, while giving the restaurant industry greater flexibility to implement it.⁸⁵ On the other hand, however, the agreement between the board and the restaurant association arguably resulted in a diluted menu labeling regulation that applies to fewer restaurants and will not be as effective in providing consumers with nutritional information. Evaluation is currently underway to assess the effectiveness of King County’s regulation.⁸⁶

The California Experience

In March and June of 2008, respectively, San Francisco and Santa Clara County, California passed similar menu labeling ordinances with nutritional disclosure requirements exceeding those in New York City’s regulation, which requires the disclosure of calories only. San Francisco’s ordinance⁸⁷ requires that menu boards and food tags display the total number of calories in standard menu items,⁸⁸ and that menus disclose the calories, saturated fat, carbohydrates and sodium in standard menu items.⁸⁹ It applies to chain restaurants with 20 or more locations in the state of California.⁹⁰ It expressly allows restaurants to provide additional nutritional information⁹¹ and to post disclaimers stating that there may be variations in nutritional content values across servings based on special ordering or slight differences in serving size and quantities of ingredients.⁹² The Santa Clara County menu labeling ordinance⁹³ requires restaurants to disclose the total number of calories, grams of saturated fat, grams of trans fat, grams of carbohydrate, and milligrams of sodium on menus,⁹⁴ and to post the total number of calories on menu boards and food tags, while providing the other nutritional information in print brochures, pamphlets, or posters that are clearly visible at the point of sale.⁹⁵ It applies to chain restaurants with 14 or more locations in the state of California.⁹⁶ In August

2008, San Mateo County followed suit and passed similar rules requiring chains with at least 15 locations in California to post nutritional information, including caloric, fat, and sodium content.⁹⁷

San Francisco and Santa Clara County's menu labeling ordinances were challenged by the California Restaurant Association. The allegations in the California litigation were very similar to those asserted by the New York State Restaurant Association, namely, that the California ordinances are preempted by the NLEA and violate the First Amendment rights of affected restaurants.⁹⁸ The two lawsuits were joined⁹⁹ and the litigation was venued in the U.S. District Court for the Northern District of California. However, given the passage of California's statewide menu labeling law, which preempts all local ordinances relating to the dissemination of nutritional information by food service establishments, the litigation was rendered moot.¹⁰⁰

California became the first state to enact menu labeling legislation in the fall of 2008. Senate Bill 1420¹⁰¹ passed the California legislature on August 31, 2008 and was signed by the governor on September 30, 2008. It will require restaurants with 20 or more locations in the state, which includes over 17,000 establishments,¹⁰² to disclose the caloric content of standard menu items on menus, menu boards, and menu tags. The law provides for a two-year phase-in period and an eight-month delayed implementation date. During the first phase, from July 1, 2009 to December 31, 2010, restaurants must provide print brochures at the point of sale that disclose the calorie, carbohydrate, saturated fat, and sodium content of standard menu items.¹⁰³ In full service restaurants, this information must be provided at the table and can be printed on menus, menu inserts, menu indexes, brochures, or table tents.¹⁰⁴ During the second phase, from January 1, 2011 forward, calories must be posted on menus, menu boards, and menu tags.¹⁰⁵ Drive-through restaurants are not required to display calories on their menu boards, but must have brochures listing the calorie, carbohydrate, saturated fat, and sodium content of standard menu items and post notices indicating that nutritional information is available upon request.¹⁰⁶

Significantly, California's menu labeling law contains broad, express preemptive language that bars any local ordinances or regulations regarding "the dissemination of nutritional information by a food facility."¹⁰⁷ Therefore, the state law voids and replaces any existing local laws, including the menu labeling ordinances enacted in San Francisco, Santa Clara County, and San Mateo County, that require restaurants to provide nutritional information. The inclusion of a preemption clause was reportedly key to overcoming restaurant industry opposition to the bill.¹⁰⁸

California is the first state to enact statewide menu labeling legislation, but it is not the only state where the restaurant industry has been successful in lobbying for state preemption of local menu labeling ordinances. In April 2008, the governor of Georgia signed House Bill 1303¹⁰⁹ into law. Georgia's law differs from California's law in that it does not establish a state standard for menu labeling; it does not require restaurants to take any action at all relating to the disclosure of nutritional information. Rather, it specifically prohibits any county board of health or political subdivision of the state (including municipalities, counties, boards, commissions, and other local government authorities) from regulating the display of nutritional

information at food service establishments.¹¹⁰ The Senate sponsor of the bill stated its goal was to protect restaurants from the future threat of inconsistent regulation by differing laws in various local jurisdictions.¹¹¹ The Georgia law was perceived as a major victory for the Georgia Restaurant Association because the industry succeeded in proactively lobbying for state preemption of menu labeling before any Georgia locality had even succeeded in passing a local menu labeling ordinance.¹¹² In other words, the law was “preemptively preemptive.”

Ohio law also broadly preempts all local legislation relating to the provision of nutritional information in food service establishments. Ohio House Bill 217¹¹³ was passed in December 2007 and became effective in March 2008. The Ohio law states that the Director of Agriculture has sole and exclusive authority to regulate the provision of food nutrition information at food service operations.¹¹⁴ It also pronounces that “[t]he regulation of the provision of food nutrition information at food service operations is a matter of general statewide interest that requires statewide regulation, and rules adopted under this section constitute a comprehensive plan with respect to all aspects of the regulation of the provision of [nutrition information] at [restaurants] in this state.”¹¹⁵ Lastly, the law expressly forbids any political subdivision of the state from “enact[ing], adopt[ing], or continu[ing] in effect local legislation relating to the provision of food nutrition information at food service operations.”¹¹⁶ The Ohio Restaurant Association lobbied for the inclusion of the preemption provision,¹¹⁷ which was inserted into a bill whose primary purpose was to establish a state grain marketing program. This is likely why the bill’s provision preempting local menu labeling laws did not appear to garner much public attention.

The New York City, King County, Washington, California, Georgia and Ohio experiences demonstrate that the restaurant industry will mobilize quickly and effectively to oppose local menu labeling laws, either by initiating litigation or by lobbying for the passage of preemptive statewide legislation. In addition, the industry is presently campaigning for the passage of federal menu labeling legislation that would establish a uniform national standard and preempt all state and local menu labeling laws.¹¹⁸ Therefore, while menu labeling may be considered an effective policy tool in state and local government efforts to curb the obesity epidemic, the fate of state and local menu labeling legislation remains uncertain.

Legal and Political Considerations Affecting Menu Labeling Legislation

As the New York City, King County, Washington, and California experiences illustrate, several political and legal issues impact the outcome of menu labeling legislation. Policymakers and public health advocates working to pass and implement menu labeling laws should be prepared to respond to some of the common policy arguments against menu labeling, as well as be educated about the bases for legal challenges to such laws.

Policy Arguments in Favor of and Against Menu Labeling Legislation

Opponents to menu labeling legislation argue that menu labeling imposes unreasonable burdens on the restaurant industry, which will result in costs being passed onto consumers. They assert that menu labeling is cost prohibitive, citing the expense of laboratory analysis of food nutrients and the costs of designing, printing, and distributing new menus and menu boards.¹¹⁹ Opponents claim that these costs could put many restaurants, especially smaller chains, out of business.¹²⁰ Proponents counter this argument by noting that most national chain restaurants already analyze the nutritional content of their menu items and menu labeling laws merely require them to make this information more accessible to consumers.¹²¹ Further, the cost of changing menus and menu boards is insubstantial and represents a fraction of chain restaurants' total marketing expenditures.¹²² Finally, proponents note that menu labeling laws apply to large chain restaurants and will not impact small, locally-owned businesses.¹²³

The restaurant industry has also argued that accurate menu labeling is not feasible because of constantly changing specials and consumer ordering preferences.¹²⁴ However, menu labeling laws apply to standard items that appear on the menu for a certain number of days per year; specials are exempt.¹²⁵ In addition, many menu labeling laws allow restaurants to post disclaimers stating that there may be variations in nutritional content across servings based on slight differences in portion sizes and quantities of ingredients or customer special ordering.¹²⁶

Opponents also question whether menu labeling laws meaningfully impact consumer behavior. While research suggests that nutritional information encourages consumers to make healthier food choices, most of the available studies were designed to gauge the impact of the "Nutrition Facts" panel on packaged foods and may not be predictive of the effects of nutrition disclosure in restaurant settings.¹²⁷ Some recent consumer choice studies suggest that the effect of nutritional information on dietary choices in restaurant settings may be modest.¹²⁸

While it is too soon to measure whether menu labeling laws will ultimately reduce weight gain and obesity, the controversy over menu labeling appears to have had the positive impact of raising consumer awareness about the nutritional content of restaurant foods and influencing the practices of some large restaurant chains.¹²⁹ When chain restaurants in New York City started posting calorie counts in the summer of 2008, the resulting "sticker shock" led to consumer demand for healthier food products and caused many chain restaurants to reformulate their products, reducing portion sizes and changing recipes to incorporate lighter ingredients.¹³⁰ Some national chain restaurants have agreed to voluntarily provide calorie information on menus and menu boards, even in jurisdictions where they are not required to do so by a state or local menu labeling law. On October 1, 2008, Yum! Brands (the parent company of Kentucky Fried Chicken, Taco Bell, Pizza Hut, Long John Silver's and A&W) announced that it would voluntarily begin placing calorie information on menu boards in company-owned restaurants nationwide beginning in late 2008, with completion expected by January 1, 2011.¹³¹

Although voluntary product reformulation and nutrition disclosures by large chain restaurants appear to be growing and positive trends, they should be regarded with some caution. The restaurant industry continues to lodge a number of criticisms about the costs, logistics, and unproven efficacy of menu labeling laws. Most of the local menu labeling laws implemented thus far have faced litigation, or the threat of preemptive statewide legislation, a fact that underscores the need for menu labeling advocates to be prepared to respond to legal challenges.

Legal Challenges to Menu Labeling Legislation

(1) Preemption

(a) Overview of Preemption and its Impact on Public Health Laws

Preemption is one of the main legal arguments raised against state and local menu labeling legislation. Preemption refers to the ability of a higher level of government to prevent or prohibit certain actions by a lower level of government. The doctrine of preemption stems from the Supremacy Clause of the United States Constitution.¹³² The Supremacy Clause allows for acts of Congress or federal agencies to preempt, or invalidate, state or local laws on the same subject. Likewise, state statutes or regulations can preempt local laws.

Preemption can significantly affect the development and enforcement of public health laws. On the one hand, preemption can help to promote public health objectives by ensuring consistent, comprehensive application of the law.¹³³ Arguably, federal public health laws can be more effective than state or local laws because they protect greater numbers of people. Some public health threats demand national attention because they span many states or regions, as in the case of epidemic disease or environmental pollution.¹³⁴ Federal law also provides a consistent regulatory scheme, which in certain specific contexts may be preferable to a “patchwork” of varying state or local laws.¹³⁵ On the other hand, however, preemption of strong state and local laws by a weaker federal law can interfere with public health goals.¹³⁶ Local interventions may be more appropriate because public health problems are not evenly distributed across racial, socio-economic, and geographic lines.¹³⁷ Urban areas may face different public health challenges than rural areas, and more racially or ethnically diverse jurisdictions often face different health concerns than places with more homogeneous populations.¹³⁸ Therefore, public health laws may have the greatest impact if they are locally tailored. In addition, it can be difficult to initially pass public health laws on a state or national level, but the enactment of local laws may serve as a catalyst for later statewide or national laws.¹³⁹ In this view, local public health initiatives serve as laboratories of invention which spur later changes in state and national public health policy.¹⁴⁰ Preemptive federal or state public health laws run the risk of stifling such innovation.

Proponents of preemption are often those who control the businesses that are impacted by public health laws. Preemption is considered a top legislative priority for big business because it concentrates authority at higher levels of government, where the industry’s influence is stronger, its lobbying efforts are

well organized, and it can more readily protect its interests. Regulated industries have frequently been successful in lobbying for the inclusion of preemption clauses in state or federal laws, making it difficult or impossible to enact local laws that are more restrictive. This is especially problematic from a public health perspective when the state or federal law in question is relatively weak.¹⁴¹

Menu labeling laws provide a unique context in which to analyze preemption issues for a number of reasons. For one, the outcome of the litigation over federal preemption is unsettled. For another, there is a debate in the obesity prevention community about whether preemption of local menu labeling ordinances is an acceptable compromise in the effort to get state or federal menu labeling legislation passed. Additionally, some would argue that uniform federal regulation of nutritional disclosures by chain restaurants is appropriate, given the national scope of these corporations and existing federal regulatory expertise over packaged food labeling.

The restaurant industry supports uniform federal regulation and argues that local menu labeling ordinances are expressly preempted by the Nutrition Labeling and Education Act. To that end, the industry has initiated lawsuits against local menu labeling ordinances in New York City, San Francisco, and Santa Clara County, California on federal preemption grounds. The following discussion will provide an overview of the NLEA's regulatory scheme as it relates to menu labeling and a summary of the litigation over New York City's menu labeling regulation, which, although unresolved, has resulted in the only series of decisions addressing whether the NLEA may preempt state or local menu labeling laws.

(b) The Nutrition Labeling and Education Act of 1990

The Nutrition Labeling and Education Act of 1990 amended the Food, Drug, and Cosmetic Act to strengthen and clarify the FDA's legal authority over nutritional labeling. It added, among other provisions, two significant subsections to Section 403 of the Food, Drug, and Cosmetic Act: Section 343(q), which requires certain factual disclosures on the nutrition labels of packaged foods; and Section 343(r), which regulates claims characterizing a food's nutritional content or its health benefits.¹⁴² Section 343(q) mandates that specific, uniform nutritional information be listed on the labels of packaged food products and establishes the standards for the ubiquitous "Nutrition Facts" panel.¹⁴³ Notably, Section 343(q) expressly exempts restaurants.¹⁴⁴ Section 343(r), on the other hand, regulates voluntary "nutrient content claims" that characterize the level of certain nutrients in a food item (e.g., "low fat") or the health-related effects of consuming a food item (e.g., "heart healthy").¹⁴⁵ Restaurants are not exempt from Section 343(r)'s requirements.¹⁴⁶

The NLEA also contains two express preemption provisions. The first of these provisions, Section 343-1(a)(4), preempts any state or local law that conflicts with the mandatory nutrition labeling scheme in Section 343(q).¹⁴⁷ Section 343-1(a)(4) does not preempt state or local menu labeling requirements, since restaurants are exempt from Section 343(q).¹⁴⁸ The second preemption provision, Section 343-1(a)(5), prohibits states or localities from regulating Section 343(r) nutrient content claims, including those made by

restaurants, in a manner that is not identical to the requirements set forth in the NLEA.¹⁴⁹ Therefore, the NLEA allows states and localities to require factual nutrition disclosures about the food served in restaurants, but does not permit state or local regulation of voluntary claims made by restaurants that characterize the nutritional content of their foods (except for those that simply mirror the NLEA itself).

(c) Litigation Regarding Federal Preemption of Menu Labeling Laws

In *New York State Restaurant Association v. New York City Board of Health I (NYSRA I)*,¹⁵⁰ a federal district court concluded that while New York City had the power to mandate menu labeling by all restaurants meeting a standard definition, its attempt to regulate only those restaurants that had already voluntarily disclosed the calorie content of their food was preempted by the NLEA.¹⁵¹ The court concluded that the regulation's voluntary aspect caused it to fall into the realm of Section 343(r) claims, where local action is preempted, rather than Section 343(q) required disclosures, where local governments are free to act.¹⁵² In response to the court's decision, New York City revised its menu labeling regulation to require all restaurants with 15 or more locations nationally, and with menu items standardized for content and portion size, to display calorie content on their menus and menu boards. The NYSRA then filed suit against the amended regulation, challenging it on preemption and First Amendment grounds.

In *New York State Restaurant Association v. New York City Board of Health II (NYSRA II)*,¹⁵³ the restaurant industry argued that laws that uniformly require all restaurants of a certain type to disclose nutritional content information are subject to NLEA preemption, asserting that any disclosure that is not part of a "Nutrition Facts" panel is a Section 343(r) nutrient content claim. The federal district court disagreed, concluding that the revised regulation was not preempted by the NLEA because the type of mandatory factual disclosure it compelled is not a "claim" under Section 343(r).¹⁵⁴ The court reasoned that the NYSRA's argument "ignores the mandatory/voluntary architecture [of the NLEA] ... as well as the obvious intent of Congress in drafting [the NLEA], which explicitly preserves state authority to impose nutrition labeling requirements on restaurants."¹⁵⁵ The restaurant association has appealed the *NYSRA II* decision to the U.S. Court of Appeals for the Second Circuit and an appellate ruling is expected soon.

(2) First Amendment Protection of Commercial Speech

The second major argument that has been raised against menu labeling laws is that they violate the First Amendment rights of affected restaurants by placing an impermissible burden on commercial speech. The restaurant industry has argued that menu labeling laws compel speech by forcing restaurants to disseminate particular messages about the content of their foods, and that such laws do not advance the government's interest in preventing obesity because there is insufficient evidence that menu labeling will ultimately be successful in decreasing consumer caloric intake and leading to population-level reductions in rates of overweight and obesity.

(a) Overview of the Commercial Speech Doctrine

The First Amendment protects commercial speech, but speech regulating commercial transactions is accorded less protection than other forms of constitutionally guaranteed expression.¹⁵⁶ The rationale for extending First Amendment protection to commercial speech is the strong public interest in consumers making informed economic decisions and the “free flow of commercial information.”¹⁵⁷ Commercial speech is subject to less stringent constitutional protection, however, because there is a strong government interest in certain forms of economic regulation, even though such regulation may have an incidental effect on free speech.¹⁵⁸ The government constitutionally regulates advertising and product labels in a wide variety of industries in the interest of providing consumers with accurate information about products that affect their health.

Depending on how they operate, laws affecting commercial speech are analyzed according to three different levels of scrutiny. Laws compelling commercial speech – those that require an entity to voice or subsidize a message with which it disagrees – are subject to strict scrutiny, under which a law must be narrowly tailored to achieve a compelling government interest.¹⁵⁹ Laws restricting commercial speech are subject to a form of intermediate scrutiny under the four-part test of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, under which a law regulating advertising of a lawful product must directly advance a substantial government interest and be no more restrictive than necessary to advance that interest.¹⁶⁰ Lastly, laws requiring the disclosure of purely factual commercial information are subject to a reasonable relationship test, similar to rational basis review, under which the law’s disclosure requirements must be reasonably related to a legitimate government interest.¹⁶¹

(b) Litigation Involving First Amendment Challenges to Menu Labeling Laws

In the menu labeling litigation to date, the main point of contention is which standard of review should be applied in evaluating the impact of menu labeling laws on commercial speech. The restaurant industry argues that strict scrutiny should apply, asserting that the government is impermissibly compelling restaurants to voice a point of view that they disagree with about the importance of calories.¹⁶² Local governments argue that the reasonable relationship test should apply, because menu labeling laws compel the disclosure of purely factual information (i.e., the number of calories in a menu item), and not a subjective viewpoint (e.g., “fast food is bad”). Proponents of menu labeling laws point out that the government already requires numerous industries to disclose factual information about the products they sell, and the restaurant industry’s argument in favor of strict scrutiny would disrupt the regulatory scheme currently in place for packaged foods, tobacco, prescription drugs, and other products.¹⁶³ Further, local governments have a legitimate interest in providing consumers with nutritional information so they can make informed decisions about the foods they eat, and providing such information promotes public health by decreasing caloric consumption and reducing obesity rates.

To date, the only case that has ruled on a First Amendment challenge to a menu labeling law is *New York State Restaurant Association v. New York City Board of Health II*.¹⁶⁴ In *NYSRA II*, the restaurant association argued that New York City’s menu labeling regulation should be evaluated under strict scrutiny¹⁶⁵ on the grounds that it compelled affected restaurants to promote a governmental message they disagreed with (namely, the idea that consumers must consider caloric content when ordering restaurant food and that calories are the only criterion that consumers should consider).¹⁶⁶ The court rejected this argument, stating that the regulation did not compel the endorsement of a viewpoint¹⁶⁷ but rather simply required restaurants to report “factual and uncontroversial’ information,” that is, the number of calories in their products.¹⁶⁸ The court concluded that the reasonable relationship test was the proper standard to apply¹⁶⁹ and the law would be upheld as long as there was a reasonable connection between the calorie disclosure requirement and the City’s purpose in enacting it. The City provided numerous declarations supporting the proposition that providing calorie information at the point of sale would reduce restaurant patrons’ caloric intake and lead to decreased rates of weight gain and obesity.¹⁷⁰ The NYSRA argued that there was not a reasonable connection between the regulation and its public health objectives because, at present, there is insufficient evidence that menu labeling will ultimately be successful in preventing weight gain and reducing obesity.¹⁷¹ In upholding the regulation, the court stated that “conclusive proof is not required to establish a reasonable relationship”¹⁷² and concluded that “it seems reasonable to expect that some consumers will use the information ... to select lower calorie meals when eating at covered restaurants and that these choices will lead to a lower incidence of obesity.”¹⁷³

(3) Equal Protection

An argument which has not been raised in prior litigation, but can be anticipated, is that menu labeling laws violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, and similar provisions found in most state constitutions. The restaurant industry may argue that because menu labeling laws target certain food service establishments for regulation (i.e., national chain restaurants) and not others (i.e., local, independent restaurants), they treat similar kinds of businesses differently and thereby violate affected restaurants’ rights to equal protection.¹⁷⁴

The Equal Protection Clause provides that “no state shall ... deny to any person within its jurisdiction the equal protection of the laws.”¹⁷⁵ It has been interpreted to embody the general rule that similarly situated persons and entities ought to be given similar treatment under the law. Laws evaluated under the Equal Protection Clause are subject to different levels of scrutiny depending on whether they burden certain rights or operate to the advantage, or disadvantage, of a particular class. Laws, like menu labeling legislation, that do not burden “fundamental” rights or target “suspect” classes are subject to rational basis review and will survive an equal protection challenge if they are rationally related to a legitimate government interest.¹⁷⁶

Menu labeling laws are likely to be upheld under the rational basis test because studies have demonstrated a connection between the provision of nutritional information in restaurants and reduced consumer caloric intake.¹⁷⁷ Local governments have a legitimate interest in reducing obesity rates and preventing obesity-related chronic diseases in furtherance of their mission to protect public health. Moreover, states and localities are accorded wide latitude in regulating local economic concerns and public health matters under their police powers.¹⁷⁸

Menu labeling laws are likely to be upheld against an equal protection challenge even though they selectively target chain restaurants for regulation. The restaurant industry may argue that menu labeling unfairly burdens large chain restaurants over independent restaurants. But the Supreme Court has said that “a law will be sustained if it ... advance[s] a legitimate government interest, even if the law ... works to the disadvantage of a particular group.”¹⁷⁹ Moreover, it could be argued that the prevalence and unhealthy nature of chain restaurants’ products warrants differential treatment.¹⁸⁰ Given the link between fast food consumption and obesity, state and local governments are arguably justified in treating chain restaurants differently from independent restaurants, based on their relative impact on public health.¹⁸¹

Policy Considerations for Menu Labeling Legislation

States and localities have a range of policy options to consider when designing a state law or local ordinance requiring menu labeling at chain restaurants. Some of these policy choices may be influenced by jurisdiction-specific legal requirements and political considerations. Therefore, this policy brief does not attempt to recommend one definitive approach. The following list of policy elements are recommended as a starting point for advocates and policymakers who are considering menu labeling legislation in their communities. While different approaches may be followed in each of the following categories, it is strongly recommended that any proposed menu labeling law takes these policy options into account.

Which Restaurants Will be Required to Post Nutritional Information

Most of the menu labeling laws that have been enacted affect chain food service establishments with 15 to 20 national outlets, operating under the same trade name, regardless of ownership.¹⁸² This threshold number can be increased or decreased, but it is recommended that a menu labeling law apply, at a minimum, to chain restaurants with 15 or more restaurants nationwide.¹⁸³ This limitation will ensure that small, independently owned businesses will not be adversely affected by the legislation.

What Type of Nutritional Information Must be Posted, and Where Will Nutritional Information be Required to be Posted

Nutritional information should be posted so that it is clearly visible at the point of sale. The law should require nutritional information to be posted on traditional menus (including take out menus), menu boards (including drive-through menu boards),¹⁸⁴ and on food tags (e.g., labels placed next to items in a self-service bakery case or next to pre-prepared salads on a salad bar).

At a minimum, the total calories in standard menu items should be posted on traditional menus. Policymakers may opt to require restaurants to disclose other nutritional information on menus, such as total grams of saturated fat, trans fat, and carbohydrates, and total milligrams of sodium. At a minimum, total calories should be posted on menu boards and food tags, with other nutritional information available in print form at the point of sale.

If a menu item may be customized based on consumer selection of several options (e.g., a combination meal that allows the consumer to choose from different side items or beverages), a menu labeling law may provide for the posting of caloric ranges on menus and menu boards. In the alternative, a menu labeling law could require the posting of the average caloric value of a combination meal if the highest and lowest caloric combinations of the various items are within a certain percentage (e.g., twenty percent) of the median value.

Which Food Items Should be Excluded from Menu Labeling Requirements

Only standard menu items should be subject to menu labeling requirements. Menu labeling laws typically do not apply to customized orders or specials that are available only for a limited time. A menu labeling law should contain language providing that items that are offered for sale for less than a certain number of days (e.g., thirty days) are exempt. Condiments should also be excluded. In addition, policymakers might consider allowing restaurants to post disclaimers indicating that there may be variations in nutritional content values across servings based on special ordering or slight differences in ingredients or serving size.

How the Law Will be Enforced

Providing for effective enforcement is an essential component of any menu labeling law. A wide variety of enforcement mechanisms are available, and each state or locality must consider its own unique resources and practices when choosing which enforcement options to include in a menu labeling law. Policymakers might consider the following non-exhaustive list of enforcement considerations when drafting a menu labeling law.

- The law or ordinance will be enforced by the state/county/city Department of Health, but violations may be cited by other licensed law enforcement officials;
- Compliance will be monitored at the same time that public health inspectors conduct other regularly scheduled food safety and licensing inspections;

- Meaningful fines will be imposed for failing to comply with the law, with repeat violators being sanctioned more heavily than initial violators; and
- Violators of the law will be subject to civil penalties, and an administrative procedure will be provided for adjudicating civil penalties.

Conclusion

Because consumption of foods prepared outside the home has increased dramatically, the legal distinction between requiring nutritional information for packaged but not restaurant foods is no longer reasonable.¹⁸⁵ Nutritional information should be provided on restaurant menus as a strategy to educate consumers about the foods they eat and to address the rapidly rising rates of obesity and weight gain in this country. Recent research has demonstrated that menu labeling holds promise in reducing Americans' caloric intake and decreasing individual and population levels of weight gain.¹⁸⁶ Therefore, menu labeling legislation is a legitimate policy option for state and local governments to pursue in their efforts to combat obesity, prevent obesity-related diseases, promote healthy eating, and protect general public health.

Although menu labeling is quickly gaining momentum as a promising strategy to address the obesity epidemic, the future of state and local menu labeling laws remains uncertain. The *NYSR4 II* decision could be reversed by the Second Circuit Court of Appeals, which would cast doubt on a number of local menu labeling laws modeled after New York City's regulation. Congress may pass a law establishing uniform federal regulation of nutrition disclosures on menus, or other states may follow California's lead and enact statewide legislation that preempts local menu labeling laws. It appears that menu labeling will continue to inspire heated debate for the foreseeable future, both in the legislature and in the court system. Therefore, advocates of menu labeling should be prepared to respond to strong political opposition and state and local menu labeling laws should be carefully drafted to avoid potential legal challenges.

Appendix of Relevant Resources

Select Publications:

The Rudd Center for Food Policy and Obesity at Yale University, *Menu Labeling in Chain Restaurants, Opportunities for Public Policy* (2008).

The Center for Science in the Public Interest, *Anyone's Guess: The Need for Nutrition Labeling at Fast-Food and Other Chain Restaurants* (2003).

County of Los Angeles Public Health, *Menu Labeling as a Potential Strategy for Combating the Obesity Epidemic: A Health Impact Assessment* (2008).

Mary Bassett et al., *Purchasing Behavior and Calorie Information at Fast-Food Chains in New York City, 2007*, 98 AM. J. OF PUBLIC HEALTH 1457 (2008).

Scott Burton et al., *Attacking the Obesity Epidemic, The Potential Health Benefits of Providing Nutrition Information in Restaurants*, 96 AM. J. OF PUBLIC HEALTH 1669 (2006).

Jennifer Pomeranz & Kelly Brownell, *Legal and Public Health Considerations Affecting the Success, Reach, and Impact of Menu-Labeling Laws*, 98 AM. J. OF PUBLIC HEALTH 1578 (2008).

Select Legislation:

New York City Health Code § 81.50 (New York City's menu labeling regulation).

California Senate Bill 1420 (California's menu labeling legislation).

U.S. Senate Bill 2784 (The Menu Education and Labeling Act (MEAL Act)).

U.S. Senate Bill 3575 (The Labeling Education and Nutrition Act (LEAN Act)).

Select Model Policies:

National Policy & Legal Analysis Network to Prevent Childhood Obesity (NPLAN), Model Ordinance Requiring Menu Labeling at Certain Restaurants.

Endnotes

- ¹ U.S. CENTERS FOR DISEASE CONTROL & PREVENTION, NATIONAL CENTER FOR HEALTH STATISTICS, PREVALENCE OF OVERWEIGHT AND OBESITY AMONG ADULTS: UNITED STATES, 2003-2004, *at* http://www.cdc.gov/nchs/products/pubs/pubd/hestats/overweight/overwght_adult_03.htm.
- ² Cynthia Ogden et al., *Prevalence of Overweight and Obesity in the United States, 1999-2004*, 295 J. AM. MED. ASS'N 1549 (2006).
- ³ TRUST FOR AMERICA'S HEALTH, F AS IN FAT: HOW OBESITY POLICIES ARE FAILING IN AMERICA 9 (2008).
- ⁴ U.S. CENTERS FOR DISEASE CONTROL & PREVENTION, OVERWEIGHT AND OBESITY – TRENDS, *at* <http://www.cdc.gov/nccdphp/dnpa/obesity/trend/index.htm> (citing the NATIONAL CENTER FOR HEALTH STATISTICS, NATIONAL HEALTH AND NUTRITION EXAMINATION SURVEY (NHANES), 2003-2004 (2007)).
- ⁵ ROBERT WOOD JOHNSON FOUNDATION, BALANCE - 2007 END OF YEAR REPORT: A REPORT ON STATE ACTION TO PROMOTE NUTRITION, INCREASE PHYSICAL ACTIVITY AND PREVENT OBESITY 3 (2008).
- ⁶ TRUST FOR AMERICA'S HEALTH, *supra* note 3, at 6. A recent survey conducted by researchers at the John Hopkins Bloomberg School of Public Health estimated that by 2015, 41 percent of American adults will be obese, and 24 percent of children and adolescents will be obese. Youfa Wang & May A. Beydoun, *The Obesity Epidemic in the United States – Gender, Age, Socioeconomic, Racial/Ethnic, and Geographic Characteristics: A Systematic Review and Meta-Regression Analysis*, 29 EPIDEMIOLOGIC REVIEWS 6, 22 (2007).
- ⁷ See sources cited *infra* notes 17-22, 24, and 25.
- ⁸ JAYACHANDRAN VAIYAM, U.S. DEP'T OF AGRICULTURE, ECONOMIC RESEARCH SERVICE, NUTRITIONAL LABELING IN THE FOOD-AWAY-FROM-HOME SECTOR: AN ECONOMIC ASSESSMENT 2 (2005).
- ⁹ See discussion *infra* page 2 and sources cited notes 17-20.
- ¹⁰ The federal Nutrition Labeling and Education Act (NLEA) mandates nutrition labeling of most processed food products. Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (1990) (codified in relevant part at 21 U.S.C. §§ 343(q) and (r)). The NLEA created the standardized “Nutrition Facts” panel, which lists information regarding the calories, total fat, saturated fat, and cholesterol in packaged foods.
- ¹¹ The NLEA expressly exempts restaurant foods from its mandatory labeling requirements, unless restaurants choose to make a nutrient content “claim” (e.g., “low fat”) about the foods they serve. 21 U.S.C. § 343(q)(5)(A)(i); 21 U.S.C. § 343(r)(1). Although the NLEA allows states and localities to mandate the disclosure of nutritional information in restaurants, to date, state menu labeling proposals have largely been unsuccessful. As of December 2008, only one state, California, has enacted statewide menu labeling legislation.
- ¹² THE KEYSTONE CENTER, KEYSTONE FORUM ON AWAY-FROM-HOME FOODS: OPPORTUNITIES FOR PREVENTING WEIGHT GAIN AND OBESITY 25 (2006), *available at* http://www.keystone.org/spp/documents/Forum_Report_FINAL_5-30-06.pdf.
- ¹³ NATIONAL RESTAURANT ASSOCIATION, 2008 RESTAURANT INDUSTRY POCKET FACTBOOK (2008), *available at* http://www.restaurant.org/pdfs/research/2008forecast_factbook.pdf.
- ¹⁴ *Restaurant Chains Must Now List the Calorie Content of the Food They Sell*, THE ECONOMIST, Aug. 28, 2008.
- ¹⁵ KEYSTONE CENTER, *supra* note 12, at 25.
- ¹⁶ ROBERT WOOD JOHNSON FOUNDATION, *supra* note 5, at 49 (2008); CENTER FOR SCIENCE IN THE PUBLIC INTEREST, ANYONE'S GUESS: THE NEED FOR NUTRITION LABELING AT FAST FOOD AND OTHER CHAIN RESTAURANTS 1 (2003), *available at* <http://www.cspinet.org/restaurantreport.pdf>; VAIYAM, *supra* note 8, at 1 (explaining that according to USDA food intake surveys, between 1977-78 and 1994-96, the amount of daily caloric intake from food consumed outside the home increased from 18 percent to 32 percent).
- ¹⁷ THE KEYSTONE CENTER, *supra* note 12, at 27.
- ¹⁸ CENTER FOR SCIENCE IN THE PUBLIC INTEREST, *supra* note 16, at 7.
- ¹⁹ KEYSTONE CENTER, *supra* note 12, at 25; Lisa Young & Marion Nestle, *The Contribution of Expanding Portion Sizes to the U.S. Obesity Epidemic*, 92 AM. J. PUBLIC HEALTH 246, 247-48 (2002).
- ²⁰ CENTER FOR SCIENCE IN THE PUBLIC INTEREST, *supra* note 16, at 11.
- ²¹ *Id.* at 4.
- ²² Samara Nielsen et al., *Trends in Energy Intake in the United States Between 1977-1996*, 10 OBESITY RESEARCH 370 (2002).
- ²³ VAIYAM, *supra* note 8, at 3.

- ²⁴ *Id.*; KEYSTONE CENTER, *supra* note 12, at 27. The Keystone Forum contains an annotated bibliography of studies examining the relationship between consumption of restaurant foods and weight gain, which is found at Appendix B. *See also* RUDD CENTER FOR FOOD POLICY & OBESITY, MENU LABELING IN CHAIN RESTAURANTS: OPPORTUNITIES FOR PUBLIC POLICY 8 (2008); ROBERT WOOD JOHNSON FOUNDATION, HEALTHY EATING RESEARCH, RESTAURANT REALITIES: INEQUALITIES IN ACCESS TO HEALTHY RESTAURANT CHOICES 2 (2008); Simone French et al., *Fast Food Restaurant Use Among Adolescents: Associations with Nutrient Intake, Food Choices and Behavioral and Psychosocial Variables*, 25 INT. J. OBESITY 1823, 1831 (2001).
- ²⁵ Shin-Yi Chou et al., *An Economic Analysis of Adult Obesity: Results from the Behavioral Risk Factor Surveillance System*, 23 J. HEALTH ECON. 565, 582 (2004).
- ²⁶ Margo Wootan & Melissa Osborn, *Availability of Nutrition Information from Chain Restaurants in the United States*, 30 AM. J. PREVENTATIVE MED. 266, 267 (2006).
- ²⁷ *Id.*
- ²⁸ CENTER FOR SCIENCE IN THE PUBLIC INTEREST, *supra* note 16, at 13.
- ²⁹ KEYSTONE CENTER, *supra* note 12. The Keystone report was intended to provide recommendations to the food and beverage industry, government, health professionals, consumer representatives and others on informing consumers about the nutritional content of restaurant foods in order to reduce obesity. The Keystone report includes the following recommendations: (1) food establishments should provide consumers with calorie information in a standard, easily accessible and understandable format; and (2) research should be conducted on how consumers use nutritional information for restaurant foods and how this information affects their caloric intake. *Id.* at 76-84.
- ³⁰ Scot Burton et al., *Attacking the Obesity Epidemic: The Potential Health Benefits of Providing Nutrition Information in Restaurants*, 96 AM. J. PUBLIC HEALTH 1669, 1671 (2006).
- ³¹ U.S. CENTERS FOR DISEASE CONTROL & PREVENTION, NATIONAL CENTER FOR HEALTH STATISTICS, HEALTHY PEOPLE 2000 FINAL REVIEW 90 (2001), available at <http://www.cdc.gov/nchs/data/hp2000/hp2k01.pdf>.
- ³² KEYSTONE CENTER, *supra* note 12, at 72; CENTER FOR SCIENCE IN THE PUBLIC INTEREST, *supra* note 16, at 14 (both citing A.S. LEVY & B.M. DERBY, U.S. FOOD & DRUG ADMINISTRATION, CENTER FOR FOOD SAFETY & APPLIED NUTRITION, THE IMPACT OF THE NLEA ON CONSUMERS: RECENT FINDINGS FROM FDA'S FOOD LABEL AND NUTRITION TRACKING SYSTEM (1996)).
- ³³ KEYSTONE CENTER, *supra* note 12, at 72; CENTER FOR SCIENCE IN THE PUBLIC INTEREST, *supra* note 16, at 14; M.W. Kreuter et. al., *Do Nutrition Label Readers Eat Healthier Diets? Behavioral Correlates of Adults' Use of Food Labels*, 13 AM. J. PREVENTATIVE MED. 277 (1997).
- ³⁴ Paul Simon et. al., County of Los Angeles Public Health, *Menu Labeling as a Potential Strategy for Combating the Obesity Epidemic: A Health Impact Assessment* (2008), available at http://www.lapublichealth.org/docs/Menu_Labeling_Report_2008.pdf.
- ³⁵ The Los Angeles researchers used the conservative estimate that menu labeling would result in 10 percent of chain restaurant patrons ordering reduced calorie meals, with an average caloric reduction of 100 calories per meal, and no compensatory increase in other food consumption or change in physical activity. *Id.*
- ³⁶ *Id.*
- ³⁷ Mary Bassett et al., *Purchasing Behavior and Calorie Information at Fast Food Chains In New York City, 2007*, 98 AM. J. PUBLIC HEALTH 1457, 1459 (2008).
- ³⁸ U.S. DEPT OF HEALTH & HUMAN SERVICES, OFFICE OF THE SURGEON GENERAL, THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT AND DECREASE OVERWEIGHT AND OBESITY 17 (2001).
- ³⁹ Press Release, U.S. Food & Drug Administration, HHS Unveils FDA Strategy to Help Reduce Obesity (Mar. 12, 2004), available at http://www.fda.gov/bbs/topics/news/2004/hhs_031204.html.
- ⁴⁰ RUDD CENTER, *supra* note 24, at 9.
- ⁴¹ CENTER FOR SCIENCE IN THE PUBLIC INTEREST, SUMMARY OF POLLS ON NUTRITION LABELING IN RESTAURANTS (2008), available at http://www.cspinet.org/new/pdf/census_menu_board_question.pdf.
- ⁴² H.R. 3895, 110th Cong. (2007); S. 2784, 110th Cong. (2008).
- ⁴³ TRUST FOR AMERICA'S HEALTH, *supra* note 3, at 78.
- ⁴⁴ H.R. 3895, 110th Cong. (2007). The text of H.R. 3895 can be accessed at <http://thomas.loc.gov/cgi-bin/query/D?c110:1:/temp/~c1109DlfQw::>
- ⁴⁵ *Id.*
- ⁴⁶ H.R. 3895 was referred to the House Subcommittee on Health on October 22, 2007. The bill did not move out of committee.
- ⁴⁷ H.R. 3444, 108th Cong. (2003). The text of H.R. 3444, which was introduced in November of 2003, can be accessed at http://www.cspinet.org/new/pdf/meal_hr3444.pdf.

- ⁴⁸ S. 2784, 110th Cong. (2008). The text of S. 2784 can be accessed at <http://thomas.loc.gov/cgi-bin/query/D?c110:1:./temp/~c110wkzZpU::>
- ⁴⁹ Margo Wootan, Menu Labeling: One Way to Support Americans' Efforts to Eat Well and Watch Their Weight, Presentation at the 8th Annual Maine-Harvard Prevention Research Center Workshop (Nov. 19, 2008), *available at* http://www.mcph.org/Major_Activities/MHPRC/Workshops/2008/Margo_Wootan_Presentation.pdf.
- ⁵⁰ S. 3575, 110th Cong. § 2 (2008). The Senate version of the MEAL Act was introduced on September 25, 2008. It has been referred to the Senate Committee on Health, Education, Labor and Pensions. The text of S. 3575 can be accessed at <http://thomas.loc.gov/cgi-bin/query/z?c110:S.3575>. The House version of the MEAL Act, H.R. 7187, was introduced on September 27, 2008. H.R. 7187, 110th Cong. § 2 (2008). It has been referred to the House Committee on Energy and Commerce. The text of H.R. 7187 can be accessed at <http://thomas.loc.gov/cgi-bin/query/D?c110:2:./temp/~c11024W5Nb::>
- ⁵¹ S. 3575, 110th Cong. § 2 (2008).
- ⁵² *Id.*
- ⁵³ *Id.*
- ⁵⁴ *Id.*
- ⁵⁵ Press Release, National Restaurant Association, NRA Statement about Introduction of LEAN Act in Congress, (Sept. 25, 2008), *available at* <http://www.nationalrestaurantassociation.com/pressroom/pressrelease.cfm?ID=1691>. *See also* Paul Frumkin, *Senate Considers National Standards for Menu Labeling: Lawmakers Introduce LEAN to Record Crowd at NRA Public Affairs Conference*, NATION'S RESTAURANT NEWS, Oct. 6, 2008; NATIONAL RESTAURANT ASSOCIATION, PUBLIC POLICY ISSUE BRIEF: MENU LABELING/NUTRITION INFORMATION, *at* <http://www.restaurant.org/government/issues/issue.cfm?Issue=menulabel>.
- ⁵⁶ Statewide menu labeling legislation was first introduced in Maine in 2003. ROBERT WOOD JOHNSON FOUNDATION, *supra* note 5, at 49. In 2007-08, roughly seventeen states and Puerto Rico, as well as numerous local governments, introduced menu labeling legislation. TRUST FOR AMERICA'S HEALTH, *supra* note 3, at 53. The states that considered menu labeling legislation in 2007-08 include: Arizona, California, Connecticut, the District of Columbia, Hawaii, Illinois, Iowa, Kentucky, Maine, Massachusetts, Michigan, New Jersey, New Mexico, New York, Pennsylvania, Tennessee, Vermont, and Washington. *Id.* The Center for Science in the Public Interest maintains a summary of all enacted and pending state and local menu labeling bills and regulations in 2007-08. CENTER FOR SCIENCE IN THE PUBLIC INTEREST, NUTRITION LABELING IN CHAIN RESTAURANTS: STATE AND LOCAL BILLS/REGULATIONS - 2007-2008, *available at* <http://www.cspinet.org/nutritionpolicy/MenuLabelingBills2007-2008.pdf>. The National Conference of State Legislatures also maintains a summary of all proposed state legislation for menu labeling or nutrition information from 2003-08, which can be accessed at <http://www.ncsl.org/programs/health/transfatmenulabelingbills.htm>.
- ⁵⁷ ROBERT WOOD JOHNSON FOUNDATION, *supra* note 5, at 51.
- ⁵⁸ *Id.* at 50; CENTER FOR SCIENCE IN THE PUBLIC INTEREST, *supra* note 56.
- ⁵⁹ CENTER FOR SCIENCE IN THE PUBLIC INTEREST, *supra* note 56.
- ⁶⁰ ROBERT WOOD JOHNSON FOUNDATION, *supra* note 5, at 51.
- ⁶¹ *Id.*
- ⁶² N.Y. State Rest. Ass'n v. New York City Bd. of Health, 509 F. Supp.2d 351 (S.D.N.Y. 2007) ("NYSRA I"). The court held that New York City's first menu labeling regulation was preempted because it applied only to restaurants that were already making voluntary disclosures about the nutritional content of their foods, which the court deemed to be nutrient "claims" under Section 343(r) of the NLEA. *Id.* at 363. Under Section 343-1(a)(5) of the NLEA, voluntary nutrient claims about food, including claims made by restaurants, can only be regulated at the federal level. *Id.* at 358; 21 U.S.C. § 343-1(a)(5).
- ⁶³ NYSRA I, 509 F. Supp.2d at 363.
- ⁶⁴ N.Y.C. HEALTH CODE § 81.50. The text of Section 81.50, along with the law's Statement of Basis and Purpose, can be accessed at <http://www.nyc.gov/html/doh/downloads/pdf/public/notice-intention-hc-art81-50-1007.pdf>.
- ⁶⁵ N.Y. State Restaurant Ass'n v. New York City Bd. Of Health, 2008 WL 1752455 (S.D.N.Y. April 16, 2008) ("NYSRA II"). The federal district court concluded that Section 81.50 was not preempted by the NLEA because the federal law leaves to state and local governments the power to impose menu labeling requirements on restaurants. *Id.* at *5. The court also held that the regulation did not infringe upon the First Amendment rights of affected restaurants because the required disclosure of caloric information is reasonably related to the government's interest in providing consumers with accurate nutritional information. *Id.* at *12.
- ⁶⁶ N.Y. State Restaurant Ass'n v. New York City Bd. Of Health, 545 F.Supp.2d 363 (2008) (denying the NYSRA's motion for a stay of enforcement of Section 81.50 pending the outcome of its appeal to the Second Circuit).
- ⁶⁷ TECHNOMIC, INC., EXECUTIVE SUMMARY: CONSUMER REACTION TO CALORIE DISCLOSURE ON MENUS/MENU BOARDS IN NEW YORK CITY (2008). This on-line survey was conducted August 27-29, 2008 with roughly 300 New York City adults. *See also* CENTER FOR SCIENCE IN THE PUBLIC INTEREST, NEW YORK CITY: RAVE REVIEWS FOR MENU LABELING (2008).

- ⁶⁸ King County Board of Health R&R No. 08-02 § 1.A-B. *See* KING COUNTY, SIGNATURE REPORT ON PROPOSED BOARD OF HEALTH RULE AND REGULATION NO. 08-02 (May 6, 2008), *available at* <http://www.kingcounty.gov/healthservices/health/nutrition/healthyeating/~ /media/health/publichealth/documents/boh/reg0802.ashx>.
- ⁶⁹ King County Board of Health R&R No. 08-02 § 1.C-D.
- ⁷⁰ *Id.* § 1.C.
- ⁷¹ *Id.*
- ⁷² *Id.* § 1.E.
- ⁷³ *Id.* § 1.F.
- ⁷⁴ *Id.* § 1.G.
- ⁷⁵ *Id.*
- ⁷⁶ Karen Gaudette, *Chain Restaurants' Menus to Show Nutritional Numbers in King County*, SEATTLE TIMES, Mar. 12, 2008.
- ⁷⁷ King County Board of Health R&R No. 08-02 § 1.H.
- ⁷⁸ *Id.* § 1.I-M.
- ⁷⁹ *Id.* § 2.A.
- ⁸⁰ *Id.* § 4.A.1.a-d.
- ⁸¹ *Id.* § 4.B.1.a-b.
- ⁸² *Id.* § 5.A-C.
- ⁸³ *Id.* § 6.C.
- ⁸⁴ *Id.* § 6.D.
- ⁸⁵ Press Release, King County, Restaurant Industry Agrees to Post Nutritional Information for Diners: Agreement Between Board of Health and Restaurant Industry First of Its Kind in Nation (Mar. 12, 2008); SEATTLE & KING COUNTY PUBLIC HEALTH, UPDATE: NUTRITION MENU LABELING AND ARTIFICIAL TRANS FAT (Mar.-Apr. 2008), *available at* http://www.kingcounty.gov/healthservices/health/nutrition/~ /media/health/publichealth/documents/healthyeating/TFML_update_MarchApril2008.ashx.
- ⁸⁶ SEATTLE & KING COUNTY PUBLIC HEALTH, *supra* note 85 at 2.
- ⁸⁷ S.F. HEALTH CODE § 468. The text of San Francisco Ordinance 40-08 can be accessed at <http://www.sfgov.org/site/uploadedfiles/bdsupvrs/ordinances08/o0040-08.pdf>
- ⁸⁸ *Id.* § 468.3(c), (d).
- ⁸⁹ *Id.* § 468.3(a), (b).
- ⁹⁰ *Id.*
- ⁹¹ *Id.* § 468.3(a).
- ⁹² *Id.* § 468.3(f).
- ⁹³ SANTA CLARA COUNTY ORD. NO. NS-300.793. The text of Santa Clara's ordinance can be accessed at <http://www.sccgov.org/SCC/docs/SCC%20Public%20Portal/keyboard%20agenda/BOS%20Agenda/2008/June%2024,%202008/TMPKeyboard202298556.pdf>.
- ⁹⁴ *Id.*
- ⁹⁵ *Id.*
- ⁹⁶ *Id.*
- ⁹⁷ CBS Broadcasting, Inc., *San Mateo County Adopts Restaurant Menu Label Law*, Aug. 13, 2008, at <http://cbs5.com/local/restaurant.menu.rules.2.794226.html>.
- ⁹⁸ A press release about the San Francisco menu labeling litigation and a copy of the plaintiff's complaint can be found on the website of the San Francisco City Attorney's Office. *See* Press Release, The City and County of San Francisco, Office of the City Attorney, Hererra Blasts Secrecy by Fat-Peddling Chains, As Fast Food Lobby Sues Over Menu Labeling (July 7, 2008), *available at* <http://www.sfgov.org/site/uploadedfiles/cityattorney/MENU-LABELING-CASE-PRESSKIT.PDF>.
- ⁹⁹ Judge Claudia Wilken issued an order "relating" the cases of California Restaurant Association v. City and County of San Francisco and California Restaurant Association v. The County of Santa Clara on August 15, 2008. The Local Rules of Practice in Civil Proceedings for the U.S. District Court of the Northern District of California allow the court to relate two lawsuits if the

court finds that they concern substantially the same subject matter and there will be a duplication of labor and expense or conflicting results if the cases are conducted before different judges. Civ. L.R. 3-12.

- ¹⁰⁰ On October 23, 2008, Judge Wilken issued an Order Granting Stipulation in *California Restaurant Association v. City and County of San Francisco* and *California Restaurant Association v. The County of Santa Clara*. The order states that the localities are considering whether to suspend or repeal their menu labeling ordinances in light of the passage of California's state law, and gives them until January 15, 2009 to decide how they will proceed. The CRA agreed to dismiss both lawsuits if San Francisco and Santa Clara County repeal their ordinances. On November 18, 2008, the Santa Clara Board of Supervisors enacted an ordinance that repeals, effective December 18, 2008, the Santa Clara County menu labeling ordinance. Similarly, on November 25, 2008, San Francisco enacted an ordinance that suspends, effective December 25, 2008, its menu labeling ordinance. Given these actions, the CRA agreed to dismiss the Santa Clara action with prejudice and to dismiss the San Francisco action without prejudice. On January 14, 2009, the restaurant association filed notices of voluntary dismissal to this effect in the U.S. District Court for the Northern District of California.
- ¹⁰¹ S.B. 1420 (Cal. 2008). The text of Senate Bill 1420 can be accessed at http://leginfo.ca.gov/pub/07-08/bill/sen/sb_1401-1450/sb_1420_bill_20080903_enrolled.pdf.
- ¹⁰² Patrick McGreevy, *New Law Will Require California Chain Restaurants to Display Calorie Counts*, L.A. TIMES, Sept. 30, 2008.
- ¹⁰³ S.B. 1420 §§ 2(a)(5); 2(b)(1)-(2).
- ¹⁰⁴ *Id.* § 2(b)(2)(A).
- ¹⁰⁵ *Id.* § 2(c)(1)-(3).
- ¹⁰⁶ *Id.* § 2(c)(4).
- ¹⁰⁷ *Id.* § 2(j).
- ¹⁰⁸ See Press Release, California Restaurant Association, CRA Agrees to Statewide Standard for Menu Labeling (Sept. 2, 2008), available at: <http://www.calrest.org/go/CRA/news-events/news/cra-agrees-to-statewide-standard-for-menu-labeling/>; Press Release, California Restaurant Association, Governor Signs Menu Labeling Legislation Creating Statewide Standards (Sept. 30, 2008), available at <http://www.calrest.org/go/CRA/news-events/news/governor-signs-menu-labeling-legislation-creating-statewide-standards/>. See also Heather Knight, *San Francisco Menu Nutrition Disclosure Plan at Risk*, S.F. CHRONICLE, Aug. 30, 2008; *Padilla Menu Labeling Bill Goes to the Governor*, SAN FERNANDO VALLEY SUN, Sept. 4, 2008.
- ¹⁰⁹ H.B. 1303 (Ga. 2008) (to be codified at GA. CODE ANN. §§ 26-2-370, 26-2-373). The text of House Bill 1303 can be accessed at http://www.legis.state.ga.us/legis/2007_08/sum/hb1303.htm.
- ¹¹⁰ *Id.*; GA. CODE ANN. § 26-2-373(a).
- ¹¹¹ Andrea Jones & Elizabeth Lee, *Bill Opposing Menu Labeling Goes to Governor*, ATLANTA J.-CONSTITUTION, Mar. 27, 2008.
- ¹¹² *Id.*; see also *Georgia Moves Toward Banning County Menu-Labeling Mandates*, NATION'S RESTAURANT NEWS, Mar. 28, 2008; *Georgia Legislature Preempts County Menu-Labeling Laws*, NATION'S RESTAURANT NEWS, Apr. 7, 2008.
- ¹¹³ Sub. H.B. 217 (Ohio 2007) (to be codified at OHIO REV. CODE §§ 924.01, 924.02, 924.08, 924.09, 924.99, 924.20-924.30, and 3717.53). The text of Substitute House Bill 217 can be accessed at http://www.legislature.state.oh.us/bills.cfm?ID=127_HB_217.
- ¹¹⁴ *Id.*; OHIO REV. CODE § 3717.53(B).
- ¹¹⁵ OHIO REV. CODE § 3717.53(B).
- ¹¹⁶ OHIO REV. CODE § 3717.53(C).
- ¹¹⁷ Dan Eaton, *Restaurants Win Ohio Round Over Posting Calorie Levels*, BUSINESS FIRST OF COLUMBUS, Aug. 1, 2008.
- ¹¹⁸ NATIONAL RESTAURANT ASSOCIATION, PUBLIC POLICY ISSUE BRIEF: MENU LABELING/NUTRITION INFORMATION, *supra* note 55 (discussing the formation of the Coalition for Responsible Nutrition Information, a group comprised of restaurants, retailer associations, the Grocery Manufacturers' Association, and national and state restaurant associations, whose mission is to advocate for a uniform national nutrition disclosure standard for chain food service establishments). See Coalition for Responsible Nutritional Information, <http://www.nationalnutritionstandards.com/index.html> (last visited Dec. 8, 2008).
- ¹¹⁹ Rebecca S. Fribush, *Putting Calorie and Fat Counts on the Table: Should Mandatory Nutritional Disclosure Laws Apply to Restaurant Foods?*, 73 GEORGE WASHINGTON L. REV. 377, 386 (2005).
- ¹²⁰ *Id.* at 386-87.
- ¹²¹ RUDD CENTER, *supra* note 24, at 7.
- ¹²² *Id.*; Jennifer Pomeranz & Kelly Brownell, *Legal and Public Health Considerations Affecting the Success, Reach, and Impact of Menu Labeling Laws*, 98 AM J. PUBLIC HEALTH 1578, 1581 (2008).
- ¹²³ RUDD CENTER, *supra* note 24, at 7.
- ¹²⁴ Fribush, *supra* note 119, at 387.

- ¹²⁵ RUDD CENTER, *supra* note 24, at 7.
- ¹²⁶ *See, e.g.*, S.B. 1420 (Cal. 2008).
- ¹²⁷ *See* sources cited *supra* notes 31-33.
- ¹²⁸ *See* sources cited in VAIYAM, *supra* note 8, at 10-11; Fred Kuchler et al., U.S. Department of Agriculture, Economic Research Service, *Obesity Policy and the Law of Unintended Consequences*, 3 AMBER WAVES 29 (2005).
- ¹²⁹ *Restaurant Chains Must Now List the Calorie Content of the Food They Sell*, THE ECONOMIST, Aug. 28, 2008.
- ¹³⁰ *Id.*; Kim Severson, *Calories Do Count*, N.Y. TIMES, Oct. 29, 2008.
- ¹³¹ Press Release, Yum! Brands, Yum! Brands Announced U.S. Divisions Will Place Calories on All Company Restaurant Menu Boards, Calls for Federal Legislation to Establish Uniform Menu Board Labeling (Oct. 1, 2008), *available at* <http://www.yum.com/news/pressreleases/100108.asp>.
- ¹³² U.S. CONST. ART. VI.
- ¹³³ Lainie Rutkow et al., *Preemption and the Obesity Epidemic: State and Local Menu Labeling Laws and the Nutrition Labeling and Education Act*, 36 J.L. MED. & ETHICS 772, 773 (2008).
- ¹³⁴ LAWRENCE D. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 81 (2d ed. 2008).
- ¹³⁵ Rutkow, *supra* note 133, at 773.
- ¹³⁶ *Id.* *See* GOSTIN, *supra* note 134, at 80, 82.
- ¹³⁷ Rutkow, *supra* note 133, at 773.
- ¹³⁸ *Id.*
- ¹³⁹ Knight, *supra* note 108.
- ¹⁴⁰ *Id.*
- ¹⁴¹ Rutkow, *supra* note 133, at 773.
- ¹⁴² The NLEA added subsections 403(q) and (r) and 403A to the federal Food, Drug and Cosmetic Act. Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353 (1990). Relevant provisions of the NLEA are codified, in part, at 21 U.S.C. §§ 343 (q) and (r).
- ¹⁴³ 21 U.S.C. § 343 (q); 21 C.F.R. §§ 101.1-101.9.
- ¹⁴⁴ 21 U.S.C. § 343(q)(5)(A)(i).
- ¹⁴⁵ 21 U.S.C. § 343(r).
- ¹⁴⁶ 21 U.S.C. § 343(r)(5).
- ¹⁴⁷ 21 U.S.C. § 343-1(a)(4).
- ¹⁴⁸ 21 U.S.C. § 343(q)(5)(A)(i).
- ¹⁴⁹ 21 U.S.C. § 343-1(a)(5).
- ¹⁵⁰ N.Y. State Rest. Ass’n v. New York City Bd. of Health, 509 F. Supp.2d 351 (S.D.N.Y. 2007) (“NYSRA I”).
- ¹⁵¹ *Id.* at 363.
- ¹⁵² *Id.* at 360-61.
- ¹⁵³ N.Y. State Restaurant Ass’n v. New York City Bd. of Health, No. 08-CIV-1000, 2008 WL 1752455 (S.D.N.Y. April 16, 2008) (“NYSRA II”).
- ¹⁵⁴ *Id.* at *4.
- ¹⁵⁵ *Id.* at *5.
- ¹⁵⁶ Central Hudson Gas & Electric Corp. v. Public Service Comm’n of New York, 447 U.S. 557, 562-63 (1980).
- ¹⁵⁷ Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).
- ¹⁵⁸ N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 912 (1982).
- ¹⁵⁹ *See* U.S. v. United Foods, Inc., 533 U.S. 405 (2001). In United Foods, the Supreme Court struck down a federal law which imposed mandatory assessments against mushroom producers to fund generic advertising to promote mushroom sales. The Court agreed with the respondent mushroom producer, who argued that the law forced the producer to fund a message with which it disagreed—the promotion of mushrooms generally—when it preferred to convey the message that its mushrooms were superior to those of its competitors.

- ¹⁶⁰ 447 U.S. 557 (1980). The Central Hudson analysis requires a court to consider the following factors: (1) whether the regulated expression concerns lawful activity and is not misleading; (2) whether the asserted governmental interest is substantial; (3) whether the regulation directly advances the governmental interest asserted; and (4) whether the regulation is more extensive than necessary to advance the governmental interest. *Id.* at 566. Under the Central Hudson test, a regulation restricting advertising that is deceptive or that concerns an illegal product or service is not protected by the First Amendment. For all other restrictions on commercial speech, however, the test requires that the government show that the regulation directly advances an important government interest and is no more restrictive than necessary. In Central Hudson, Central Hudson Gas & Electric challenged a Public Service Commission regulation intended to promote energy conservation that completely prohibited advertising by an electrical utility. The Court struck down the law, holding that the regulation violated the First Amendment because it was more restrictive than necessary to accomplish the state’s interest in energy conservation.
- ¹⁶¹ Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).
- ¹⁶² Pomeranz & Brownell, *supra* note 122, at 1581.
- ¹⁶³ *Id.*
- ¹⁶⁴ N.Y. State Restaurant Ass’n v. New York City Bd. of Health, No. 08-CIV-1000, 2008 WL 1752455 (S.D.N.Y. April 16, 2008) (“NYSRA II”).
- ¹⁶⁵ *Id.* at *9.
- ¹⁶⁶ NYSRA Mem. of Law in Supp. of Mot. for Decl. Relief and Prelim. Inj. at 14-18.
- ¹⁶⁷ NYSRA II, 2008 WL 1752455 at *9. The court noted that the regulation did not require a statement about the nutritional importance of calories or whether a purchaser ought to consider calories when ordering food in restaurants, nor did it prevent restaurants from contesting the City’s views. *Id.*
- ¹⁶⁸ *Id.*
- ¹⁶⁹ *Id.* at *8.
- ¹⁷⁰ *Id.* at *11.
- ¹⁷¹ *Id.* at *12.
- ¹⁷² *Id.*
- ¹⁷³ *Id.*
- ¹⁷⁴ Pomeranz & Brownell, *supra* note 122, at 1581.
- ¹⁷⁵ U.S. CONST. AMEND. 14, § 1.
- ¹⁷⁶ Pomeranz & Brownell, *supra* note 122, at 1581 (citing *Vacco v. Quill*, 521 U.S.793, 799 (1997)).
- ¹⁷⁷ See Simon, *supra* note 34; Bassett, *supra* note 37; Robert & Veronica Atkins, Center for Weight and Health, University of California at Berkeley, *Potential Impact of Menu Labeling of Fast Foods in California* (2008).
- ¹⁷⁸ See *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).
- ¹⁷⁹ *Romer v. Evans*, 517 U.S. 620, 632-33 (1996).
- ¹⁸⁰ Pomeranz & Brownell, *supra* note 122, at 1582.
- ¹⁸¹ *Id.*
- ¹⁸² The “regardless of ownership” provision is an important inclusion so that restaurants that operate as a franchisee of a parent company are included within the definition of affected establishments.
- ¹⁸³ While most menu labeling laws apply to chains with a particular number of locations *nationwide*, California’s law applies to any food facility that has at least 20 other locations operating in the *state* with the same name and offering substantially the same menu items. CAL. HEALTH & SAFETY CODE §114094(a)(1).
- ¹⁸⁴ California’s menu labeling law does not require the posting of nutritional information on drive-through menu boards. Exempting drive-through menu boards may dilute the effectiveness of menu labeling laws. According to one estimate, the fast food industry generates about 65% of its revenues from drive-through business. CENTER FOR SCIENCE IN THE PUBLIC INTEREST, INFORMATION OUT THE WINDOW: THE IMPORTANCE OF MENU LABELING AT THE DRIVE-THRU (2008), *available at* http://cspinet.org/new/pdf/drive_thru_fact_sheet.pdf.
- ¹⁸⁵ Pomeranz & Brownell, *supra* note 122, at 1578.
- ¹⁸⁶ See sources cited *supra* note 177.

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